

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 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. 2004AP3322-CR

Cir. Ct. No. 2003CF627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. RUZKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Robert A. Ruzkowski has appealed from a judgment convicting him of first-degree sexual assault of a child in violation of

WIS. STAT. § 948.02(1) (2003-04),¹ and from an order denying his motion for postconviction relief. The trial court imposed a bifurcated sentence of fifty years, consisting of thirty years of initial confinement and twenty years of extended supervision.

¶2 The sole issue on appeal is whether the trial court erroneously exercised its discretion in sentencing Ruzkowski. We conclude that the trial court acted within the scope of its sentencing discretion, and affirm the judgment and order.

¶3 Ruzkowski's arguments on appeal derive from comments made by the trial court in response to the sentencing recommendation contained in the presentence investigation report (PSI). The PSI writer recommended initial confinement of thirteen to sixteen years, with seven to ten years of extended supervision. The PSI writer stated that he used a grid system promulgated by the Wisconsin Department of Corrections (DOC) to make the sentencing recommendation.

¶4 Ruzkowski seeks resentencing. He contends that the trial court mistakenly believed that the DOC promulgated the grid system in order to shorten the sentences recommended by its agents and reduce the prison population. He contends that the trial court thus erroneously considered facts outside the record and sentenced him based upon inaccurate information. Ruzkowski contends that the trial court's false assumptions about the purpose of the grid system led it to believe that the PSI writer would have recommended a longer sentence absent the

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

grid system, and to apply a mechanistic policy of assuming that a PSI recommendation should be longer than is actually recommended in the PSI.

¶5 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *Id.*, ¶18.

¶6 An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. In addition, a defendant has a due process right to be sentenced on the basis of accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). However, a defendant who moves for resentencing based on inaccurate information must show both that the information was inaccurate, and that the trial court actually relied on the inaccurate information in the sentencing. *Id.*

¶7 Based upon our review of the record, we are not persuaded that the trial court sentenced Ruzkowski based upon inaccurate information or facts outside the record. Ruzkowski was initially charged with first-degree sexual assault of a child as a repeat child sexual offender under WIS. STAT. § 939.62(2m)(b)2., a charge which carried a mandatory life sentence. *See* § 939.62(2m)(c). In exchange for his guilty plea, the repeater allegation was dismissed, subjecting Ruzkowski to a maximum penalty of sixty years' imprisonment. WIS. STAT. §§ 939.50(3)(b) and 948.02(1). Of that sixty years, a maximum of forty years could be initial confinement and twenty years could be extended supervision. WIS. STAT. § 973.01(2)(b)1. and (d)1.

¶8 As conceded by the State, in sentencing Ruzkowski the trial court expressed its belief that sentencing recommendations in PSI's have been lowered as a result of a DOC policy and grid system which seek to reduce the size of the prison population. However, even accepting Ruzkowski's contention that the trial court's assumptions about the purpose of the grid system are wrong, based upon our independent review of the sentencing transcript we are not persuaded that the trial court relied on these assumptions in imposing sentence.

¶9 The sentencing transcript reveals that the trial court made its initial comments about its perception of DOC policy when questioning the PSI writer about his recommendation. However, the trial court then noted that its duty as a judge is to independently evaluate each case. It commenced its sentencing decision by correctly noting that the sentence imposed in a particular case should be 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. *See Gallion*, 270 Wis. 2d 535, ¶44. The trial court then gave a detailed and lengthy explanation of its sentencing decision, discussing factors relevant to the primary sentencing factors. These included Ruzkowski's past criminal record and history of undesirable behavior patterns, his personality, character and social traits, his culpability for the crime and its serious nature, his educational background and employment record, his changing degrees of cooperativeness, the effect of the crime on the victim and his family, and Ruzkowski's need for close rehabilitative control. These were all relevant sentencing factors. *See id.*, ¶43 n.11.

¶10 The sentencing recommendation in a PSI is a relevant factor to consider in sentencing a defendant, but it is not binding on the sentencing court. *Johnson*, 158 Wis. 2d at 469. In sentencing Ruzkowski, the trial court explained

in great detail why it believed a very lengthy sentence was warranted. It noted that Ruzkowski had received a break when the repeater allegation was dismissed, and that the State could easily have convicted him as a repeater, subjecting him to a life sentence. It discussed Ruzkowski's prior conviction for two counts of child sexual assault, his grooming of the current victim and his prior victim, his continued contact with minors in violation of the terms of his probation in the prior case, his admissions concerning sexually related communications with minors, and his continued alcohol use.

¶11 The trial court also discussed Ruzkowski's character and social traits, finding a pattern of lying and attempted manipulation of the victim and the victim's family, his probation agent, and his sexual offender treatment program provider. Although the trial court acknowledged Ruzkowski's physical disability and difficult childhood, it concluded that he had not meaningfully complied with sexual offender treatment opportunities, nor made meaningful attempts to pursue an education or maintain employment. Based on these factors, it concluded that Ruzkowski presented a high risk of reoffending and that he would not be able to participate in treatment in the community in a manner that would address his needs and protect the community. It concluded that Ruzkowski posed a great danger, and that if he were sentenced to sixteen years of confinement as recommended in the PSI, he was virtually certain to reoffend.

¶12 The trial court therefore concluded that a very lengthy sentence was required. However, it concluded that forty years of initial confinement was unwarranted because Ruzkowski admitted the offense and spared the victim and his family the ordeal of going through a trial. It concluded that sentencing him to thirty years of initial confinement would give him credit for his admissions, while protecting society until he reached an age where he was hopefully less likely to

reoffend. It concluded that twenty years of extended supervision would also ensure that he was adequately monitored after his release.

¶13 Based upon our review of the trial court's sentencing decision, we conclude that its beliefs concerning the purpose of the DOC grid system did not affect the sentence imposed by it. As aptly explained by the State in its brief, the trial court chose to sentence Ruzkowski to fifty years' imprisonment notwithstanding the PSI writer's recommendation, not because of it. The trial court refused to impose the sentence recommended by the PSI writer because it believed the recommended sentence was too short. It concluded that a much longer period of incarceration and extended supervision was necessary based upon its conclusions concerning the risk posed by Ruzkowski, and the need to protect the public from him.²

¶14 In affirming the judgment and order, we also caution the trial court about using the bench to express its opinion on topics which are not directly relevant to the issue before it. Although we have no doubt as to the trial court's good intentions, its speculation as to the purpose behind the DOC's adoption of a grid system merely served to obfuscate and divert attention from what was otherwise a thorough and reasonable exercise of sentencing discretion.

² Although the trial court's postconviction assertion of nonreliance is not dispositive, *State v. Groth*, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163, our conclusion that the trial court did not rely on inaccurate information or information outside the record is corroborated by the trial court's postconviction statement that it would have imposed the same sentence regardless of the PSI recommendation.

By the Court.—Judgment and order affirmed.

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

