

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2008

David R. Schanker
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. 2007AP1919-CR

Cir. Ct. No. 2005CF214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. KINARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. John A. Kinard has appealed from a judgment convicting him upon a guilty plea of third-degree sexual assault in violation of

WIS. STAT. § 940.225(3) (2005-06).¹ In exchange for Kinard's guilty plea, a charge of second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(b) was dismissed and read-in for purposes of sentencing.

¶2 The trial court sentenced Kinard to a bifurcated sentence of six years and six months, consisting of one year and six months of initial confinement, followed by five years of extended supervision. Kinard moved for postconviction relief from the sentence, and the trial court denied the motion. We affirm the judgment and the order denying postconviction relief.

¶3 Kinard was convicted of having sexual intercourse with his ex-wife, Charli Kinard, without her consent on April 7, 2005. The read-in offense involved an allegation that he had sexual intercourse with Charli without her consent in August 2004, causing injury to her.

¶4 On appeal, as in his postconviction motion, Kinard argues that the trial court abused its discretion by imposing a sentence that was unduly harsh. He appears to contend that probation should have been imposed, and that the trial court improperly based the sentence on the public's negative reaction to charges of sexual assault. We reject Kinard's arguments.

¶5 Sentencing is left to the discretion of the trial 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. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

the trial court's decision. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied*, 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. *Id.*

¶6 To properly exercise its discretion, a trial 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.* It must identify the factors it considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision. *Ziegler*, 289 Wis. 2d 594, ¶23.

¶7 The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. *Id.* The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. *Id.* The weight to be given each of the sentencing factors remains within the wide discretion of the trial court. *Stenzel*, 276 Wis. 2d 224, ¶9.

¶8 The “sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.” *Gallion*, 270 Wis. 2d 535, ¶23. However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, “minimum” does not mean “exiguously minimal,” or insufficient to accomplish the goals of the criminal justice system. *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Moreover, while the trial court must provide its sentencing rationale on the record, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. *See State v. Fischer*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. *Gallion* requires an explanation but not mathematical precision. *See Ziegler*, 289 Wis. 2d 594, ¶25.

¶9 Contrary to Kinard’s contentions, the trial court did not erroneously exercise its discretion at sentencing. Instead, it engaged in a textbook example of sentencing, and is to be commended.

¶10 At sentencing, the trial court considered the sentencing objectives of punishment, deterrence, rehabilitation, and protection of the community. It discussed the gravity of the offense, Kinard’s character, and the need to protect the public. Within the context of considering these factors, it considered Kinard’s past history, character and demeanor, his degree of culpability and remorse, the PSI recommendation of probation, and the nature of the crime. It acknowledged Kinard’s lack of a prior criminal record, his steady employment history, and his appropriate demeanor in court.

¶11 The trial court acknowledged that this sentencing was difficult, and that it was obligated to impose the minimum sentence consistent with the protection of the public, the rehabilitation of the defendant, and the gravity of the offense. While acknowledging the victim's statement that she feared Kinard, it ultimately concluded that confinement was not necessary to protect the community from him and that his treatment needs did not necessitate confinement. It also considered imposing probation as recommended in the PSI. However, it rejected this option on the ground that to do so would unduly depreciate the seriousness of the offense.²

¶12 No basis exists to disturb the trial court's conclusion. As noted by the trial court, the third-degree sexual assault conviction was based on allegations that Kinard locked the victim in a bedroom, choked her, and engaged in sexual intercourse with her without her consent. The trial court noted that Kinard lied to the police when questioned as to whether intercourse had occurred. It also noted that in a telephone conversation recorded by the police on the day of the assault, Kinard made no exculpatory statements, and his responses confirmed the victim's contention that he told her to take actions that were designed to cover up the offense.³

² "Trial courts ... are not required to blindly accept or adopt sentencing recommendations from any source." *State v. Trigueros*, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54. This includes the recommendations of PSI writers. *Id.*

³ Kinard attacks the credibility of the victim in his appellant's brief. However, he pled guilty to third-degree sexual assault and cannot now contend that the trial court should have imposed a more lenient sentence based on the alleged lack of credibility of the victim. This is particularly true based on the trial court's determination that the victim's version of the April 2005 assault was credible, and Kinard's was not.

¶13 Based on its conclusion that the April 2005 sexual assault was a serious and violent offense, the trial court determined that probation was unwarranted and a period of confinement was necessary to avoid unduly depreciating the seriousness of the crime.⁴ However, based on its determination that confinement was unnecessary to protect the public or rehabilitate Kinard, it concluded that a lengthy period of confinement was not required. It therefore ordered eighteen months of initial confinement, followed by five years of extended supervision.

¶14 The sentence imposed by the trial court was significantly less than the ten year sentence that could have been imposed. *See* WIS. STAT. § 939.50(3)(g) and § 940.225(3). Because the sentence was not so excessive, unusual, and disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances, it cannot be deemed unduly harsh. *See State v. Taylor*, 2006 WI 22, ¶19, 289 Wis. 2d 34, 710 N.W.2d 466. Because the trial court engaged in a thorough and meaningful sentencing analysis based upon proper sentencing factors, no basis exists to conclude that the trial court erroneously exercised its discretion.

¶15 In reaching this conclusion, we note that the trial court's failure to give particular factors the weight that Kinard wished does not constitute an erroneous exercise of discretion. *See Stenzel*, 276 Wis. 2d 224, ¶16. In addition,

⁴ In its sentencing discussion, the trial court also discussed the read-in offense. Because of factual issues underlying that offense, the trial court stated that it was difficult to decide whether it should have a major impact on the sentence. Ultimately, it concluded that even disregarding the read-in offense, Kinard committed a serious sexual assault in April 2005 and needed to be sentenced accordingly.

we reject Kinard's claim that the trial court erroneously exercised its discretion by imposing a sentence to mollify the community or press.

¶16 Kinard appears to allege that the trial court was biased against him because it had been the subject of public criticism concerning a previous sexual assault sentence. However, Kinard never moved for recusal of the trial court judge and therefore waived any claim that the judge should have recused or disqualified himself based on bias. *See State v. Lipke*, 186 Wis. 2d 358, 369 n.3, 521 N.W.2d 444 (Ct. App. 1984) (this court will not consider issues raised for the first time on appeal).

¶17 Even if we consider the issue, nothing in the record supports a claim that the trial court judge was biased against Kinard or sentenced him based on an improper factor. At sentencing, the trial court merely acknowledged that the public is sensitive to the seriousness of sexual assault and that, while this is not a factor warranting tremendous weight, it is a factor to consider in assessing whether a particular sentence would unduly depreciate the seriousness of the offense. In the context of its entire sentencing decision, including its extensive explanation of the reasons for the individualized sentence imposed here, its comments were permissible. *See State v. Santana*, 220 Wis. 2d 674, 681-83, 584 N.W.2d 151 (Ct. App. 1998). Moreover, at the postconviction hearing, the trial court stated that even if it had not been previously involved in a sexual assault sentencing that spurred public criticism, the sentence imposed here would have been the same.⁵

⁵ When this court reviews a sentence, we look to the entire record, including the reasons given by the trial court in denying postconviction relief. *See State v. Santana*, 220 Wis. 2d 674, 683-84, 584 N.W.2d 151 (Ct. App. 1998).

No basis therefore exists to disturb the trial court's sentence, or the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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

