

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2006

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. 2006AP887-CR

Cir. Ct. No. 2005CF36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC D. SNYDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eric Snyder appeals his judgment of conviction for possession of an improvised explosive device and disorderly conduct. Snyder also appeals an order denying his motion for postconviction relief. Snyder argues the trial court erroneously exercised its sentencing discretion by placing undue

emphasis on a prior unrelated incident, thereby improperly punishing him for the prior incident. Snyder also argues the court did not consider probation. We conclude the court did not overemphasize the prior incident, considered the appropriate factors, and considered probation. Therefore, we affirm.

BACKGROUND

¶2 On February 6, 2005, Snyder pumped a BB gun and told his wife to get her things and leave their home. Snyder's wife left and contacted the Oneida County Sheriff's department. Snyder was subsequently arrested. Snyder's wife and her father later returned home and found a plastic gas container filled with gas in the attached garage. A battery charger was inserted in the container. The battery charger had an electric cord running into the house but it was not plugged into an outlet. Three liquid propane tanks surrounded the gas container. Police theorized that if the propane tanks had been turned open, and the electric cord to the battery charger had been plugged in, a detonation could have occurred causing the destruction of the garage and a portion of the house.

¶3 On May 13, 2005, Snyder pled no contest to disorderly conduct and possession of an improvised explosive device. A sentencing hearing was conducted on June 22, 2005.

¶4 At sentencing, the court noted the dangers created by the explosive device. The court also noted Snyder's prior criminal history and his history of substance abuse. The court then addressed an incident that had occurred approximately six months prior to the charged offense.

¶5 The previous incident occurred after Snyder lost his job at a Rhinelander business called Pensee. The day after losing the job, Snyder became

intoxicated, got a firearm and a twelve-pack of beer and went to Pensee. Although the business was closed, Snyder entered and went to his boss's office. Snyder then took the firearm and fired a blank into his own head. Snyder was not criminally charged as a result of the Pensee incident but instead received counseling.

¶6 The sentencing court noted that despite the counseling received as a result of the Pensee incident, Snyder went on to commit the present offense. It then addressed the need to protect the public from Snyder's dangerous behavior and stated probation would not be appropriate. The court sentenced Snyder to three years of initial confinement and three years of extended supervision for the possession of an improvised explosive device charge and ninety days on the disorderly conduct charge.

¶7 Snyder filed a motion for postconviction relief. The court denied Snyder's motion stating, "the sentence that was imposed was justified based on everything"

DISCUSSION

¶8 Sentencing is a discretionary decision we will not disturb absent an erroneous exercise of that discretion. *State v. Taylor*, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466. When making a sentencing pronouncement, the court must provide a "rational and explainable basis" with "delineation of the primary sentencing factors to the particular facts of the case." *State v. Gallion*, 2004 WI 42, ¶58, 270 Wis. 2d 535, 678 N.W.2d 197. These primary factors include the gravity of the offense, the character and rehabilitative needs of the defendant, and protection of the public. *See State v. Naydihor*, 2004 WI 43, ¶78, 270 Wis. 2d 585, 678 N.W.2d 220. The court may also consider the defendant's history of criminal offenses including pending charges, the defendant's

personality, character and social traits, his truthfulness, remorse, repentance and cooperativeness, the need for close rehabilitative control, and the rights of the public. *State v. Krueger*, 119 Wis. 2d 327, 337, 351 N.W.2d 738 (Ct. App. 1984).

¶9 A court erroneously exercises its discretion if it gives too much weight to one factor or relies on irrelevant or immaterial factors. *Id.* at 337-38. The court must sentence the defendant for the crime he or she was convicted of and not for a separate incident. *See Rosado v. State*, 70 Wis. 2d 280, 290, 234 N.W.2d 69 (1975) (holding that the trial court misused its discretion by directly punishing the defendant for an uncharged offense).

¶10 Snyder argues the trial court erroneously exercised its sentencing discretion by placing undue emphasis on the Ponsee incident, thereby improperly punishing him for that incident. Snyder attempts to analogize his case to *Rosado*. In *Rosado*, the trial court spoke extensively about a prior incident and said little about the crime charged. *Id.* In pronouncing the sentence the trial court “said it was sentencing the defendant for his ‘course of conduct,’” rather than for the single charged incident. *Id.* at 290-91. However, this case is distinguishable from *Rosado* where the court held:

[e]vidence about the [other incident] was relative to the question of the defendant’s character, and so was admissible at the sentencing hearing. However, it is one thing to consider [the other incident] as one factor relevant to deciding the appropriate sentence for the crime of which the defendant was convicted, and quite a different thing to regard the [other incident] as a separate crime or series of crimes for which the defendant is punishable

Id.

¶11 In this case, the court merely considered the Ponsee incident as “one factor relevant to deciding” the sentence. *Id.* The court stated it had to evaluate

the convicted crimes in light of Snyder's actions at Ponce because that incident occurred so close in time to the convicted offenses. The court noted Snyder had "put others at risk in a potentially extremely dangerous situation with a bomb within six or eight months of having gone to Ponce and done this other thing." The court also noted that even though Snyder was not criminally charged as a result of the Ponce incident and instead received counseling, the counseling did not prevent him from committing the present crime. In addition to noting the Ponce incident, the court considered Snyder's prior criminal history, his history of substance abuse, and the danger Snyder posed to the community, as well as certain positive characteristics, such as Snyder's work history. Therefore, the court did not unduly emphasize the Ponce incident but rather based its sentence on a number of proper considerations.

¶12 Snyder contends that the Ponce incident "constituted the primary factor in determining Snyder's prison sentence." However, the court specifically stated the primary concern driving its sentencing determination under *Gallion* was public protection, especially in light of the danger posed to the community by constructing an explosive device.

¶13 Snyder also argues the court did not consider probation. Probation should be the first alternative unless confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement or it would unduly depreciate the seriousness of the offense. *Gallion*, 270 Wis. 2d 535, ¶25; *Bastian v. State*, 54 Wis. 2d 240, 248-49 n.1, 194 N.W.2d 687 (1972). The record in this case clearly indicates the court considered probation. The court addressed the need to protect the public from Snyder's dangerous behavior and stated probation would not be appropriate:

I have to be concerned about the protection of the public Like I say, he had the biggest break in August of 2004 and I cannot in this short period of time, given the fact that he's had counseling, he's had a pretty good support system, I can't put him on probation and release him to the community in six months or a year and I won't.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

