

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0704-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY L. JANDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ This court need not address Gary L. Janda's complaints that his due process rights were violated when the circuit court considered inaccurate information at sentencing because he failed to show that the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court actually relied upon inaccurate information. Likewise, we need not address his claim that he suffered from ineffective assistance of counsel because counsel did not seek a *Machner* hearing.² Finally, we affirm his conviction because we conclude that although the circuit court's sentencing statement was terse, it did reflect the proper exercise of sentencing discretion.

¶2 Janda entered into a plea agreement with the State that provided he would plead no contest to two counts of misdemeanor battery and two counts of disorderly conduct, and that one count of criminal damage to property would be dismissed. The State promised that in return, it would recommend twelve months of probation but take no position on jail time as a condition of probation. The circuit court found Janda guilty of two counts of battery and imposed two years of concurrent probation along with sixty days in the county jail on one count.

¶3 In this direct appeal, Janda raises three issues. First, he contends that his due process rights were violated when the court relied upon inaccurate information at the time of sentencing. Second, he insists that he received ineffective assistance of counsel. Finally, he asserts that the circuit court erroneously exercised its sentencing discretion.

¶4 Janda complains that at his initial appearance the State informed the court that he had an extensive criminal record and consequently a cash bond in the amount of \$2200 was set. He claims that the district attorney mixed the criminal record of one Mark Patrick Neal with his record and then wrongly advised the court that Janda had a prior record requiring a high cash bail. He argues that because the amount of the cash bond was in the record the court had before it at

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

sentencing and because the sentence imposed deviated from the sentencing recommendation, the court had to have based its sentence on the assumption that the high cash bond meant that Janda had an extensive prior record.

¶5 Janda's proof that the record of another person was mixed up with his is supported by the inclusion of the criminal records of Janda and Mark Patrick Neal in Janda's appendix. In our independent review of the record, we concluded that the criminal records were never entered into evidence in the circuit court. Although we generally do not consider matters outside the record on appeal, *see Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981), a party's unrefuted contentions may be deemed admitted. *See Charolais Breeding Ranches v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Because the State does not object to the contents of Janda's appendix, we include it in our consideration of the record.

¶6 Although sentencing is within the trial court's discretion, *see State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998), that discretion must be exercised following consideration of information that is accurate, *see State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) ("Defendants have a due process right to be sentenced on the basis of accurate information."). A defendant, such as Janda, "who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." *Id.*

¶7 Janda falters on both aspects of this twofold requirement. First, during the sentencing hearing, the State advised the court of Janda's correct record. Second, there is no evidence to support Janda's assertion that the court reached the conclusion that the high cash bond was commensurate with an

extensive criminal record. Additionally, as we discuss below, the circuit court did not consider Janda's prior record in sentencing; rather, it limited its consideration to the aggravated nature of Janda's criminal behavior and his culpability.

¶8 Janda's second complaint is that his trial counsel was ineffective. Before filing this appeal, Janda did not seek a *Machner* hearing in the circuit court. Contrary to his assertion that a *Machner* hearing was not necessary because there was sufficient evidence in the record to "make the legal determination that counsel's performance was deficient and prejudiced the defense," we have held:

"[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion. This dual purpose renders the hearing essential in every case where a claim of ineffective assistance of counsel is raised.

State v. Curtis, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (citations omitted). Here, the lack of a *Machner* hearing prevents our review of trial counsel's performance.

¶9 We will consider Janda's argument that the court erroneously exercised its sentencing discretion because it failed "to state on the record the relevant and material factors which influenced the court's decision." Before imposing sentence, the trial court made the following terse statement:

He hit somebody with a hammer, right? After punching some guy out at the bar who is sitting there. He goes and gets a hammer and punches somebody else. Mr. Janda, what have you got to say for yourself?

¶10 There exists a strong policy against interfering 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 (1983).

¶11 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 (Ct. App. 1990). This exercise of discretion contemplates a process of reasoning based 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. *See McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). As long as there is evidence in the record that the trial court considered the appropriate factors, this court will not second-guess a sentencing decision of the trial court. *See id.* at 281. To properly exercise its discretion, the trial court must give consideration to the recognized primary factors and other appropriate sentencing considerations. *See State v. Iglesias*, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994). The weight to be given to each factor is left to the trial court's broad discretion. *See State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

¶12 The three primary sentencing factors a trial court must consider are: (1) the gravity of the offense; (2) the character of the offender; and (3) the need for the protection of the public. *See State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). Additional factors that the trial court may take into consideration are: (1) the past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) the results of a presentence investigation; (5) the vicious or aggravated nature of the crime; (6) the degree of the defendant's culpability; (7) the

defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse, repentance and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *See id.* at 426-27.

¶13 The court can consider those factors it decides are important and the sifting and winnowing the court engages in is peculiarly within the discretion of the court. Although terse, the sentencing reasons of the court encompass the primary factor of the gravity of the offense and its subcategories of the vicious or aggravated nature of the crime and the defendant's culpability. The court expressed its concern that, acting alone, Janda punched a patron of a bar without provocation and then armed himself with a hammer and punched a second person without provocation. We can draw the reasonable inference that the circuit court also reflected on the primary sentencing factor of the need to protect the public—in this case from an individual who engages in unprovoked physical assaults. Therefore, we are satisfied that the circuit court properly exercised its sentencing discretion.

By the Court.—Judgment affirmed.

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

