COURT OF APPEALS DECISION DATED AND FILED

August 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2011AP368-CR **Cir. Ct. No. 2005CF445**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY D. KNICKMEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Jeffrey Knickmeier appeals the judgment of conviction and sentence of six months in jail, concurrent, on each of two counts of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

misdemeanor theft by bailee, contrary to WIS. STAT. § 943.20(1)(b). He also appeals the denial of his postconviction motion. He contends his sentence was excessive and the circuit court erred in the exercise of its sentencing discretion. We reject his arguments and affirm.

BACKGROUND

¶2 Knickmeier entered a no-contest plea in March 2006 to three counts of misdemeanor theft by bailee. The amended information alleged that Knickmeier, at the time a practicing attorney, had intentionally converted a client's money to his own use.[2] Knickmeier was sentenced to six months in jail on count one, with Huber privileges; on counts two and three the court withheld sentence and placed him on probation for three years for each count, concurrent. Restitution was ordered as a condition of probation but the amount was not set.

¶3 While Knickmeier was appealing the convictions, he was released from jail on signature bond and his probation supervision was stayed. After the unsuccessful appeal was completed, he finished the six-month jail sentence on count one, and the stay of probation on counts two and three was lifted. Also after the unsuccessful appeal was completed, Knickmeier, in April 2008, was ordered to pay $17,302.67 in restitution plus costs.

¶4 Knickmeier was taken into custody on a probation hold in March 2010 for violating probation rules, including making out-of-state trips without his agent's knowledge or prior approval. He waived a revocation hearing, admitted

[2] The original complaint charged Knickmeier with one count of felony theft by bailee, contrary to WIS. STAT. § 943.20(1)(b) and (3)(c) (1999-2000).

the violations, and self-revoked his probation. The circuit court sentenced him to six months in the county jail on each of counts two and three, to be served concurrently. The circuit court denied Knickmeier's postconviction motion challenging his sentence.

DISCUSSION

¶5 Sentencing lies within the sound discretion of the circuit court and a review on appeal is limited to whether the court's discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (citations omitted). "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.***, ¶18 (citations omitted). When imposing a sentence, the circuit court should discuss relevant factors such as the severity of the offense and character of the offender and relate them to identified sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***id.***, ¶¶39-46. The weight assigned each relevant factor is particularly within the circuit court's discretion. ***State v. Schreiber***, 2002 WI App 75, ¶8, 251 Wis. 2d 690, 642 N.W.2d 621 (citation omitted). In order to demonstrate a misuse of discretion, a defendant generally must show that the record contains an "unreasonable or unjustifiable basis" for the circuit court's action. ***Id.***, ¶9.

¶6 Knickmeier makes numerous challenges to the six-month jail sentence the court imposed. We address his primary contentions and explain why we reject them. Any challenges we do not specifically address lack merit because, at bottom, they depend upon accepting a more favorable view of his conduct and

of the facts than the circuit court did—an approach that is inconsistent with our standard of review. *See* ***Gallion***, 270 Wis. 2d 535, ¶18.

¶7 First, Knickmeier contends that a sentence of six months in jail, in addition to the six months in jail he has already served, is excessive because he had no prior criminal record and because he had defenses to his withdrawal of client funds, although they were never litigated because he entered a plea. We conclude the sentence is not excessive. The maximum penalty on each of the three misdemeanor counts to which he pled is a $10,000 fine or nine months of imprisonment or both. Thus he could have been sentenced to nine months on counts two and three, consecutive, for a total of eighteen months, instead of the six months concurrent the court imposed. Despite Knickmeier's continued justification of his conduct in converting his client's funds, he pled no contest to the three misdemeanors. The circuit court explained that it viewed an attorney's theft from his client as a serious offense and it was particularly so here because of the vulnerability of the client. This is a reasonable view of the record and the circuit court was entitled to make this judgment.

¶8 Second, Knickmeier argues that his probation violations were not crimes but just "technical violation[s] of probation rules."[3] He acknowledges that he took several out-of-state trips without permission from his probation agent.

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[3] In Knickmeier's initial brief he argues that he was improperly revoked because his probation discharge date had already passed before the revocation. The State disputes the discharge date Knickmeier contends is correct, and also argues that, even if that date is accepted, pursuant to WIS. STAT. § 304.072(1) and (3), probation was tolled before then because of the investigation into the probation violations. Knickmeier does not dispute the tolling argument in his reply brief. We take this as a concession and do not discuss the issue further. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments not refuted may be deemed conceded).

