COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP968-CR **Cir. Ct. No. 2012CF154**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEANN L. LESZYNSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Leann Leszynski appeals her conviction for neglecting a child, which resulted in the death of her daughter, and the denial of

her postconviction motion. On appeal, she challenges both her sentence and the circuit court's denial of her motion to suppress pre- and post-***Miranda***[1] statements she made to police officers. We hold that the circuit court properly used its discretion in imposing Leszynski's sentence and that it properly denied her motion to suppress. Therefore, we affirm.

Facts

¶2 On May 1, 2012, Leszynski's doctor's office contacted the West Bend Police Department. The doctor's office informed the police department that Leszynski had called and told the person she spoke with that her daughter was unresponsive. The police department dispatched an officer to Leszynski's apartment building. The police officer then contacted Leszynski by phone, and Leszynski agreed to let the officer into the building. Leszynski let the police officer into her apartment. Once inside, the police officer checked the child and did not find any signs of life. The officer then contacted the detective bureau and moved Leszysnki and her live-in boyfriend into the hallway. The cause of death was later determined to be an infection that began in a cut on the child's finger that spread throughout her body, although this was determined after an autopsy, some time after police investigation and interrogation had concluded..

¶3 When the detective arrived at the apartment, Leszynski expressed that she wanted to go somewhere more private to speak about what happened. The detective suggested that they go to the police department and use the interview rooms there. Leszynski voluntarily agreed to go to the police

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

department. She was transported in a patrol car by a police officer, but she was not handcuffed and the detective informed her that she was not in custody.

¶4 Upon arriving at the police station, Leszynski smoked a cigarette in the parking lot. Leszynski was then placed in a locked interview room. However, a police officer constantly monitored the room and would provide food, water, and bathroom breaks upon request. Leszynski was informed that, even though the room had an automatic lock, she only needed to knock on the door and it would be opened. She was, in fact, provided with water and a bathroom break, but she made no other requests. She was repeatedly told at the police station that she was not under arrest.

¶5 The detective initially interviewed Leszynski for just over an hour before another detective advised her of her ***Miranda*** rights both orally and in writing. In total, Leszynski stayed at the police station for about ten and one-half hours before being transported to jail, and she never said she did not want to speak further with the detective.

¶6 Before trial, Leszynski filed a motion to suppress the statements she made to police officers, which the circuit court denied. Leszynski then pled no contest to intentionally contributing to the neglect of a child resulting in death in violation of WIS. STAT. 948.21(1)(d) (2013-14).[2] The State recommended a sentence of ten years of initial confinement. However, the circuit court issued the maximum sentence of fifteen years' initial confinement and ten years' extended supervision. Leszynski now appeals.

[2] All references to the Wisconsin statutes are to the 2013-14 version unless otherwise noted.

Analysis

Justification for the Maximum Sentence

¶7 Before providing our analysis of the issues, we note our opinion in a companion case, ***State v. Streicher***, 2014AP423-CR, unpublished slip op. (WI App May 6, 2015). We incorporate by reference the ***Streicher*** opinion whenever relevant.

¶8 The first issue we will address is the circuit court's decision to impose the maximum possible sentence on Leszynski. The circuit court exercises its discretion in issuing a sentence. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review is limited to determining whether the circuit court erroneously exercised its discretion. ***Id.*** There is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999) (citation omitted). We will only find that the circuit court erroneously exercised its discretion if the sentence is so disproportionate that it "shock[s] public sentiment and violate[s] the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶9 The circuit court should at least consider these three factors when deciding on a sentence: "(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public." ***Spears***, 227 Wis. 2d at 507. The circuit court can also consider

> the aggravated nature of the crime, the past record of criminal offenses, any history of undesirable behavior

> patterns, defendant's personality, character and social traits, results of presentence investigation, degree of defendant's culpability, defendant's demeanor at trial, defendant's age, educational background and work history, defendant's remorse, repentance and cooperation, and the length of pretrial detention.

State v. Smith, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997).

¶10 The circuit court determined in this case that the offense was so serious that "the only appropriate sentence is the imposition of the maximum penalty authorized by the Wisconsin Legislature." The court explained:

> It was obvious to Leann Leszynski that [the daughter] was declining. These are severe and clear and evident injuries. This little one was getting worse. She was not getting better. This had to be abundantly clear to the defendant, yet she almost totally ignored her child's distress. This is a very grave case. An extremely sad case. [The young girl] should be with us today.

