

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0710-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000048

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMANDA L. GEAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Amanda Gear appeals a judgment convicting her on four felony counts. The issue is whether the trial court properly exercised its sentencing discretion. We conclude it did, and therefore we affirm.

¶2 Through various schemes Gear stole substantial sums from family, friends, and businesses. The resulting charges included five counts of identity theft, three counts of forgery, and one count each of credit card fraud and theft by fraud. Pursuant to a plea bargain, Gear entered pleas to four of the charges. The other charges were dismissed and became read-ins.

¶3 In sentencing Gear the trial court made extensive references to the presentence investigation report. The court emphasized the seriousness of the crimes, describing them as “brazen” and “outrageous.” Other factors the court examined included Gear’s mental health problems and treatment needs, and the need to protect the public from further fraudulent acts. Gear’s reported failure to cooperate with the presentence investigator and failure to diligently pursue treatment during the proceedings ruled out probation in the court’s view. Consequently, the trial court imposed concurrent prison sentences of two years of initial confinement and seven years of extended supervision on each charge.

¶4 Gear subsequently moved for resentencing. She alleged that the court sentenced her on inaccurate information in the PSI; that the prosecutor deliberately provided the court with misleading information at sentencing about an alleged bail violation; and that counsel provided ineffective assistance by failing to review the PSI with Gear before sentencing, and by failing to call the various alleged inaccuracies and misstatements to the court’s attention. The State did not oppose the motion, apparently conceding counsel’s ineffective performance. The trial court therefore vacated the conviction, and resentenced Gear.

¶5 At resentencing, Gear alleged the following errors in the PSI and in the prosecutor’s comments at sentencing: that Gear in fact maintained her treatment and medications during the prosecutions, that her apparent failure to

cooperate with the PSI investigator was exaggerated or the result of excusable neglect, and that Gear did not knowingly violate her bail conditions by handling cash and credit cards at her job. Counsel also noted her exemplary record over the first ten months of her initial confinement and presented testimony from an expert witness that Gear was a low risk to reoffend and amenable to treatment in the community for her psychological problems.

¶6 Notwithstanding counsel's arguments, the court reimposed the identical sentences. The court again emphasized the seriousness of the offenses and characterized them as lying toward the more serious end of property crimes due to their sophistication and "brazenness," and the fact that they occurred repeatedly over a period of time. Despite the explanations Gear offered, the court reiterated that questions remained concerning her willingness to cooperate with the presentence investigation and with treatment providers. However, the court did accept her explanation of the alleged bail violation and dismissed that as a factor. The court added:

She has rehabilitative needs. She is doing well in the prison system, and I never usually have that insight that she is doing well in the prison system. But now there is nothing in the record here today to indicate that she is not doing well in the prison system. And I suppose the argument that could be made as well—perhaps is, well then, the court then made the right decision because her treatment program or her rehabilitation program in the prison ... is helping.

¶7 On appeal, Gear contends that the trial court erroneously exercised its discretion by failing to clarify whether it continued to rely on inaccurate information in sentencing her, that the court "mechanically imposed the identical sentence" without adequate explanation, and that the sentence "violated the judgment of reasonable people." She further contends that the comments quoted

above suggest that the court used her positive prison experience as a factor against her.

¶8 Sentencing lies within the trial court's discretion. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In the exercise of that discretion, the sentencing court must primarily consider the gravity of the offense, the character of the defendant, and the protection of the public. *State v. Borrell*, 167 Wis. 2d 749, 773, 482 N.W.2d 883 (1992). The weight given each sentencing factor is discretionary. *State v. J.E.B.*, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). There is a strong public policy against interfering with the trial court's sentencing discretion, and we presume that the trial court acted reasonably. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). However, a criminal defendant has a due process right to be sentenced on materially accurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). We will order resentencing if the defendant proves by clear and convincing evidence that the challenged sentencing information was inaccurate, and that the court relied on it in deciding the sentence. *State v. Groth*, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163.

¶9 Gear has not demonstrated that the trial court relied on inaccurate information at resentencing. At issue is whether, despite Gear's corrections to the presentence report, the court could reasonably continue to question her cooperation with the presentence investigator and treatment providers. Gear plainly refuted some of the alleged noncooperation. However, she did not explain certain other instances of noncooperation. A gap still remained in her treatment record. Evidence of misstatements to the investigator also remained. Consequently, the trial court reasonably continued to question her cooperation,

based on information in the presentence report that Gear failed to prove inaccurate.

¶10 The decision on resentencing was a proper exercise of the trial court's discretion. The trial court did not "mechanically" impose the same sentence. Instead, the court exhaustively explained its rationale, evaluating both the aggravating and mitigating circumstances. The court acknowledged the corrections and explanations Gear provided, and explained why they made no difference. A proper exercise of discretion requires that the trial court rely on facts of record and the applicable law to reach a reasonable decision. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. That is what the trial court did on resentencing.

¶11 The sentence was not excessive. We will reverse a sentence as too harsh or excessive only if it shocks public sentiment and violates the judgment of reasonable people. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Gear's numerous offenses involved repeated acts of fraud, some directed at friends and relatives. All involved a betrayal of trust. The sentence, far less than the maximum available, is neither shocking nor unreasonable.

¶12 The court commented on Gear's prison experience, but nothing in the resentencing hearing transcript suggests that the court used it against her. At the original sentencing, Gear had asked for probation, with a lengthy jail sentence as a condition. The trial court explained at length why a prison term was better than a lengthy jail sentence, given Gear's extensive rehabilitation needs. The court's comments about her prison record appear to reference back to that original sentencing decision. Nothing about them suggests that the court denied Gear probation because of her good adjustment to prison.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

