COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

No. 94-2682-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODNEY HENDERSON REED,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Rodney Henderson Reed appeals from a judgment of conviction following his no contest pleas to two counts of second degree sexual assault and from the order denying his motion for sentence modification. On appeal, he argues that the trial court: (1) considered sentencing guideline forms that were incomplete and inaccurate; (2) improperly considered Reed's anger towards women; (3) failed to explain why it ordered

the sentences on both counts to be served consecutively; and (4) ordered sentences that were unduly harsh. We reject his arguments and affirm.

On August 9, 1992, Reed learned that he had a sexually transmitted disease. Reed then beat up his girlfriend from whom he believed he had contracted the disease. Later that same day, Reed anally and vaginally sexually assaulted Stephanie M., a complete stranger. The trial court ordered consecutive sentences of seven years and eight years for the sexual assaults against Stephanie M.

Reed makes numerous arguments, mixing general erroneous-exercise-of-discretion theories with claims relating to the trial court's use of sentencing guidelines. Reed first argues that the trial court erroneously exercised discretion when it allegedly failed to completely and accurately fill out the sentencing guidelines, and that this constituted a "new factor" justifying reduction of his sentence.[1] Reed claims that the trial court marked the appropriate mitigating factor of "lack of a prior record" on only one of the score-sheets. Reed also asserts that the trial court erroneously included as an aggravating factor that "Offender took major role or directed offense" when, in fact, Reed was the only perpetrator. Reed further claims that the trial court did not consider other mitigating factors, such as his no contest plea, employment record, military service, "strong family," high school education, or his abuse of alcohol.

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was then not in existence or because, even though

[1] Whether a deficiency in filling out the sentencing guidelines presents an appealable issue under § 973.012, STATS., will hopefully be resolved in ***State v. Elam***, No. 94-1050-CR (accepted on bypass from the court of appeals). We agree, however, with the analysis of ***State v. Fenderson***, No. 94-0044-CR (Wis. Ct. App. June 7, 1995) (recommended for publication), which states that the defendant has no right to appeal under § 973.012 when a sentence deviates from the sentencing guidelines because of lack of jurisdiction. ***Id.***, slip op. at 5-6. The ***Fenderson*** court held that ***State v. Halbert***, 147 Wis.2d 123, 432 N.W.2d 633 (Ct. App. 1988), still controls because no majority in ***State v. Speer***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993) (3-3 decision), agreed to overrule ***Halbert***. Because ***State v. Elam*** is pending, however, we think it prudent to also analyze Reed's case under ***Speer***.

it was then in existence, it was unknowingly overlooked by all the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Erroneous or inaccurate information used at sentencing may constitute a "new factor" if it was highly relevant to the imposed sentence and was relied upon by the trial court. *See* ***State v. Smet***, 186 Wis.2d 24, 34, 519 N.W.2d 697, 701 (Ct. App. 1994).

At the sentencing hearing the trial court clearly considered Reed's lack of a prior record as a mitigating factor. It was marked on one of the guideline forms. The omission of this factor on the other score-sheet was, as the State correctly points out, a clerical error and can hardly be called a "new factor."

Reed argues that the trial court erred when it filled in the aggravating factor that he "took major role or directed offense" because Reed was the only perpetrator. Literally, however, when a perpetrator commits a crime alone, he or she does indeed take the major role and direct the offense. Further, even assuming that this portion of the guideline form is only to be referenced in a multi-offender case, there is nothing in this sentencing record to suggest that the trial court relied on this alleged error. An alleged error by the trial court in filling out the sentencing guidelines must have a reasonable possibility of contributing to the sentence for this court to even consider challenges to the error and the sentence. *See* ***State v. Halbert*** 147 Wis.2d 123, 130 n.3, 432 N.W.2d 633, 636 n.3 (Ct. App. 1988). Here, the trial court never even mentioned this factor from the guidelines.

Reed argues that mitigating factors such as his high school education, "strong family," work history, military service, alcohol abuse, and no contest pleas are mitigating factors that the trial court neglected to mark on the score-sheet and should have considered for sentencing purposes. Reed also argues that the trial court did not explain its deviation from the sentencing guidelines.

A sentence imposed by the trial court will not be modified unless the trial court erroneously exercised its discretion. *See* ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). There is a strong public policy against interfering with a sentence imposed by the trial court and, indeed, "[t]he trial court is presumed to have acted reasonably." ***State v. Wickstrom***, 118

Wis.2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). An appellant can only overcome this presumption by showing an "unreasonable or unjustifiable basis for the sentence." ***Id.*** Further, a trial court erroneously exercises its discretion when it fails to state the relevant material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other factors. ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). The weight to be given to each sentencing factor, however, is within the trial court's discretion. ***Id.***

A trial court is required to consider three primary factors when imposing a sentence: the gravity of the offense; the defendant's character; and protection of the community. ***Jones***, 151 Wis.2d at 495, 444 N.W.2d at 763. "The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; and, the needs and rights of the public." ***Thompson***, 172 Wis.2d. at 264-65, 493 N.W.2d at 732-733.

In imposing the sentence the trial court stated:

I have to consider three things at the time of sentencing, Mr. Reed.

