

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2684-CR

Cir. Ct. No. 2009CF64

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY P. ZINK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony P. Zink appeals from a judgment of conviction and an order denying his motion for postconviction relief. Zink contends that the circuit court erroneously exercised its discretion at sentencing by refusing to consider an actuarial assessment that scored him at a low risk to

reoffend, even though the court identified protection of the public as among the primary objectives of the sentence imposed. We reject Zink's claim and affirm the judgment and order.

¶2 Zink was convicted following guilty pleas to three counts of repeated sexual assault of a child. Pursuant to a plea agreement, three counts of causing a child to view sexual activity and two counts of incest were dismissed and read in. All of the charges against Zink stemmed from offenses he committed over a three-year time span against three young girls, two of whom were his stepdaughters. The circuit court sentenced Zink to a total of seventy-five years of imprisonment, consisting of thirty years of initial confinement followed by forty-five years of extended supervision.

¶3 After sentencing, Zink filed a motion for postconviction relief. The motion alleged that the circuit court erroneously exercised its discretion when it declined to consider the actuarial assessment. The court held a hearing on the matter and denied the motion. This appeal follows.

¶4 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. Our analysis includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.* The primary sentencing factors that a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Ziegler*, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. *Id.* Other factors may also be relevant, including the defendant’s demeanor and remorse. *Id.*

¶6 At sentencing, defense counsel addressed the need to protect the public, in part, by referring to the Static-99, an actuarial instrument used to assess a sex offender’s risk of reoffense. Defense counsel explained that Zink scored at a very low risk to reoffend on the instrument. The prosecutor responded that the presentence investigation writer “did perform some actuarial assessment” and scored Zink at a higher number, which translated to a low-moderate risk.

¶7 In its sentencing remarks, the circuit court indicated that it did not care about the Static-99 or “what some scientist or some academic guru might think about the likelihood of re-offending at this stage.” Specifically, the court observed:

When the court looks at these particular offenses, I really look at the offense severity, and then I look at the future risk. We’ve heard a lot of commentary by the D.A. and defense counsel on these Static[-]99s. Quite frankly, I don’t care about a Static[-]99, I don’t care about Static[-]2. I don’t care about Static anything. We have a defendant that has been convicted of three heinous crimes, with five crimes being dismissed and read in that are equally as heinous. We’re talking about something extremely serious here.

I'm not trying to second guess what some scientist or some academic guru might think about the likelihood of reoffending at this stage. That may come at some point in the future, but not at this sentencing. At this sentencing, I'm going to certainly look at his character, I'm going to look at the seriousness of the offense, and I'm going to look at the need to protect the public.

In its subsequent discussion of those three factors, the court commented, “we’ve got low character value, we’ve got a high seriousness of the offense and a high need to protect the public.”

¶8 On appeal, Zink cites the above passage as evidence of the circuit court’s erroneous exercise of discretion. Because the court refused to consider information that was relevant to its objective of protecting the public, Zink maintains that he is entitled to resentencing.

¶9 We disagree with Zink that the circuit court erroneously exercised its discretion in this case. Although the court was admittedly dismissive of the Static-99 at sentencing, it was not because the court did not understand the instrument or recognize its value. Rather, it simply determined that the instrument did not have enough significance to override the other factors it considered, including the character of the offenses. As the court explained at Zink’s postconviction hearing:

This court—I’m not going to sugar coat the fact that the Court did make the statement that I did with regard to Static-99s, it wasn’t—with regard to this sentencing hearing. The Court never wanted to give the impression that Static-99s don’t have any value. But certainly in this particular case when the Court looked at all of the sentencing factors and looked at the gravity and the nature of the offense, the five counts that were dismissed and read-in, the character, rehabilitative needs of the defendant in this case, the need to protect the public. Sure. I gave the need to protect the public a high—a high value, but I think the Court wants to emphasize that to gauge future risk the Court can consider the character of the offense itself.

And we aren't dealing with an offense here, we are dealing with offenses, and we are dealing with behavior that was dismissed and read in. Everybody here, I believe, agrees that the—that the convictions in this case do reflect an extremely—some very egregious behavior. And when I sentenced I indicated the need to certainly look at the offense severity and the future risk.

....

So do courts say things at the time of sentencing that maybe upon reflection could be taken out of context? Probably. And maybe this is a classic case where somebody drew the inference on the Static-99s that I don't really care about them. Well, in this particular case I don't think they have any significance or enough significance in this Court's opinion and this particular sentencing of this defendant that it in any way influenced this court's decision on sentencing.

¶10 Reviewing the circuit court's remarks, it is apparent that the overriding factors in Zink's sentence were: (1) the seriousness of the offenses, which the court described as "off the charts"; and (2) the dismissive attitude Zink had concerning the aggravated nature of his crimes and their impact on his victims. These were permissible factors for the court to consider in fashioning its sentence. *See Ziegler*, 289 Wis. 2d 594, ¶23. As a result, we conclude that the court properly exercised its discretion.

By the Court.—Judgment and order affirmed.

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

