COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2723-CR **Cir. Ct. No. 2009CF1313**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALLY J. LINSSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 REILLY, J. Sally J. Linssen appeals from a judgment convicting her of theft and forgery. She argues that she is entitled to resentencing because her

sentence to the maximum term of initial confinement was unduly harsh and excessive.[1] We do not agree.

¶2 In August 2009, small business owners Lori and Dennis Nowak became suspicious of their longtime friend and employee Linssen. Linssen had worked for them for approximately six years as the bookkeeper to their business, Clear View Plumbing. Suspicions were raised when Dennis received a phone call from a supply company indicating that Clear View was $10,000 past due on its account. After looking into things, the Nowaks discovered that Linssen was sending out checks for amounts greater than the balance that was owed, but they could find no receipts, checks or photo copies of checks to show the exact amounts that were being sent.

¶3 Linssen admitted to police investigators that she was stealing money on a regular basis from the Nowaks by authorizing business checks to herself, signing Lori's name as the maker of the checks, and depositing them into her

[1] Also, in support of her unduly harsh-sentence argument, Linssen states:

> Aside from the prison term, [the sentencing court] also found Linssen ineligible for Challenge or Earned Release, nor was a risk reduction sentence ordered [and] as one of the conditions of extended supervision, [the court] ordered Linssen to pay restitution in the amount of $191,300 and to maintain employment of *at least 60 hours a week* on average.

First, we note that the amount of restitution ordered was stipulated to by the parties. Therefore, it is unclear why being ordered to pay the amount stipulated to supports an argument that Linssen's sentence was excessive. Second, Linssen does not fully represent what the sentencing court ordered with regard to working sixty hours/week. Specifically, the court stated: "She is to make every reasonable effort to maintain employment at least 60 hours a week on average." And finally, it is unclear whether Linssen is trying to assert a claim of judicial bias within this issue. Regardless, the issue is not developed and we address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues inadequately briefed).

personal account at Citizen's Bank in Mukwonago. She stated that she would hold back checks that were supposed to be sent to vendors so that she could make certain that the checks she authorized to herself cleared the account first.

¶4 Citizen's Bank of Mukwonago's fraud investigator was able to compile all the checks from Clear View that went into Linssen's account. The total amount of funds taken from the Nowaks' business accounts was $125,847.79.

¶5 Linssen was charged in a criminal complaint filed November 12, 2009, with one count of felony theft in a business setting of an amount greater than $10,000, contrary to WIS. STAT. §§ 943.20(1)(b) and (3)(c), and 939.50(3)(g); and one count of felony forgery/uttering, contrary to WIS. STAT. §§ 943.38(2) and 939.50(3)(h).

¶6 Linssen waived her right to a preliminary hearing. An information charging the same offenses was filed January 28, 2010. Linssen pled guilty to both felonies on May 24, 2010. At sentencing, the severity of Linssen's property crime was described by the victims, Lori and Dennis Nowack, who both implored the court to impose the maximum sentence. Lori opined to the court:

> And please let me be clear, this person I so trusted has deceived and taken down a business, a marriage, a family, and me as a person. She did it completely of her own free will knowing every step of the way first-hand exactly who she was hurting and all of the damage she was causing.
>
> ….
>
> It is our children that have been robbed of more than material things they could have had or done. They have been robbed of their college education, their parents' time, and their security because they no longer understand what a safe person means.

¶7 The State emphasized the severe impact of Linssen's criminal conduct on the victims. It also noted that Linssen received a charging break because she agreed to plead guilty; she could have faced dozens more felony counts for the many separate criminal transactions she engaged in over the five-year span. It argued that a substantial prison sentence was necessary to protect society and to deter others like Linssen who might be tempted to embezzle. Per the plea agreement, it recommended the following: for the felony forgery/uttering, two years of initial confinement followed by three years of extended supervision; for the felony theft, a consecutive imposed but stayed sentence of five years of initial confinement, followed by five years of extended supervision and imposition of a consecutive five-year term of probation.

