

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

May 29, 1997

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0504-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROCHELLE L. OESTREICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Rochelle Oestreich pled no contest to one count each of burglary and theft of movable property valued under \$500, both as a party to a crime, in violation of §§ 943.10(1), 943.20(1)(a), and 939.05, STATS. Additional counts of burglary and theft were dismissed and read-in for consideration at sentencing. Accepting the prosecution's recommendation, the

trial court withheld sentence and placed Oestreich on probation for five years. The court also imposed, as a condition of probation, six months in jail, with work-release and child-care privileges. Oestreich had argued for less or no jail time. The court also ordered Oestreich to pay surcharges and court costs. Restitution had been paid before sentencing. Oestreich was not entitled to any sentence credit. The trial court later denied Oestreich's motion for sentence modification.

The state public defender appointed David H. Nispel to represent Oestreich on appeal. Nispel has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Oestreich received a copy of the no merit report and was advised of her right to file a response, which she did.

According to the criminal complaint, which formed the factual basis for the judgment of conviction, Oestreich was one of four individuals involved in the theft of money from the home of an elderly man. The first incident occurred while the victim was sleeping, and Oestreich stayed in the car to act as a lookout. The second set of charges occurred while the victim was at church, and Oestreich entered the residence. She claimed, however, that she did not personally take any property.

In a motion for sentence modification, Oestreich argued that she received a harsher sentence than her accomplices even though she had no criminal record and was less culpable than they were. She also argued that the trial court considered an irrelevant factor, i.e., that she was receiving AFDC payments. Following a hearing, the trial court denied her motion.

Oestreich's response to the no merit report raises the same claims presented by the motion for sentence modification. The no merit report identifies

the issue as whether the trial court erroneously exercised its discretion by imposing an unduly harsh sentence or one unwarranted by the facts in the record. Nispel's discussion of the issue addresses Oestreich's concerns. Nispel concludes that a challenge to the sentence lacks arguable merit. Based upon its independent review of the record, this court concludes that his analysis is correct.

Sentencing is within the trial court's discretion, and the court is presumed to have acted reasonably. *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is to consider the gravity of the offense, the character and rehabilitative needs of the offender, including his or her criminal record and attitude, and the need to protect the public. *See State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). Here, the court did so. The court considered theft and burglary to be serious offenses made worse by the victim's age, his lifetime of hard work, and his trusting nature. The court was unimpressed by Oestreich's belated concern about the care of her children while she was in jail, by her claim to be less culpable, by her use of the stolen money for "party time," and by her unwillingness to work. The court would not consider Oestreich for in-house detention because she would have to pay the cost of the ankle bracelet from AFDC income.¹ The court also considered the protection of

¹ The trial court made numerous comments at the sentencing and sentence modification hearings regarding Oestreich's receipt of AFDC for her four children, e.g.:

Where do you get the money for [cigarettes] if you don't work? AFDC, food stamps.... I suppose you have had a beer in the last week too out of my money.

....

... And I'm supporting your four kids while you're in jail, or your AFDC checks for your kids are paying the restitution. That type of stuff is just, it's unbelievable.

(continued)

the public when it stated that Oestreich would have continued to steal from the victim if she had not been caught.

Discretion was properly exercised. Further review is limited to determining if the sentence “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, 461 (1975). Burglary is a ten-year felony. Oestreich received probation with jail time of six months. A claim that the sentence is overly harsh, is thus not well-founded.

Further, Oestreich is not entitled to relief because her accomplices received probation with less or equal jail time. The factors that went into the sentencing of the accomplices are not part of this record; however, each of them were also placed on probation and given jail time as a condition: one received seven months; another, six; and the third, three months. Oestreich's sentence is not significantly harsher than those of the co-defendants.

This court's independent review of the record did not disclose any additional potential issues for appeal. Further proceedings on Oestreich's behalf would be frivolous and without arguable merit within the meaning of *Anders* and RULE 809.32, STATS.

Therefore, we find that the judgment of conviction and the order denying sentence modification are affirmed pursuant to RULE 809.21, STATS. We

We question the appropriateness of expressing such sentiments when imposing sentence. We conclude, however, that the record as a whole demonstrates that proper sentencing discretion was exercised and a reasonable sentence imposed.

discharge Attorney David H. Nispel of his obligations to represent Oestreich further in this appeal.

By the Court.—Judgment and order affirmed.