The court went on to say that it would depreciate the seriousness of the offense to impose anything less than the maximum sentence. The court considered the gravity of the offense, the rehabilitative needs of Leszynski, and the need to protect the public, holding that the most important consideration was the seriousness of the crime. The court held that the main purpose of the sentence was punishment, but protecting the community and the need to deter future crimes were also important. *See* ***State v. Owens***, 2006 WI App 75, ¶8, 291 Wis. 2d 229, 713 N.W.2d 187 (punishment is a valid sentencing objective).

¶11 The court in this case considered all the relevant factors with regard to sentencing. In fact, Leszynski acknowledges as much. Her complaint is that the court gave her the maximum sentence and this was because the court did not properly "balance" the relevant factors, did not give enough credit to her prior good character, and, most importantly according to her, did not start with the

proposition that she should only get the "minimum amount of custody" needed to protect the public, reflect the gravity of the crime and rehabilitate her. The theme of her complaint is that this was a one-time occurrence involving her and her daughter; it is unlikely to be replicated so as to endanger the general public. Therefore, how much the public is protected is questionable. And, while it is a tragedy that her daughter died because she did not seek medical attention in time, it was not because she intended harm, but because she thought that a cut finger was capable of being treated with a home remedy. That she was badly mistaken does not mean, according to her, that the "gravity" of the offense was high enough to support a maximum sentence. She also complains about the presentence investigating writer, but we will get to that issue in turn.

¶12 First, she is simply wrong to say that circuit courts have a duty to "balance" the three relevant factors. We have found no case that uses the term. And she cites no case to support her. The best she can do is to quote ***Gallion*** where the supreme court wrote that a sentence should "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶44 (citation omitted). The law is that the court must "consider" each factor. This means that it must pay attention to each factor and show regard for each. But "consider" is not synonymous with "balance," which is to offset or compare one factor to another. This may seem to be a play on words, but words are important here. Courts have no duty to start a sentence as if it were a fifty-fifty property division in a divorce and then weigh each factor against each other and discuss the weight given to each factor. Rather, the court, in its discretion, looks to the factor or factors that the court deems to be material to the

ultimate sentence. ***Ocanas***, 70 Wis. 2d at 185. It is a subtle difference, but a difference nonetheless.

¶13 Now, getting back to Leszynski's claim, she is basically saying that, because this was a one-time occurrence concerning her neglect of her daughter, the public is unlikely to be harmed. But, as we read the circuit court's sentencing remarks, that is not the main factor which moved the circuit court to give the maximum sentence. Rather, it was the "gravity of the offense" which the court deemed most important. The court noted that the daughter was only three years old. Yet, this young child, according to the forensic expert, had wounds on her body that were inconsistent with everyday scratches and bruises that can be expected of active, busy children. This young girl had blunt head and neck injuries, multiple contusions and abrasions to her head, neck and face, and an injury to her little finger that was more than just a simple childhood injury—the muscle and the tendon were exposed. The infection presented a swelling, a discoloration, and blistering of the left forearm. Clearly, the child was suffering in every way. Leszynski knew this. She admitted that she noticed her daughter's eye bleeding and could hear her moans and comforted her and told her she loved her. But then she left and went back to bed. She slept through a substantial part of her daughter's dying. She was not even watching. And what was Leszynski's explanation for not seeking medical attention? She said she had been accused in the past of child abuse, which had resulted in the children being taken away from her. She stated that she was not going to let a doctor take her daughter away again.

¶14 It is after this commentary on the facts that the circuit court quoted the PSI writer who had this to say:

> It is extremely evident to this writer that Ms. Leszynski's concern for self-preservation outweighed her concern for her child's well being. This case has little to nothing to do with Ms. Leszynkski's success or failure as a mother. It has everything to do with three-year old [daughter's] suffering and the lack of human decency and compassion shown to this innocent child.

The court commented that it was obvious that the young girl was declining. It had to be "abundantly clear" to Leszynski. Yet, she almost totally ignored her child's distress. It is this utter disregard for her child that was so grave, that in the opinion of the circuit court, only a maximum sentence was authorized.