¶8 Linssen's defense counsel pointed to her lack of criminal record, her cooperation with authorities, her remorse, and her ability to work off the restitution owed to the victims if she is not incarcerated for a long period of time. Defense counsel recommended imposed but stayed maximum concurrent prison sentences and imposition of maximum concurrent terms of probation for the two offenses.

¶9 Exercising her right of allocution, Linssen expressed remorse and apologized to the Nowacks.

¶10 After hearing all of this, the sentencing court proceeded to exercise its discretion on the record. It addressed the gravity of the offense, the character of the offender and the need to protect society.

¶11 In addressing the gravity of the offense, the court described it as a "more aggravated" property crime due to Linssen's violation of the trust of two people who were not only her employers, but her longtime friends, along with her

manipulation of the financial and legal system. The court also noted that Linssen could have faced many more than the two felony charges and thus a greater exposure to penalty. In pointing out that the crimes were intentional, planned and carried out over a number of years, the court stated that "this is as aggravated as I can imagine it could be, it is at the top of the aggravation scale."

¶12 In addressing Linssen's character, the court observed that the types of crimes and the length over which they were committed demonstrates a lack of basic honesty, a lack of integrity, and a lack of conscience. It specifically questioned her morality and ability to be rehabilitated given that she could

> do this to another family … to someone you have known and known for a long time, to someone you posed as a friend and confidant for …. If you can do this what can't you do? If you can do this, why would anyone ever think you're going to be any different, tomorrow, next year or 20 years from now? We hope for that. We hope for rehabilitation.

The court acknowledged Linssen's lack of criminal record as an important factor in considering her rehabilitative prospects, but then determined that it is somewhat overshadowed by the length of time Linssen continued to commit these many serious crimes. The court believed that had she not been caught, Linssen would have perpetrated these crimes indefinitely and concluded that "without supervision she is still likely to commit these crimes again. It becomes too habitual, too [i]ngrained."

¶13 In discussing the need to protect the public, the court acknowledged that in a physical sense, there is no reason to think Linssen is going to hurt anybody. However, what it considered to "bear some weight here" is that "people are entitled to expect the government to do what it can to protect their private property" and Linssen's crimes contributed to the losses that perpetrators of such

crimes impale on society as a whole. The court gave "substantial weight" to the interest in deterring others who might be tempted to engage in such financial crimes.

¶14 The court then sentenced Linssen. On the felony theft count, it sentenced her to five years of initial confinement followed by five years of extended supervision; and on the felony forgery count, to one year of initial confinement followed by three years of extended supervision, to be served consecutive to the felony theft sentence. Linssen appeals.

¶15 Linssen argues she is entitled to resentencing because the trial court erroneously exercised its sentencing discretion by giving her a sentence that is unduly harsh and excessive. Because Linssen failed to seek sentence modification in the trial court, waiver applies. *See* ***State v. Walker***, 2006 WI 82, ¶¶30-31, 292 Wis. 2d 326, 716 N.W.2d 498. However, in the interest of finality, we choose to reach the merits. *See* ***id.***, ¶35.

¶16 Our review is limited to determining whether the sentencing court erroneously exercised its discretion. There is an erroneous exercise of discretion if that discretion is exercised on the basis of irrelevant or improper factors. ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409; ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. If discretion has been exercised, there is a strong policy against appellate court interference with that exercise of sentencing discretion. ***Gallion***, 270 Wis. 2d 535, ¶18.

¶17 There is a strong presumption that the exercise of sentencing discretion is reasonable because the sentencing court is best suited to consider relevant factors as well as the demeanor of the defendant. ***Id.*** An appellate court is not to substitute its preferences for a particular sentence simply because, had it

been in the sentencing court's position, it would have meted out a different sentence. ***Id.***; *see* ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). The sentencing court is presumed to have acted reasonably and Linssen bears the burden of proving an unreasonable or unjustifiable basis on the record for the sentence imposed. *See* ***State v. Davis***, 2005 WI App 98, ¶12, 281 Wis. 2d 118, 698 N.W.2d 823. Due to this presumption of reasonableness, the burden imposed on her to prove an erroneous exercise of sentencing discretion is a "heavy" one. *See* ***Harris***, 326 Wis. 2d 685, ¶30 ("the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion"). If Linssen is contending that the sentencing court relied on improper factors, she must prove it by clear and convincing evidence. *See* ***Harris***, 326 Wis. 2d 685, ¶¶34-35, 60.

