

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2005

Cornelia G. Clark
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. 2004AP2466-CR

Cir. Ct. No. 2002CF194

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELA JEAN GUSTUM,

DEFENDANT-APPELLANT.

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

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Angela Gustum appeals a judgment, entered upon a jury's verdict, convicting her of hiding a corpse and second-degree reckless

homicide contrary to WIS. STAT. §§ 940.11(2) and 940.05(1).¹ Gustum argues the trial court erroneously exercised its sentencing discretion and erred by denying her motion for sentence modification. We reject Gustum's arguments and affirm the judgment and order.

BACKGROUND

¶2 In August 2002, the State charged Gustum with one count each of first-degree intentional homicide and hiding a corpse, arising from the death of Scott Harrison. After a trial, the jury returned verdicts convicting Gustum of hiding a corpse and the lesser-included offense of second-degree reckless homicide. Gustum was convicted upon the jury's verdicts and a presentence investigation report was ordered.

¶3 At sentencing, the parties stipulated that two counts of misappropriation of personal information and one count of burglary from other circuit court cases would be dismissed and read in. Consistent with the recommendation made in the PSI, the trial court sentenced Gustum to the maximum terms on both counts, to be served concurrently. The court imposed five years' initial confinement followed by five years' extended supervision on Gustum's conviction for hiding a corpse. With respect to the second-degree reckless homicide conviction, the court imposed a fifteen-year sentence consisting of ten years' initial confinement and five years' extended supervision. Gustum's postconviction motion for sentence modification was denied and this appeal follows.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶4 Gustum argues the trial court erroneously exercised its sentencing discretion. Sentencing lies within the discretion of the trial court. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See id.* There is a strong public policy against interfering with the sentencing discretion of the trial court, and sentences are afforded the presumption that the trial court acted reasonably. *See id.* at 681-82.

¶5 If the record contains evidence that the trial court properly exercised its discretion, we must affirm. *See State v. Cooper*, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court “examined the facts and stated its reasons for the sentence imposed, ‘using a demonstrated rational process.’” *State v. Spears*, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). “To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record.” *Cooper*, 117 Wis. 2d at 40.

¶6 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its

discretion “only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate 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).

¶7 Here, Gustum claims the trial court failed to adequately state its reasons for the sentence imposed. We disagree. The trial court went into great detail in discussing the statutory factors underlying its sentencing determination, repeatedly citing the PSI. The sentencing court considered the seriousness of Gustum’s offenses, particularly emphasizing their impact on the victim’s family. With respect to Gustum’s character, the court acknowledged that Gustum had a very difficult childhood but concluded that these difficulties could not be used to justify her crimes. The court additionally noted its concern with Gustum’s activities after Harrison’s death, stating:

You went to Eau Claire for a substantial period of time, committed a burglary, stole things that belonged to the man that you had just left in a landfill, sold them, took other property.

. . . .

But I find that behavior after this crime to be just absolutely appalling. If there was any remorse, if there was any empathy for anyone, if there was anything other than just a concern for yourself and what was going to happen to you, I ... certainly don’t see it in any of that conduct at all, none whatsoever.

The court acknowledged the need for protection of the public and concluded that Gustum’s failure to take advantage of rehabilitative programs in the past made her particularly unsuited to probation. Referring to the length of Gustum’s sentence, the court noted, “It’s going to take her at least that many years in my opinion to be

able to achieve what she needs to achieve so that she can be a contributing member of society.”

¶8 Gustum concedes that the trial court identified each of the mandatory factors in reaching its sentence. Citing *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, Gustum nevertheless claims the court erred by failing to provide a specific explanation for the sentence imposed rather than the two to five-year sentence she sought. *Gallion*, however, does not require a sentencing court to give a detailed explanation for imposing one sentence over another. Rather, “[t]he sentence imposed in each case 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.” *Id.*, ¶23 (quoting *State v. McCleary*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)).

¶9 Consistent with *Gallion*, the trial court here delineated the primary sentencing factors as they applied to the particular facts of Gustum’s case, ultimately noting that the length of the sentence was the minimum amount of time necessary for Gustum to rehabilitate herself. Because the trial court considered relevant factors and imposed a sentence authorized by law, we conclude the trial court properly exercised its sentencing discretion. With respect to her postconviction motion for sentence modification, Gustum identified no new factor justifying sentence modification. See *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

¶10 To the extent Gustum is concerned that the trial court imposed the maximum sentence on the basis of crimes for which she was acquitted, this argument is purely speculative and finds no support in the record. Although a

sentencing court may consider a charge for which a defendant was acquitted in assessing the defendant's character, *see State v. Arrendondo*, 2004 WI App 7, ¶¶53-55, 269 Wis. 2d 369, 674 N.W.2d 647, the trial court's discussion of Gustum's character did not go to whether Gustum intended to kill Harrison.

¶11 Gustum also claims that she would have received a lesser sentence had the trial court followed the sentencing guidelines imposed under WIS. STAT. § 973.017. As Gustum concedes, however, § 973.017 is inapplicable as it applies only to offenses committed on or after February 1, 2003. A claim that a sentence would have been different under later sentencing law does not justify re-sentencing. *See State v. Smart*, 2002 WI App 240, ¶¶13-14, 257 Wis. 2d 713, 652 N.W.2d 429. In any event, even if § 973.017 were applicable to Gustum's crimes, a departure from the guidelines is no basis for appeal. *See* WIS. STAT. § 973.017(10).

By the Court.—Judgment and order affirmed.

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