> I have to consider the seriousness of the offense. I consider sexual assaults and the legislature considers sexual assaults to be among the more serious offenses that we have in this state....
>
> I also have to consider the offenses, when you talk about the seriousness of them, in terms of comparing one second degree sexual assault to another second degree sexual assault. On that score I find these [offenses] to be extremely serious. This is not one where you just overpowered a 17-year-old or a 15-year-old. This is one where you were extremely violent and ugly towards this woman and ... she did

not deserve to be treated in this fashion by you and more than just the physical acts themselves were the language that you used towards her.[2]

You were the one who was in total control of her. You were the one that was going to decide how long it was going to last and how many different acts were going to take place and what type of acts were going to be committed and you have to face up to those, Mr. Reed, and the longer you go without facing up to them, the tougher it's going to be for you to get beyond this and face what your problems are.

You tell me you're not angry at women, and I tell you until you realize how angry you are at women you won't ever change because what I see in this ... presentence report and the description of this offense is someone who is extremely angry at women, who goes from one woman to another that night, beats one woman up. You're clearly angry about getting a sexually transmitted disease, and you clearly put all the blame for that on this other woman.... [Y]ou go from that to attacking a total stranger.

I think you're very angry, Mr. Reed, and I'm not sure why. This report doesn't--doesn't show why. I don't know if it's because you didn't feel you could measure up to what your siblings had done. I don't know. That's not for me to say.

I also have to consider your background and needs. On that score you do reasonably well on one significant portion of it and that's lack of a prior record. You don't really have a record to speak of, certainly not one that would have suggested to anyone prior to this day that you were likely to do this.

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[2] In addition to repeatedly threatening to kill the victim, Reed made verbally abusive, degrading and obscene statements to the victim.

> You have some serious needs clearly. One is ... alcohol treatment. You need it in a big way given the alcohol abuse that I see in this report. You also have some significant counseling needs I think to address your anger and how you treat women. Just so you understand where I'm coming from, Mr. Reed, this sexual assault is not about sex.... This had to do with being angry and expressing that anger in the most violent way you could towards this woman who happened to be walking by, and that's what you have to come to grips with.

The court also remarked on the community's need to be protected.

The sentencing record shows that the trial court properly considered the relevant sentencing factors and provided reasons for departing from the guidelines on both the score-sheet and at the sentencing hearing. The trial court noted that Reed committed two distinct sexual assaults against the victim and the aggravated nature of those assaults.[3] The trial court considered relevant sentencing factors such as Reed's alcohol problem and his "strong family." Additionally, Reed's military career was mentioned by defense counsel at sentencing and was also mentioned in the presentence investigation report, which was considered by the trial court. The PSI also noted that Reed was a high school graduate. In addition to Reed's no contest pleas being noted in the PSI, the sentencing judge was also the judge who accepted his pleas.

Reed also argues that the trial court erroneously exercised its discretion by not explicitly stating why the sentences were imposed consecutively. It is well-settled that the discretion a judge has in determining the length of a sentence is the same for determining if sentences should run concurrently or consecutively. *See* ***Cunningham v. State***, 76 Wis.2d 277, 284-285,

[3] In ***Speer***, the trial court did not erroneously exercise its sentencing discretion when, in the absence of explicitly mentioning its deviation from the guidelines, the record included the sentencing guidelines scoresheet and the transcript from the sentencing hearing evincing its reasoning. ***Speer***, 176 Wis.2d at 1128-1132, 501 N.W.2d at 439-440. We conclude that the sentencing judge in the present appeal satisfied the ***Speer*** standard.

251 N.W.2d 65, 69 (1977). We will not interfere with the sentence imposed by the trial court if the total time of incarceration is reasonably explained. *See* ***State v. Johnson***, 178 Wis.2d 42, 56-57 n.5, 503 N.W.2d 575, 579 n.5 (Ct. App. 1993). The trial court thoroughly explained its reasons for the length of Reed's incarceration. We see no reason to interfere with the sentence imposed by the trial court.

Reed also contends that the trial court violated his due process rights when it stated at the sentencing hearing that Reed was "angry at women." Reed argues that the trial court relied too heavily on this allegedly unsubstantiated fact.

A defendant has a due process right to be sentenced on true and accurate information. See ***Bruneau v. State***, 77 Wis.2d 166, 174-75, 252 N.W.2d 347, 351 (1977). A due process challenge to the use of a fact at a sentencing hearing, however, requires that a defendant show through "clear and convincing evidence" that the challenged information was inaccurate and was relied upon by the trial court to the defendant's prejudice. *See* ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991).

Reed's anger towards women was a reasonable inference that the trial court made based on the facts that on the same day Reed beat up one woman and then brutally raped another who was a complete stranger. We reject Reed's due process claim.

Finally, Reed claims that his sentences are "unduly harsh or unconscionable" and violate the Eighth Amendment of the United States Constitution. Even absent a "new factor," a trial court may modify a sentence where it concludes that the sentence imposed is "unduly harsh or unconscionable." ***Cresci v. State***, 89 Wis.2d 495, 504, 278 N.W.2d 850, 854 (1979). An appellate court will conclude that a trial court erroneously exercises its discretion as to sentence length "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock the 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, 461 (1975).

The trial court considered the requisite sentencing factors and concluded that the aggravated nature of Reed's crimes warranted fifteen years incarceration. We do not find the sentences so disproportionate "as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***id.*** Thus, the trial court did not erroneously exercise its sentencing discretion and Reed's fifteen year sentence is affirmed.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.