¶15 Leszynski takes issue with the court's characterization of her. But the court's characterization was based on fact and not conjecture. The court's factual underpinnings were and are supported by the record. In full understanding of the seriousness of the situation, Leszynski stayed away from medical attention because *she* did not want to deal with the possibility of having her children taken away. Indeed, as the circuit court concluded, this was all about her and not the child. There, in a nutshell, is the justification for the maximum sentence.

¶16 Leszynski accuses the PSI writer of what we call "going beyond her job description," which she claims is limited to investigating the facts and providing a neutral report to the circuit court. Wrong. The job of the PSI writer is much more. According to our supreme court:

> The PSI should contain the following information related to the defendant: the present offense, the defendant's prior criminal record, the defendant's prior correctional institution record, any statement by the victim(s), and the defendant's family information and personal history. WIS. ADMIN. CODE § DOC 328.27(3) (Dec. 2006). The PSI should also include the *PSI writer's recommendation for sentencing and the reasoning that supports that recommendation*….

State v. Melton, 2013 WI 65, ¶28, 349 Wis. 2d 48, 834 N.W.2d 345 (emphasis added; footnote omitted). When the law speaks of a "neutral" PSI writer, it is talking about one who has no conflict of interest with the district attorney's office. *See* ***State v. Howland***, 2003 WI App 104, ¶37, 264 Wis. 2d 279, 663 N.W.2d 340. And then we have this from ***State v. Suchocki***, 208 Wis. 2d 509, 518-19, 561 N.W. 2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1:

> The purpose of a PSI is to do more than simply compile the factual background regarding a specific defendant. The report contains a variety of areas where the PSI writer is able to make discretionary determinations. For example, the report has a section involving the "agent's impressions." This portion of the PSI involves the writer's subjective feelings regarding the defendant to be sentenced. Many PSIs contain a writer's specific sentencing recommendations to the court as well.

So, bottom line, the role of the PSI writer is not confined to a neutral investigation of the facts. The PSI writer makes a recommendation based on those neutral facts, but the recommendation is based on the PSI writer's impressions and subjective feelings. Leszynski simply has the wrong idea about the PSI writer's role.

¶17 Having shown what the role of the PSI writer is, we turn to Leszynski's complaint regarding a statement made by Leszynski to the writer as follows: "I feel I should get probation so I can prove to everyone I can complete it with no problem." The circuit court did quote and comment on this statement. But it is important to consider the context in which the circuit court addressed the statement. The court had documented Leszynski's statements of remorse but had also focused on the PSI writer's impression that Leszynski's concern was for self-preservation. When the court commented that "[i]t's not clear" to what extent Leszynski was remorseful, it was basically saying that the line between "self

preservation" and "remorse" was an ambiguous one. We view the circuit court as not putting any weight on the statement one way or the other, except to note the ambiguity.

*Pre-**Miranda** Statements*

¶18 We will now move on to Leszynski's suppression issue, and this is where the companion case, earlier cited, is relevant, in part. Leszynski contends, as did her boyfriend, Streicher, that she was confined or restrained such that she was in custody when she gave her pre-***Miranda*** statements. She claims, as did Streicher, that she was placed in an interrogation room that automatically locked, and even though she was told she could leave the room by knocking on the door, this was insufficient because she would have had to ask police first rather than just being able to get up and go. She contends that a reasonable person in her position would not have believed that she was free to go. In her view, the police had complete control over whether she could leave the room. She could not get out unless someone responded to her knock. Therefore, she posits, while police did tell her that she was not under arrest and was free to go, the automatically locking room told her otherwise.

¶19 Leszynski couples the automatically locking room with what she contends were the realities of the situation at that time. She had previously admitted that she had not sought medical attention for her daughter. She knew, therefore, that she was a suspect in her daughter's death and, therefore, the interrogation was not really about gathering information about what had occurred, but was for the purpose of having her confess to the crime. So, being in the locked room with the spotlight on her as a suspect, taken together, showed that she was in custody at the time and a reasonable person in her position would so believe.

¶20 We reject Leszynski's argument. Going back to the time that police were first involved, a doctor had called police and dispatch had sent an officer to the apartment where Leszynski and Streicher resided. The officer observed the body of the dead young girl. Leszynski was crying and distraught. Both she and Streicher volunteered statements describing what happened. According to the officer, Leszynski told him that a clock had fallen off the wall and had struck her daughter.[3] A detective soon arrived on the scene and told her that he was there to discover what had happened to her daughter. She was in the hallway at the time and she told the detective that she wanted to talk to him in privacy. The detective suggested the police station and both Leszynski and Streicher agreed.

