COURT OF APPEALS
DECISION
DATED AND RELEASED

February 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2014-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODGER A. DIERKS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

EICH, C.J.[1] Rodger Dierks, appearing pro se, appeals from a judgment of conviction and sentence on seven counts of making threats of harm over the telephone.[2] Dierks pled guilty to all seven counts and was placed on probation.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Dierks was charged with six counts of violating § 947.012(1)(a), which makes it a

His probation was revoked after he was found to have violated several of the conditions of his release, and he was returned to court for sentencing, receiving the maximum sentence of 90 days incarceration on each count, to be served consecutively. He claims the total 630-day sentence was excessive "for 1st time violation of probation," and he states: "County jail is too much for a non-violent crime." We affirm the judgment.

We begin by noting that, contrary to Dierks's statement, he was sentenced not for a "violation of probation" but for the seven offenses of which he was convicted. And, in context, they are anything but non-violent.

The complaint alleged that, on October 1, 1994, Dierks made seven telephone calls to his wife, in which he repeatedly threatened to kill her and her daughter (his stepdaughter) and their dogs, threatened to kill himself (stating that he had already cut his throat and wrists), and proclaimed that he was going to burn all of her belongings. In later calls, he said that he had killed his wife's dog, that her house was burning, and that he had hired men to kill her. All of the calls were laced with the basest obscenities.

Dierks entered into a plea agreement under which, in exchange for the State's recommendation of probation on all counts, he agreed to several conditions, including participation in treatment programs and abstinence from alcohol and controlled substances. Other conditions forbade him from having any contact with his wife or other family members and required that he "not commit any crimes or engage in criminal activity." Judgment withholding sentence and placing him on probation was entered on October 17, 1994.

His probation was revoked a few months later after he continued to drink and again threatened to kill his wife and to have her eleven-year-old daughter "kidnapped, sexually assaulted and killed"--threats which were overheard by the young girl. On the same day he also stabbed his stepson in the chest with a pencil.

(..continued)
misdemeanor to intentionally "make[] a telephone call and threaten[] to inflict injury or physical harm to any person or the property of any person," and one count of violating § 947.012(1)(b), which similarly penalizes one who "[w]ith intent to frighten, intimidate, threaten or abuse, telephones another and uses any obscene, lewd or profane language ...."

The State argues that because Dierks did not challenge the reasonableness of his sentence in the trial court, his appeal is premature. *See* ***Spannuth v. State***, 70 Wis.2d 362, 365, 234 N.W.2d 79, 81 (1975). Given Dierks's pro se status, however--and in the interest of judicial economy--we elect to consider the merits of his claim.

As indicated, Dierks challenges the length of his sentence, and he supports his argument not with any legal or factual arguments but with photocopies of newspaper articles indicating that other people charged with various misdemeanors in various courts received lesser sentences than his, and with unreferenced assertions about the sentencing judge's friendship with the district attorney and attacks on his probation officer, his lawyer and others. His brief also contains a list of telephone numbers of people he claims will "give [him] a good reference."

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" abuse of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Our limited review in this area reflects the strong public policy against interference with sentencing discretion; we presume that the trial court acted reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." ***State v. Harris***, 119 Wis.2d 612, 622-23, 350 N.W.2d 633, 638-39 (1984). We do so, at least in part, because the trial court "has a great advantage in considering the relevant factors and the defendant's demeanor." ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987).

We have also said:

> We will not disturb a sentence imposed by the trial court unless the ... court [erroneously exercised its discretion]. Indeed, "[t]here is a strong policy against interfering with the trial court's sentencing discretion." Further, the trial court is presumed to have acted reasonably, and the burden is on the appellant to "show some unreasonable or

> unjustifiable basis in the record for the sentence complained of."

State v. Thompson, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992) (citation and quoted sources omitted).

Finally, as we also have said, we will not reverse a sentence on a claim of excessiveness unless it is "so excessive and unusual and so 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." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

The trial court explained the reasons underlying the sentence in considerable detail.

> [T]he facts of this case ... were astounding in terms of the potential for violence.
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> > ... [T]he threats ... were as real and as dangerous as any that I have seen come across my bench ... since I have been [in office]. The thing that struck me as extremely significant was the extent of the violence that ... was found by the police, the destruction to the house, the striking out [in] every [conceivable] way ... at the very things that were important to Mr. Dierks's stepdaughter, to his wife, the home, trashing of the home, the burning of the clothes and items of personal property that related to his wife and his stepdaughter, the threats relating to the physical abuse of the stepdaughter, kidnapping, the sexual assaulting of the stepdaughter, killing of her dogs, the family dogs.
> >
> > ....
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> > ... You were placed on probation. You were given every opportunity by that probation to address these

> [problems], and if these matters were important to you, it rested in your hands ... and now what I have to judge when I look at the severity and gravity of the offense, when I look at the character and personality and social traits of yourself, when I look at the rights of the public and the protection of the rights of the public, what I have to look at is what you did ....
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> ....
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> In this latest episode ... the reason for revoking your probation is that ... the gravity of these offenses hasn't sunk into you yet. You are still using threats, force, manipulation on these people ... and ... other members of the public ... and certainly the public at large, have a right to be protected from this.

The court concluded by noting that until Dierks himself resolves to address his problems, "all we can do is protect people [and] deter this type of conduct by you and by others," and that the only way to accomplish that end is through incarceration.

There is no question that the trial court exercised its discretion in examining and considering the three basic factors in sentencing: the gravity of the offense, the character of the defendant, and the need for protection of the public. ***Cunningham v. State***, 76 Wis.2d 277, 281, 251 N.W.2d 65, 67 (1977). "And where, as here, the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law," the court has appropriately exercised its discretion and we will affirm its decision even if it is one with which we ourselves would not agree. ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991) (citation omitted). That is the case here. The trial court did not erroneously exercise its discretion in sentencing Dierks.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.