

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2009

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. 2008AP2599-CR

Cir. Ct. No. 2008CF85

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH N. KNAUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LINDA M. VAN DE WATER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph N. Knaus appeals a judgment convicting him upon his no-contest plea to one count of second-degree sexual assault. We

affirm because Knaus has not demonstrated that the trial court erroneously exercised its discretion in fashioning his sentence.

¶2 Knaus was charged with one count of second-degree sexual assault of an unconscious person, contrary to WIS. STAT. § 940.225(2)(d) (2007-08),¹ for touching his eighteen-year-old stepdaughter's vaginal area while he thought she was asleep. Knaus admitted the assault to his wife and further admitted to police that he had done it on four separate occasions, beginning when the girl was seventeen. He pled no contest two months later.

¶3 Knaus faced a forty-year sentence. The State adopted the presentence report's recommendation that the court sentence Knaus to a "moderate to lengthy" period of probation. Knaus sought four to five years' probation. Nonetheless, the court sentenced him to six years' imprisonment: two years' initial confinement and four years' extended supervision. The court denied Knaus' postconviction motion for resentencing on grounds that Knaus had not cited a new factor justifying sentence modification and the imposed sentence was neither harsh nor unconscionable. Knaus appeals.²

¶4 Once again, Knaus contends his sentence is too harsh. 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. An erroneous exercise of discretion occurs when the trial court fails to state the relevant and

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

² Although Knaus moved postconviction for resentencing, his notice of appeal limits his appeal to the judgment of conviction.

material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other contravening considerations. *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). When the trial court has properly exercised its discretion, we follow a consistent and strong policy against interfering with its discretion. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. We also afford a strong presumption of reasonability to its sentencing determination because the trial court is best suited to consider the relevant factors and the defendant's demeanor. *Id.*

¶5 Knaus argues that the sentence is excessive vis-à-vis the need to protect the public, *i.e.*, that the sentence was not limited to the least amount of confinement necessary to protect the public. He also contends that the trial court did not give enough consideration to mitigating circumstances presented by his “prosocial lifestyle” and “solid employment,” and that he was remorseful and sought treatment. A more appropriate sentence, he submits, would have been to follow the parties' recommendation of probation.

¶6 In fashioning a sentence, the sentencing court must address three primary factors: the nature of the offense, the character of the offender and the need to protect the public. *Thompson*, 172 Wis. 2d at 264. The court is to identify the general objective of most import. *Gallion*, 270 Wis. 2d 535, ¶41. Beyond that, the court also may consider the defendant's: past record of criminal offenses; history of undesirable behavior patterns; personality, character and social traits; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance or cooperativeness; and rehabilitative needs, and may consider the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the victim's rehabilitative needs; and

the needs and rights of the public. *Thompson*, 172 Wis. 2d at 264-65. We leave to the trial court to determine which of the secondary factors are relevant to its sentencing decision in the particular case. See *State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999).

¶7 Here, the trial court acknowledged Knaus' lack of a prior record, his admission to the crime, his asserted feelings of guilt and shame and the victim's statement that she had forgiven Knaus. The court focused, however, on the "very, very serious offense" and the need to protect the public. It found that, spurred by his admitted pornography addiction, Knaus abused his position of trust and responsibility and failed to control his sexual urges even in his own home with his own stepdaughter, making him "a danger to the public, a danger to the victim, and a risk in the community."

¶8 Knaus emphasizes that the parties and the PSI all recommended probation. While he does not dispute that the trial court is not obliged to follow any sentencing recommendation, see *State v. Johnson*, 158 Wis. 2d 458, 464-65, 463 N.W.2d 352 (Ct. App. 1990), Knaus asserts that the sentence imposed should call for the minimum amount of custody or confinement consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. See *Gallion*, 270 Wis. 2d 535, ¶23. He says that is probation.

¶9 The court expressly stated that in light of the circumstances of the offense, to place Knaus on probation would unduly depreciate its seriousness. This sufficiently justified the court's discretionary determination that Knaus's offense warranted imposing a sentence more severe than probation. See *Gallion*, 270 Wis. 2d 535, ¶23. We conclude the six-year determinate sentence is not unduly harsh or unconscionable when compared to Knaus' forty-year exposure.

See State v. Scaccio, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Nor does it strike us as “so excessive ... unusual and ... disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶10 The trial court examined in classic fashion the primary sentencing factors, explained how they related to the facts of this case and supported its reasoning for going beyond the recommendations of probation. The court considered the arguments of counsel, the information in the PSI, the victim’s written statement and Knaus’ allocution. The resulting sentence represents a proper exercise of discretion.

¶11 As a final matter, we address the appendix Attorney Bridget Boyle provides. She certifies that it satisfies WIS. STAT. RULE 809.19(2)(a) which requires including the “portions of the record essential to an understanding of the issues raised.” The sentencing transcript was essential to understand the issue Boyle raised, yet she provided but a single page of it, bringing her dangerously close to filing a false certification. Filing a false certification is a serious infraction of the rule and violates SCR 20:3:3(a) (2008), which prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal. *See State v. Bons*, 2007 WI App 124, ¶24, 301 Wis. 2d 227, 731 N.W.2d 367. The omission is grounds for imposition of a penalty or costs on a party or counsel. *See id.*, ¶25; *see also* WIS. STAT. RULE 809.83(2). Nonetheless, we admonish Boyle in the future to furnish an appendix that not only eases the burden on this court but which fully honors the representations made in her certification.

By the Court.—Judgment affirmed.

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

