COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 1, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-3595-CR, 95-3596-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. GADACH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Eric Gadach appeals the denial of his motion for postconviction relief, in which he requested a sentence modification. He argues the trial court abused its discretion when it sentenced him to maximum consecutive sentences without an adequate basis, and improperly participated in the plea negotiations. Gadach asks this court to reduce his sentence or, in the

alternative, to reverse the order and remand for a new sentencing hearing. We reject Gadach's arguments and affirm the order.

On March 8, 1996, Gadach, a seventeen-year-old, was charged as an adult with felony theft as a party to the crime, for his participation in a March 1 snowmobile theft. On March 22, Gadach was charged with intentional causation of bodily harm, robbery, and bail jumping for his participation in a March 15 beating of a sixteen-year-old. The robbery charge was replaced with an extortion charge in the April 8 information.

On May 10, pursuant to a plea agreement, Gadach pled guilty to the theft and bail jumping charges, the bodily harm and extortion charges were dismissed and read into the record, and pending juvenile matters were dismissed. The trial court entered judgments of conviction and sentenced Gadach two years in prison on the theft charge and five years in prison on the bail jumping charge. The sentences were made consecutive, and reflected the maximum penalty for each offense. At Gadach's request, the court recommended that Gadach be transferred as soon as possible to the St. Croix Correctional Center, a boot camp facility, to serve his sentence.

On appeal, Gadach asserts the sentence was harsh, excessive and without an adequate basis. We deferentially review the trial court's sentencing decisions for an erroneous exercise of discretion. *See* ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). The trial court is presumed to have acted reasonably in passing sentence on the defendant, and the burden is on the defendant to show an unreasonable or unjustifiable basis in the record for the sentence. ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987). We will uphold a sentence that is within the relevant

statutory parameters 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." *See* ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984) (citation omitted).

The trial court must state the basis for the sentence it imposes on the facts of record. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). As explained by our supreme court,

> [T]here must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

Id. (quoting ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971)).

When sentencing a defendant, the trial court should consider the gravity of the offense, the character of the defendant, and the need for protection of the public. ***Id.*** The court may also consider the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, the results of a presentence investigation, the vicious or aggravated nature of the crime, the degree of the defendant's culpability, the defendant's demeanor at trial, the defendant's age, educational background and employment record, the defendant's remorse, repentance and cooperation, the defendant's need for close rehabilitative control, and the rights of the public. ***Id.*** at 623-24, 350 N.W.2d at 639 (citations

omitted). The weight to be given each factor is within the trial court's discretion. ***Scherreiks***, 153 Wis.2d at 517, 451 N.W.2d at 762.

We have reviewed the record and are satisfied that the trial court properly exercised its discretion when it imposed sentence. The trial court noted that Gadach, as a juvenile, was adjudged delinquent for felony physical abuse of a child and two felony burglaries. He took judicial notice of the fact that those felony adjudications came at the end of a series of numerous other charges filed against Gadach as a juvenile. The court also told Gadach that his reputation for engaging in unlawful activities at such a young age was well known to law enforcement officials, even in neighboring communities.

The trial court suggested that other judges had been too easy on him, and Gadach agreed that had he faced a tough sentence from a tough judge earlier on in his delinquent life, he would have changed his conduct and would not be going to prison for his most recent offenses. The court also suggested, and Gadach agreed, that his affiliation with the Gangster Disciples had not been beneficial. Gadach also admitted that he had a substance abuse problem with marijuana. The court then sentenced Gadach to the maximum penalties because of his prior record, the prior juvenile charges filed against him, the read-ins and the nature and circumstances of the theft and bail jumping offenses. At Gadach's request, the court recommended he be transferred to boot camp.

Because the parties jointly waived a presentence investigation report, the court had no such report to rely on when determining Gadach's sentence. On appeal, Gadach asserts the court should not have sentenced Gadach to the maximum penalties without the benefit of a presentence investigation. We reject this argument because his express waiver of the report at the trial court precludes

Gadach from arguing on appeal that such a report should have been made available to the court when it imposed sentence. Likewise, we reject Gadach's suggestion that the trial court "speculat[ed] about [his] chemical dependency problem," when the transcript indicates that Gadach himself told the trial court that he had a substance abuse problem with marijuana.

