COURT OF APPEALS
DECISION
DATED AND RELEASED

December 4, 1996

No. 96-1743-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE G. ARAUJO,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed*.

SNYDER, J. Jose G. Araujo appeals from a judgment of conviction for disorderly conduct, contrary to § 947.01, STATS. He challenges the propriety of the trial court's imposition of forty days condition time, claiming that the sentencing court misused its discretion. We disagree and conclude that the trial court properly considered multiple factors in crafting a sentence for Araujo.

A criminal complaint was issued in August 1995 charging Araujo with disorderly conduct for an incident that occurred the previous December. The complaint alleged that Araujo engaged in an altercation with Shelley Heilert at her apartment. Araujo, a physician, and Heilert, his office manager, had been engaged; the argument concerned the return of certain items belonging to Araujo, including an engagement ring.

In January 1996, Araujo pled no contest to the disorderly conduct charge with the understanding that the State would recommend a twelve-month period of probation, but no jail or condition time.[1] Sentencing was adjourned until May 1996, at Araujo's request, due to an upcoming trial in a civil suit that Heilert had filed against Araujo.[2]

At the sentencing hearing, the prosecutor recommended probation without any jail time. She also stated that she did not believe that she "could prove under the circumstances that [Araujo] intended to cause [Heilert] any injury"; therefore, she had not sought a battery charge against Araujo. Counsel for Araujo made a parallel sentencing recommendation to the court.

At the sentencing hearing, the trial court also heard a statement by Heilert, who expressed her unhappiness with the prosecutor's charging decision

[1] The plea agreement Araujo initialed and signed included the standard language, "I understand that the Judge is not bound to follow any plea agreement or any recommendations made by the attorneys or by myself. I understand that the Judge is free to sentence me to the maximum possible penalties in this case." The maximum penalty for the disorderly conduct charge was ninety days imprisonment and a fine of $1000. *See* §§ 947.01 and 939.51(3)(b), STATS.

[2] The civil lawsuit settled without a trial.

and sentence recommendation.[3] During Heilert's statement, the court noted that while medical reports indicated that there were some injuries which were the result of the incident, it was unclear "as to whether or not [Araujo] intended to -- to cause those injuries or whether it was more or less of an accident that you fell down the steps, I don't know." The court directed Heilert to confine her statement to a description of the struggle that took place during the altercation.

After hearing Heilert's statement, as well as the sentencing recommendations from the prosecutor and defense counsel, the court then directed the following comments to the defendant:

> Mr. Araujo, you just simply cannot force your way into another person's apartment. The Court notes that at about 2:10 a.m., ... you telephoned Shelley Heilert and accused her of various things. ... You then drove over to her apartment at that time of night, rang the doorbell. When she answered the door you forced your way into the residence and you again shouted various obscenities at her. ... [Y]ou did engage in some physical contact with her.

The trial court also concluded that "clearly ... there is a strong possibility that [Araujo] did engage in--or could have been convicted of a battery charge." Consequently, the court determined that "some considerable punishment is

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[3] The court, however, properly noted the following:

> Let me point out that the Court does not charge people. I don't have anything to do with the charging. The District Attorney's Office makes an evaluation and they charge, and then this Court, if the person is found guilty of that charge, this Court has to sentence on that charge. ...
>
> So as to sentencing today, I'm faced with a disorderly conduct charge. That's what's before me today.

necessary" and then imposed a one-year period of probation with forty days condition time. Araujo now appeals the imposition of condition time, claiming that the trial court impermissibly considered the allegations that formed the basis for a portion of Heilert's civil lawsuit.

Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court has misused its discretion. ***State v. Roubik,*** 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987). There is a strong public policy against interfering with the trial court's sentencing discretion; the trial court has a great advantage in considering the relevant factors. ***Id.*** Furthermore, a sentencing court is presumed to have acted reasonably, and the defendant bears the burden of showing an unjustifiable basis in the record for the sentence. ***Id.***

A trial court must consider a variety of factors when imposing sentence. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). Consideration of the comments and even "wishes" of a victim is within a sentencing court's prerogative. ***State v. Johnson,*** 158 Wis.2d 458, 465, 463 N.W.2d 352, 356 (Ct. App. 1990). The fact that a victim may not be objective in the matter is of little import; bias and personal interest should not cause a victim's comments to be disregarded. *See* ***id***. at 465, 463 N.W.2d at 355. Trial courts are not "rubber stamps"; they accept recommendations only if they can independently conclude that the recommended sentence is appropriate in light of the facts of the case. ***Id.***

Our independent review of the record leads us to conclude that the trial court properly exercised its discretion in sentencing Araujo. The trial court considered all of the factors placed before it and concluded that because Araujo's actions were violent and that he presented a danger to Heilert on the night in question, the sentence imposed must serve as "a deterrent to [Araujo] ... to refrain from engaging in these types of actions." In fashioning the sentence, the court noted that its dual purpose was to "entice [Araujo] to remain on probation and yet punish [him] accordingly."

We conclude that as outlined in ***Johnson***, the trial court properly fashioned a sentence which was "appropriate in light of the acknowledged goals of sentencing as applied to the facts of the case." ***Id.*** The trial court heard statements that while Araujo was charged with disorderly conduct, there was some physical contact during the altercation and evidence from medical professionals that Heilert had been injured as a result. The trial court commented on the "volume" of information it had received from the victim and specifically inquired as to whether defense counsel had had an opportunity to review that document.[4] The trial court provided a fair opportunity for all parties to present any information deemed relevant to sentencing.

In sum, we conclude that the trial court properly exercised its discretion and sentenced Araujo on the basis of the aggravated nature of the disorderly conduct charge. The trial court considered multiple factors and

[4] The trial court also solicited a statement from defense counsel concerning the evidence it had before it which had been collected for the civil suit and reiterated that "[w]hatever you believe you wish to present to the Court in your ... sentencing arguments, I'll certainly look at."

ultimately fashioned a sentence that was based on the nature of the case before it.

By the Court. – Judgment affirmed.

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