¶18 The trial court has "wide discretion" in deciding whether to impose consecutive sentences. ***Davis***, 281 Wis. 2d 118, ¶27; *see* WIS. STAT. § 973.15(2). The trial court properly exercises its discretion in imposing consecutive sentences by considering the same factors it applies in determining the overall length of sentence. ***State v. Berggren***, 2009 WI App 82, ¶46, 320 Wis. 2d 209, 769 N.W.2d 110.

¶19 The sentencing court must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. ***Harris***, 326 Wis. 2d 685, ¶28. Additional related factors the court may consider include: (1) past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational

background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Id.*** Sentencing courts have considerable discretion as to the weight to be assigned to each factor. ***Id.***

¶20 "In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." ***Id.***, ¶29. The sentencing court is not required to address all of the sentencing factors on the record. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

¶21 Moreover, the court has considerable discretion to determine the length of the sentence within the permissible statutory range. ***Hanson v. State***, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). The trial court exhibits the essential discretion if it considers the nature of the particular crime (the degree of culpability) and the personality of the defendant and, in the process, weighs the interests of both society and the individual. ***State v. Daniels***, 117 Wis. 2d 9, 21, 343 N.W.2d 411 (Ct. App. 1983). The sentencing court is to identify the most relevant factors and explain how the sentence imposed furthers the sentencing objectives. ***Harris***, 326 Wis. 2d 685, ¶29. The court need only, however, provide an explanation for the "general range" of the sentence imposed within the statutory range, not for the precise number of years chosen, and need not explain why it decided against imposing a lesser sentence. ***Davis***, 281 Wis. 2d 118, ¶26 (citing ***Gallion***, 270 Wis. 2d 535, ¶¶49-50, 54-55).

¶22 In short, this court's duty is to affirm if, from the facts of record, the sentence is sustainable as a proper discretionary act, ***Berggren***, 320 Wis. 2d 209, ¶44, and it does not shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Upon this record, our duty is to affirm.

¶23 Linssen has failed to provide clear and convincing evidence that the sentencing court relied on improper factors, *see* ***Harris***, 326 Wis. 2d 685, ¶¶34-35, 60, or that her sentence was unduly harsh and excessive, *see* ***Ocanas***, 70 Wis. 2d at 185.

¶24 First, the record demonstrates that the court properly exercised sentencing discretion by relying on a number of relevant and appropriate sentencing factors before imposing a sentence within the statutory range for Linssen's aggravated property felonies. The court emphasized what it considered to be the gravity of the offense, the need to punish Linssen, and the societal interest in deterring others. In considering Linssen's character and rehabilitative prospects, the court observed that the length of time Linssen engaged in the crimes likely made thievery and forgery a habitual, ingrained part of who she is. It also found troublesome Linssen's ability to perpetrate this crime upon two of her closest friends.

¶25 Second, Linssen's sentence—one within the statutory maximum—was not unduly harsh and excessive. *See* ***Hanson***, 48 Wis. 2d at 207. We understand that Linssen was not sentenced according to the plea agreement, but the sentencing court is under no obligation to do so. *See* ***State v. Williams***, 2000 WI 78, ¶2, 236 Wis. 2d 293, 613 N.W.2d 132 ("In Wisconsin, a trial court is not

bound by the [S]tate's sentence recommendation under a plea agreement."). As noted, the court considered Linssen's character and mitigating factors and concluded that the aggravated nature of Linssen's criminal conduct over five years outweighed whatever mitigating factors there were. The court explained that, despite Linssen's lack of criminal record, her actions showed such an immoral character that there is no reason not to believe she would do it again if given the chance. The court did what it was obligated to do. It considered the crime itself, the community and the criminal. *See* ***Daniels***, 117 Wis. 2d at 21. In so doing, the court exercised exemplary discretion on the record in sentencing Linssen.

By the Court.—Judgment affirmed.

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