However, he asserts, he took the trips with his seventy-eight-year-old father. "If anything," he argues, these are "activities for which [he] should be commended." The circuit court did not specifically mention the reason for the revocation at sentencing but, in explaining why a sentence was necessary, the court did consider it significant that Knickmeier failed to successfully complete probation. This, too, was a judgment the court was entitled to make. The court could reasonably reject Knickmeier's view, as it implicitly did, that the reasons for his rule violations were positive and therefore no sentence was warranted.

¶9 Third, Knickmeier asserts that the purpose of giving him probation was to enable him to pay restitution, and, he asserts, he paid more than he really owed. In his view, he should therefore already have been discharged from probation and there is therefore no justification for any further punishment. Knickmeier's argument on why he owes a lesser amount than he has already paid—even though he hasn't paid the amount ordered—derives from his view of the applicability of the circuit court's ruling on which incidents were properly included in the criminal complaint. However, well after that ruling, after entering into the pleas and after sentencing, Knickmeier entered into an agreement on the amount of restitution he was to pay and that was the amount ordered. Knickmeier had the opportunity to litigate all restitution issues and he chose not to do so. Although Knickmeier at sentencing mentioned that he had agreed to pay more than he owed and had already paid more than he owed, it was apparently not until his postconviction motion that he presented a developed argument on why the court lacked jurisdiction to order him to pay the amount he agreed to. At that hearing, the circuit court declined to consider this argument because Knickmeier had the opportunity to raise it earlier and did not. Knickmeier's argument that the earlier court ruling was "jurisdictional" is not persuasive. Knickmeier has

therefore failed to convince us that the circuit court either erred or erroneously exercised its discretion when it declined to view the amount of restitution he paid as more than he owed.

¶10 Fourth, Knickmeier contends that the victims[4] of his crimes did not want him to be sentenced to jail after revocation. The only reasons they were not present at the sentencing to say this, he asserts, were that the prosecutor did not make his recommendation for six months jail time until the sentencing and the Department of Corrections "revocation packet" was not made available until the day of sentencing. Knickmeier asserts that the court's failure to take into account the victims' wishes was an erroneous exercise of discretion and that the prosecutor violated WIS. STAT. § 971.095(6). This statute provides that the "district attorney shall make a reasonable attempt to provide information concerning the disposition of a case involving a crime to any victim of the crime who requests the information." Knickmeier does not reply to the State's argument that he does not have standing to assert a victim's right. We take this failure to reply as an implicit concession that the State is correct. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted). In addition, Knickmeier does not point to anything in the record to support this alleged violation, whereas the prosecutor stated on the record that the State was "in compliance with Chapter 950." Finally, even if the victims did not want Knickmeier to be sentenced to jail after revocation—a fact not supported by a

[4] Knickmeier uses the term "victims" to refer to the client who was the victim identified in the criminal complaint, as well as the Wisconsin Lawyers' Fund for Client Protection and the law firm currently representing Knickmeier's former client.

record citation—the circuit court would not have misused its discretion in not following their wishes. *See* ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990) (court need not accept sentencing recommendations from any particular source).

¶11 Fifth, Knickmeier takes issue with the circuit court's statement that he consistently tried to avoid personal responsibility. The court viewed this as an aspect of Knickmeier's character and took it into account in imposing sentence. The court's view on Knickmeier's avoiding personal responsibility is amply supported by the record.

¶12 In summary, Knickmeier has not shown that the circuit court erroneously exercised its sentencing discretion. The court's comments show that it considered the factors that Knickmeier advanced to show that no further punishment was warranted, and it explained the reasons it disagreed with Knickmeier. The court explained the factors that led it to conclude a six-month jail sentence was warranted: the seriousness of the crimes, the failure to take personal responsibility, and the failure to successfully complete probation. The court gave the most weight to the seriousness of the crime. These are proper sentencing factors and the weight to give them was for the court to decide.

CONCLUSION

¶13 We affirm the sentence and the circuit court's denial of Knickmeier's postconviction motion.

By the Court.—Judgment and order affirmed.

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