

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-1273-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN BLUMENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RONALD S. BROOKS and JEFFREY A. KREMERS, Judges. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Brian Blumenberg appeals from a judgment entered after he pled guilty to one count of disorderly conduct, party to a crime, contrary to § 947.01, STATS. He also appeals from a postconviction order denying

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

his request for modification of his sentence. He claims that the trial court erroneously exercised its sentencing discretion by considering his employment as a police officer as a primary factor when it imposed sentence. Because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

BACKGROUND

¶2 This appeal has its genesis in an argument that occurred in the early morning hours of November 9, 1997, between Blumenberg and Arthur Bub and Jacob Van Ruden in the 700 block of South 39th Street in Milwaukee. Some of the details of what transpired in this confrontational incident are disputed, but such dispute is essentially irrelevant for the purposes of resolving the issue on appeal.

¶3 On the night in question, Blumenberg, who was employed as a police officer, left the Stadium Club tavern after it closed, and was seated in his truck parked around the corner from the tavern. He was off duty at the time. Bub and Van Ruden walked past the truck on their way to their respective residences, which were located in the 700 block of South 39th Street. As they passed Blumenberg's truck, one of them made a comment about the truck, which was offensive to Blumenberg. Blumenberg drove past them, made a U-turn, returned, and stopped in the street where a series of name-calling and oral challenges were exchanged. Blumenberg stated that he was a police officer and that they had better not "mess" with him because he had a "gauge." Van Ruden walked behind the truck and told Blumenberg, "I'm taking your license plate." Blumenberg drove away and Bud and Van Ruden went home.

¶4 Blumenberg drove home and then called two friends, Jamie Horch and Kevin Kettinger. He informed them that he was having trouble with some guys, needed their help, and would pick them up at their place of employment

after work. When Blumenberg arrived, Horch and Kettinger concluded that he was intoxicated. Blumenberg made them aware that he had his service weapon and a shotgun. The shotgun was removed from its case. They observed numerous rounds of shotgun ammunition in the truck. Blumenberg then drove back to the South 39th Street location and parked the truck in an alley. Blumenberg and Kettinger took the shotgun, got out of the truck, and proceeded down the alley towards what was believed to be the residences of Bub and Van Ruden. Horch remained in the truck and was seated in the driver's seat. Blumenberg pulled the stocking cap he was wearing down over his face. Horch saw a police squad approaching so he honked the truck horn. This alerted Blumenberg and Kettinger, who took cover under a nearby truck until the squad disappeared. They then fled, abandoning the shotgun which the police later recovered. Blumenberg and Kettinger walked to a nearby restaurant where Blumenberg called a friend to pick them up. The friend drove them to the home of Kettinger's sister, Debra LaPalma. Blumenberg hid his service weapon at LaPalma's home. LaPalma drove them back to the scene.

¶5 In the meantime, after arriving home, Bub observed Blumenberg's truck through his window. Frightened, he called police and explained the situation; he then called Van Ruden to warn him. When Blumenberg and Kettinger arrived back at the scene, the police were waiting and Blumenberg and Kettinger were arrested.

¶6 Pursuant to a plea agreement, Blumenberg pled guilty and was sentenced to sixty days in the House of Correction with Huber privileges. He now appeals.

ANALYSIS

¶7 Blumenberg claims that the trial court erroneously exercised its sentencing discretion when it considered, as a primary factor, his status as a police officer in applying the sentencing factors in imposing sentence.

¶8 When called upon to review a sentence determination, this court adheres to a consistent and strong policy against interfering with the discretion of the trial court that passes sentence. *See State v. Paske*, 163 Wis.2d 52, 61-62, 471 N.W.2d 55, 58 (1991) (citing *McLeary v. State*, 49 Wis.2d 263, 281, 182 N.W.2d 512, 521 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and on the demeanor of the defendant. *See State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). Furthermore, 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 that is being challenged. *See State v. Thompson*, 172 Wis.2d 257, 263-64, 493 N.W.2d 729, 732 (Ct. App. 1992). A trial court's sentence is reviewed for an erroneous exercise of discretion. *See Paske*, 163 Wis.2d at 70, 471 N.W.2d at 62.

¶9 It is similarly well-established that trial courts must consider three primary factors in passing sentence. These factors are: the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *See id.* at 62, 471 N.W.2d at 59 (citing *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984)). The weight to be given to each of the factors is a determination, particularly within the discretion of the trial court. *See Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). After consideration of all relevant factors, the sentence may be based on any one of the

three primary factors. See *State v. Krueger*, 119 Wis.2d 327, 338, 351 N.W.2d 738, 744 (Ct. App. 1984). In addition, the sentencing court may also take into account other secondary factors that may be material under the facts. See *State v. Lewandowski*, 122 Wis.2d 759, 763, 364 N.W.2d 550, 552 (Ct. App. 1985).

¶10 An erroneous exercise of sentencing discretion may be found if the trial court failed to state on the record the material factors that influenced its decision, gave too much weight to one factor in the face of contravening considerations, or relied on irrelevant or immaterial factors. See *Krueger*, 119 Wis.2d at 337-38, 351 N.W.2d at 744; *State v. Harris*, 75 Wis.2d 513, 250 N.W.2d 7, 10 (1977).

¶11 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. See *McCleary*, 49 Wis.2d at 277, 182 N.W.2d at 519. The trial court must engage in an explained judicial reasoning process and explain the reasons for its actions.

¶12 To support his claim, Blumenberg argues that the trial court erred in two ways. First, he contends that the court improperly included an analysis of his violation of the public trust as a primary factor in determining what sentence to impose. Second, he argues that while the court imposed a sentence within the statutory limit for a conviction for disorderly conduct, party to a crime, the court emphasized the violation of public trust and imposed a sentence that is not commensurate with his character, background, or level of offense under the facts. This court is left unconvinced.

¶13 As noted above, a sentencing court is required to consider, among the primary factors, the *character* of the defendant. It also may take into account

secondary factors that are material to the circumstances of the sentencing. As in most sentencing exercises, the employment history of the defendant is an appropriate factor implicated in assessing his or her character. Blumenberg cannot step away from the fact that, at the time of this incident, he was an off-duty police officer which, even in that status, carried with it full-time responsibilities. In fact, one of the exacerbating circumstances was his intended use of his status in gaining a confrontational advantage over Bub and Van Ruden. Furthermore, before the postconviction court, he sought to gain additional advantage because of his employment record as a police officer. Thus, he cannot now be heard to assert that his professional status, and how he wears its mantel of public trust, has no bearing on his character. Such a claim has no basis in logic, law or common sense.

¶14 This court has carefully reviewed the lengthy oral decision of the sentencing court. It demonstrates a great deal of forethought. Doubtless, the court emphasized Blumenberg's flawed character traits vis-à-vis the public trust responsibilities that he was expected to discharge, but did not. The court, however, did not ignore the nature and gravity of the offense, and addressed these elements in deciding how to tailor the punishment to the crime. Because of the unique circumstances, the court ruled out rehabilitative punishment, concluding that a punitive penalty was appropriate. Although other courts might have imposed a different punishment, this court cannot conclude that the trial court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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