¶21 So, we see from the scenario that the police knew very little at this time about what had actually happened. The police wanted more information and both Leszynski and Streicher volunteered to give it. This hardly identifies her as a suspect in a criminal action. Moreover, Leszynski herself was the catalyst for the investigation to continue at the police station. She wanted privacy and obviously felt that she could get her privacy concerns allayed there, or she would not have consented to go there. The police even told them both that they were not under arrest and were being placed in the squad car merely to transport them to the station. Leszynski was not required to go to the station or even to get into the squad. There were no handcuffs involved and no questioning took place in the squad. A reasonable person in Leszynski's position would not be likely to believe

[3] The officer testified that Leszynski said it was a clock that fell off the wall. In the recording of the interview at the police station, however, the object that fell off the wall on the little girl was referred to as a picture and a mirror. We will hereafter refer to the object as a picture.

she was in custody when she wanted to go somewhere private, had no problem with going to the police station, and had been told that she was not under arrest.

¶22 Nor did anything occur at the police station which would have changed the investigatory nature of the interview. The detectives testified that, at the time, it was not at all clear what had happened. It was not determined until after a later autopsy that the cause of death had been an infection. They had not yet interviewed the two persons in the best position to help them determine the historical events. Without this information, the police did not know whether a crime had even been committed, let alone the nature of the crime. And as we stated in our companion case, Leszynski was free to leave the room. All she had to do was knock. She never sought confirmation about her custody status, most likely because a reasonable person would believe she was not under arrest, and she knew that all she had to do was knock.

¶23 Leszynski, like Streicher, cites ***State v. Uhlenberg***, 2013 WI App 59, 348 Wis. 2d 44, 831 N.W.2d 799, to support her claim. But for the same reasons that we rejected Streicher's reliance on ***Uhlenberg***, we reject her contention. We incorporate by specific reference the discussion of ***Uhlenberg*** in the companion case and adopt it here.

¶24 Leszynski's last claim is that the post-***Miranda*** statements should have been suppressed because the "damage [was] already done" before she had been given her ***Miranda*** warnings. She cites ***Missouri v Seibert***, 542 U.S. 600, 604 (2004), where the United States Supreme Court, in her words, "refused to sanction a police practice that consists of questioning a suspect in custody, obtaining a confession, then providing ***Miranda*** warnings, getting the suspect to confess again." Factors in determining whether it is a ***Seibert*** situation are: the

completeness or detail of the questions and answers in the first round of the interrogation, the timing and setting of the first and second confessions, the continuity of police personnel and the degree to which the interrogator's questions treated the second round as continuous with the first. ***Seibert***, 542 U.S. at 615.

¶25 This is not a ***Seibert*** case. While it is true that police learned how Leszynski had opted for home remedies rather than calling medical personnel because she was afraid of possible abuse allegations and while she admitted that her daughter looked as though "someone had beaten the crap out of her," she continued to give police the same story throughout—that a heavy picture had fallen off the wall and done most of the damage to her daughter.

¶26 But aside from Leszynski's account of how the death had occurred, the police learned for the first time, from the initial discussions, how the young girl had been limping badly, vomiting, not eating, had been bleeding abnormally from a cut, had been sleeping restlessly and had died while Leszynksi slept through the night. As we have already stated, at this time, the police had no knowledge that the young girl had died from a bacteriological infection stemming from her cut finger—knowledge which came as a result of a later autopsy. What they learned during the investigation was that there had possibly been child abuse. The police, armed with this information, then gave the ***Miranda*** warnings because they disbelieved the "picture falling from the wall story" and thought that the death was probably due to child abuse or neglect. Once the warnings were given, the tenor of the questioning changed. The first segment was investigatory—to find out the historical background—and the second segment, after the ***Miranda*** warnings, was accusatory—to link Leszynski to her child's death. The two statements she gave were not overlapping. The timing was different even though the setting was the same. The detective only used the information gathered in the

pre-***Miranda*** investigation as the backdrop for the post-***Miranda*** interrogation. Leszynski's ***Seibert*** argument fails.

By the Court.— Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5