

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2018

Sheila T. Reiff
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. 2017AP1675-CR

Cir. Ct. No. 2011CF58

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN DANIEL NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: R. MICHAEL WATERMAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Nelson appeals an amended judgment sentencing him to prison after the revocation of a deferred judgment agreement as

well as an order denying his motion for postconviction relief. The sole issue Nelson raises on appeal is whether the circuit court erroneously exercised its discretion by rejecting probation as a viable sentencing option. We conclude that the circuit court properly exercised its discretion. Accordingly, we affirm.

BACKGROUND

¶2 In 2012, Nelson entered a no-contest plea on a charge of first-degree sexual assault of a child, pursuant to a deferred judgment agreement. The charge was based upon Nelson touching the vaginal area of an eight-year-old child, purportedly in retaliation for the child's mother having cheated on him.

¶3 Pursuant to the agreement, the circuit court deferred entering judgment for six years upon Nelson's plea, in exchange for which Nelson agreed to comply with several terms set by the State, including that Nelson have no contact with the victim, the victim's siblings, or the victim's parents. If Nelson successfully complied with the terms of the agreement for six years, the State would move to dismiss the charge.

¶4 In 2016, the circuit court revoked the deferred judgment agreement, based upon the State's allegation that Nelson had contact with the victim's mother, and the court imposed a bifurcated prison sentence. Nelson filed a postconviction motion alleging that the circuit court engaged in "mechanistic sentencing by rejecting probation as a viable sentencing alternative." The circuit court denied Nelson's postconviction motion, and Nelson now appeals.

DISCUSSION

¶5 We review a circuit court's exercise of its sentencing discretion to determine whether the court rationally applied proper standards of law to the facts

of record and inferences reasonably derived therefrom, and whether it explained its decision in a manner that demonstrates a process of reasoning. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). We afford sentence determinations a strong presumption of reasonableness because the circuit court is in the best position to evaluate the relevant factors and the demeanor of the defendant. *State v. Klubertanz*, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116.

¶6 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 those factors to identified sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court may decide what weight to give each factor, however. *State v. Schreiber*, 2002 WI App 75, ¶8, 251 Wis. 2d 690, 642 N.W.2d 621.

¶7 Moreover, while the court should provide an explanation for the general range of the sentence imposed, it need not employ “mathematical precision” detailing why it imposed a particular number of years. *Klubertanz*, 291 Wis. 2d 751, ¶¶17, 22.

¶8 Here, the circuit court imposed a bifurcated sentence consisting of five years of initial confinement and ten years of extended supervision. This sentence was in the low range for a Class B felony. *See* WIS. STAT. § 948.02(1)(e)

(2015-16)¹ (classifying first-degree sexual assault of a child under the age of thirteen as a Class B felony); § 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony); § 939.50(3)(b) (providing maximum imprisonment time of sixty years for a Class B felony).

¶9 Nelson argues the circuit court erroneously exercised its discretion “when it rejected probation as an alternative to prison due to the fact that the defendant’s deferred [judgment] agreement had been revoked,” mechanistically treating his situation as one calling for a “mandatory minimum sentence,” all without adequately considering the minimal nature of the violation that led to revocation of his deferred judgment agreement. We reject both Nelson’s characterization of the basis for the circuit court’s decision, and his challenge to the circuit court’s consideration of the revocation of the deferred judgment agreement.

¶10 The circuit court acknowledged it was to order probation unless it found that confinement was necessary to meet Nelson’s needs or protect the public, or that probation would unduly depreciate the seriousness of the offense. The court’s determination that probation was inadequate was not based solely upon—or even primarily upon—the revocation of the deferred judgment agreement. Rather, the court concluded that anything less than a prison term would unduly depreciate the seriousness of the offense, observing “if you don’t

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

get time for sexually assaulting an 8-year old child, what do you [get prison time for]?”

¶11 Moreover, the circuit court’s discussion of why a five-year initial prison term was warranted is part and parcel of its conclusion that probation was inadequate in this case. Far from mechanistically imposing sentence, the circuit court thoroughly discussed the *McCleary–Gallion* factors and explained their application to this case.

¶12 As to the seriousness of the offense, the circuit court noted that first-degree sexual assault of a child was second in severity only to first-degree homicide in the legislative scheme, and that such childhood trauma could have adverse effects throughout the victim’s lifetime. The court emphasized that the victim in this case had already lost her sense of security and comfort around men, had been experiencing fear, anxiety, mistrust and nightmares, and was struggling at school following the assault.

¶13 The court further observed that Nelson’s explanation for the offense—that he did it to exact revenge—was selfish, calculated, twisted and downright despicable, and that Nelson needed to be held accountable for what he had done. The court’s comments suggest that it viewed Nelson’s willingness to harm an innocent child who had done nothing to him as worthy of punishment in and of itself.

¶14 As to Nelson’s character and rehabilitative needs, the circuit court acknowledged that Nelson had a high school education, was gainfully employed and active in the community, and enjoyed family support. Furthermore, Nelson did not appear to have any substance abuse issues, he had gone through a psychosexual assessment and therapy for sexual offenders, and he was deemed to

present a low risk of reoffending. However, the court stated that Nelson could still present a danger to those with whom he had a personal relationship, if not to the general public, because of his failure to recognize or respect personal boundaries.

¶15 The circuit court did not err in noting that Nelson had already been presented with an opportunity for rehabilitation in the community setting through the deferred judgment agreement, and he had squandered it. This correlated with the court's observation that the public's faith in the judicial system would be undermined if Nelson were to be placed on probation after violating the terms of the deferred judgment agreement. It was entirely within the circuit court's discretion how much weight to give to this factor.

¶16 In sum, the revocation of Nelson's deferred judgment agreement was a proper factor for the circuit court to consider. Furthermore, the record demonstrates that the court rationally weighed that factor along with other relevant considerations in reaching a conclusion that a prison term was warranted to achieve the court's primary objective of punishment.

By the Court.— Judgment and order affirmed.

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