Despite Gadach's arguments to the contrary, we conclude the trial court relied on accurate information, including Gadach's numerous files in the trial court, to determine an appropriate sentence. The court expressly stated that it would take a tough stance at sentencing, based largely on Gadach's propensity to repeatedly engage in unlawful activities at such a young age, as evident in his prior record as well as the numerous other charges filed against him as a juvenile. Although the sentence was admittedly harsh, it was within the court's discretion to sentence him to the maximum penalties. At the sentencing hearing, defense counsel told the court that his client "does not want some sort of slap on the wrist" as punishment for his offenses. Given the nature and number of Gadach's prior and current offenses and his young age, Gadach's sentence would not "shock public sentiment" or "violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Sarabia***, 118 Wis.2d at 673, 348 N.W.2d at 537. Therefore, we reject Gadach's assertion that his sentence was excessive.

Next, Gadach asserts the trial court improperly participated in the plea negotiations. We agree. As explained by our supreme court,

> Whatever may be the policies or procedures elsewhere, this court has firmly stated that a trial judge is not to participate in plea bargaining … the entire sentencing process is to be a search for the truth and an evaluation of alternatives. Any

> advance understanding between prosecutor and defendant must not involve the trial judge.

State v. Erickson, 53 Wis.2d 474, 481-82, 192 N.W.2d 872, 876 (1972). In Wisconsin, the trial judge may not participate in plea negotiations before a plea agreement has been reached because it "destroys the voluntariness of the plea." ***State v. Wolfe***, 46 Wis.2d 478, 487-88, 175 N.W.2d 216, 221 (1970). Therefore, the defendant who asserts the judge improperly participated in the plea agreement is, in effect, asserting that his or her plea was involuntary. ***Id.***

Here, it is evident from the transcript that the trial judge participated in the plea negotiations before a plea agreement was reached. The following excerpts are the court's comments to defense counsel when confronted with this issue at the postconviction motion hearing. By its own admission, the trial court participated in the plea negotiations:

> Let me just – before you even start here. So, do I take it from now on if you're successful on this particular issue that I have to walk out into the courtroom and hear or not hear a plea bargain for the first time, agree or not agree, and embarrass people or not embarrass people? Is that what you want, or what?
> ….
> … If it is the state of the law that attorneys are never to come in and talk about proposed plea negotiations with a court--if that is to be--that is absolutely fine with me. I really don't enjoy it, don't like it. I try to not participate within the realm of human possibility. I listen. I, out of courtesy, indicate whether I accept or reject the plea bargain proposal, or how to make it acceptable to the court. If you don't want that to happen in the future, this case may be the one that will make it not happen in the future. Okay?
> ….
> … [T]he reason why [defense counsel] and [the prosecutor] came in--by the way, there was more than one discussion--there were several discussions--was to figure out how to concoct a charge that would be palatable to get Mr. Gadach in the boot camp. The first attempt was nixed as I recall by

> [the boot camp superintendent]. And so it was changed to … bail jumping ….
> … And that was done for the benefit of your client. I'd be more than happy to vacate everything to the point before the entry of the pleas to that and go back to the original charge and forget about all of the planning to get Mr. Gadach into boot camp.
> ….
> Now, from this point on obviously the practice that has been long lived in this county and many others … is all over with ….
> The rationale in the conversations was that Eric, being 17, should go to boot camp if he wants to go to boot camp. He indicated he did. Well, what sort of charges do they allow to get into boot camp? The charges that ... he was facing ... was unacceptable to the superintendent of the boot camp and, therefore, it was back to the drawing board. And if that is participating in a plea bargain, absolutely I participated, to that extent for the benefit of the Defendant. And if that was wrong, I'll admit it was wrong, and we got back to the … original information--which is the robbery. You can't have it work in his favor both ways.

When the trial judge participates in the plea negotiations before a plea bargain has been reached, the remedy is to permit the defendant to withdraw the plea because the plea was involuntary. ***Wolfe,*** 46 Wis.2d at 488, 175 N.W.2d at 221. If Gadach's request were to withdraw his plea, his request would be granted upon the requisite showing of manifest injustice. *See* ***id.; State v. Booth***, 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987). However, Gadach instead requests a reduction in his sentence as the remedy for the trial court's improper participation in the plea agreement. In the alternative, Gadach requests a remand for a new sentencing hearing. These remedies are unavailable to the defendant, and we decline to adopt additional remedies when the long-standing remedy of plea withdrawal established by our supreme court in ***Wolfe*** already exists to provide adequate relief to the defendant.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.