COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1962-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BASHAR ELRAMAHI,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MOHAMMED FARHAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

ANDERSON, J. Bashar Elramahi and Mohammed Farhan appeal their sentences for retail theft. Elramahi and Farhan contend that the six-month sentence in the county jail, as a condition of probation, is unduly harsh and shocks the conscience of the public. We affirm because our independent review of the sentencing transcript establishes that the sentencing court properly considered all of the factors relevant to the sentencing and correctly exercised its discretion.

Sentencing is within the sound discretion of the trial court and we will not reverse absent a misuse of that discretion. *See* ***State v. Tarantino***, 157 Wis.2d 199, 221, 458 N.W.2d 582, 591 (Ct. App. 1990). There exists a strong policy against interference with the discretion of the trial court in passing sentence. In reviewing a sentence to determine whether discretion has been misused, this court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence disputed. *See* ***State v. Macemon***, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983).

On appeal, Elramahi and Farhan assert that the sentencing court misused its discretion by failing to give proper weight to the three primary factors that are to be considered when the sentence is imposed. They also contend the sentencing court misused its discretion in considering speculative evidence of a national scheme to shoplift baby formula.

Elramahi and Farhan were both charged with two counts of being a party to the crime of retail theft in violation of §§ 939.05 and 943.50(1m), STATS. They were arrested by city of Fond du Lac police upon the complaint of loss prevention specialists employed by K-Mart and Wal-Mart department stores. Elramahi and Farhan were observed in the K-Mart and each had a shopping cart

and went to the infant department where each placed cans of infant formula in their carts. Elramahi concealed the formula in his cart with a package of toilet paper. At the checkout, Farhan paid for seven cans of formula and handed the receipt to Elramahi who exited the store with the concealed cans of formula. Elramahi was observed placing the cans of infant formula into a van with Illinois license plates. The K-Mart employees then observed Elramahi and Farhan get into the van and followed them to a Wal-Mart where both put cardboard boxes into separate carts and entered the store.

The Wal-Mart loss prevention specialists, previously alerted to the incident at the K-Mart store, observed Elramahi and Farhan engage in the same behavior. However, Elramahi was stopped when attempting to leave the store with a cart full of merchandise, and as he was escorted past Farhan, who was at the checkout, he asked Farhan to pay for his merchandise.

On the morning their joint jury trial was to start, Elramahi and Farhan entered no contest pleas to all counts. The pleas were entered without the advantage of plea discussions with the State. After receiving their written plea questionnaires and conducting a colloquy, the court found them guilty and immediately heard recommendations as to sentencing. The sentencing court imposed the same sentence on both Elramahi and Farhan; sentence was withheld and they were placed on probation for two years, a $2500 fine was imposed and, as a condition of probation, a six-month term in the county jail was ordered.

In making a sentencing recommendation, the State detailed what it believed to be a scheme by Elramahi and Farhan to shoplift infant formula that went beyond the two Fond du Lac stores. The State advised the court that 480 cans of infant formula were found in the van being used by the parties. Receipts,

dated between March and May 1997, from stores in eleven states only accounted for 200 cans of formula. Counsel for Elramahi and Farhan argued that the State was merely speculating that the receipts established a larger scheme and it would be improper to sentence them for more than the thefts from the two Fond du Lac stores. On appeal, this argument is renewed. Elramahi and Farhan assert that the evidence only established they were in possession of more merchandise than they had receipts for and it is pure speculation to link them to other crimes. They complain that the evidence is not relevant and is unreliable.

Elramahi and Farhan do not seriously challenge the sentencing court's remarks that under § 911.01(4)(c), STATS., the rules of evidence are not applicable in sentencing hearings. Rather, they challenge the sentencing court's consideration of this information as evidence of their *modus operandi*. In ***Waddell v. State,*** 24 Wis.2d 364, 368, 129 N.W.2d 201, 203 (1964), *overruled on other grounds by* ***Stockwell v. State***, 59 Wis.2d 21, 207 N.W.2d 883 (1973), the supreme court held that the trial judge in imposing a sentence for an admitted crime could consider other unproven offenses. The reason for allowing the judge to do so is that these other offenses are "evidence of a pattern of behavior which, in turn, is an index of the defendant's character, a critical factor in the sentencing." ***Mallon v. State***, 49 Wis.2d 185, 192, 181 N.W.2d 364, 368 (1970) (quoted source omitted).

Contrary to the argument on appeal, the court did not engage in unwarranted speculation. The court took the evidence into consideration when reviewing the nature of the offense. The court believed that this evidence, along with the conduct actually observed by the loss prevention specialists, showed "a degree of sophistication, planning, calculation, obviously deceit" that was an aggravating factor. The court commented that the evidence would negate any

mistake defense and would establish a pattern of conduct that was an aggravating factor. The sentencing court properly weighed and balanced the State's evidence of a larger scheme: "I can't conclude that the van contents were all stolen, but it shows to me that what they were stealing, they didn't need for personal use." We determine that the sentencing court did not overstep the bounds of its discretion.

Elramahi and Farhan's second objection is that the six-month jail term is unduly harsh and would shock the conscience of the public. They argue that the sentencing court failed to consider all of the factors summarized in ***State v. Harris***, 119 Wis.2d 612, 350 N.W.2d 633 (1984), and imposed a sentence that exceeds the guideline that the sentence imposed should be the minimum amount of custody consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendants.

The appellate courts of this state have "repeatedly held that the imposition of a criminal sentence must at the very least be based on the gravity of the offense, the character of the offender and the need for the protection of the public." ***State v. Ogden,*** 199 Wis.2d 566, 571, 544 N.W.2d 574, 576 (1996) (quoted source omitted). Additional factors courts should consider in sentencing include: (1) past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *See* ***Harris***, 119 Wis.2d at 623-24, 350 N.W.2d at 639.

The weight to be attributed any factor is for the trial court to determine in the exercise of its judicial discretion. The imposition of a particular sentence, including conditions of probation, can be based on any one or more of the three primary factors. While an element of weighing or balancing is involved, this is for the trial court to perform. Such determination will not be reweighed or rebalanced by this court since "weight which is to be attributed to each factor is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Anderson v. State***, 76 Wis.2d 361, 367, 251 N.W.2d 768, 770 (1977) (quoted source omitted).

The sentencing court looked at all three of the primary factors. Although the offenses were property crimes, the court, as previously noted, found that they were part of a sophisticated, well-planned criminal enterprise. The court took note that the pattern of retail theft was an aggravating factor. The court commented that retail theft makes all consumers victims.

Turning to the character of the defendants, the court commented that they were well beyond the age of youthful immaturity where a small retail theft might be expected. The court's attention was caught by the fact that Elramahi and Farhan were not motivated by poverty; it commented that "[t]he defendants have offered no circumstances of mitigation, of personal circumstances, and as the consequence, their character must be that they are out-and-out thieves. They are shoplifters, and that's what they are doing, and they were caught." The court concluded by stating that these were crimes of greed.

Finally, considering the need to protect the public, the sentencing court concluded that Elramahi and Farhan were high risks to offend again. Although the court found some mitigating factors present in the backgrounds of

both, it reached the conclusion that a stern sentence, including jail time, was needed to protect the public and serve as a deterrence to others who might consider the same criminal conduct.

We conclude that Elramahi's and Farhan's claims fail. This court affirms the sentencing of the trial court.

By the Court.—Judgments and orders affirmed.

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