

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 7, 2001**

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.

**No. 00-1746-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARIO M. MARTINEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

Before Wedemeyer, P.J, Fine and Schudson, JJ.

¶1 PER CURIAM. Mario M. Martinez, *pro se*, appeals from a judgment convicting him of thirteen counts of theft, uttering, and practicing law without a license, contrary to WIS. STAT. §§ 943.38(2) (1993–94, 1995–96), 943.20(1)(b) (1993–94, 1997–98), 757.30(1) (1997–98), and from the trial court’s order denying his postconviction motion for resentencing. Martinez claims: (1)

the trial court relied on inaccurate information regarding the amount of restitution, and improperly imposed a harsher sentence based on this “inaccurate” information; (2) his due-process rights were violated when the trial court held a restitution hearing after sentencing; (3) the trial court improperly presided over his case when a conflict of interest existed; and (4) the trial court erroneously exercised its sentencing discretion. We affirm.

### **I. BACKGROUND.**

¶2 Mario M. Martinez was a lawyer who stole money from his clients. As a result, the Board of Attorneys’ Professional Responsibility disbarred him. In addition, the Milwaukee County District Attorney’s Office charged Martinez with thirty-one counts of theft, forgery, and practicing law without a license. The case was eventually plea-bargained. Martinez entered either guilty or no-contest pleas to thirteen counts and the remaining counts were dismissed but “read-in” and considered for purposes of sentencing.

¶3 The sentencing court asked the parties to resolve the issue of restitution, but stated that if the parties could not agree on a restitution amount, the court would hold a restitution hearing. The sentencing court noted that the restitution amount, as calculated by the Board of Attorneys’ Professional Responsibility, was approximately \$158,000. The trial court sentenced Martinez to eight years of prison, stayed thirty additional years of prison, and imposed ten years of probation. The parties never agreed on a restitution amount. The court held a restitution hearing approximately eight months after sentencing and determined that the correct amount of restitution was approximately \$73,600.

¶4 Martinez filed a postconviction motion seeking, among other things, resentencing, claiming that the court based its sentence on inaccurate restitution

information. The trial court denied the motion for resentencing, holding: “The court based its sentences on the number of victims, the nature and repetition of the activity, and the absolute need for community protection—not on the specific or individual claims of restitution.”

## II. DISCUSSION.

### A. *Inaccurate sentencing information.*

¶5 Martinez claims that the trial court relied on inaccurate information regarding the amount of restitution, and improperly imposed a harsher sentence based on this “inaccurate” information. “A defendant has a due process right to be sentenced on the basis of true and correct information.” *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998) (quoted source omitted). A defendant who requests resentencing based on a claim of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990).

¶6 Martinez has failed to demonstrate that the trial court actually relied on inaccurate restitution information in imposing sentence. While the trial court mentioned the \$158,000 figure in its sentencing decision, it acknowledged that this figure was disputed by Martinez. The trial court explained—both at the time of sentencing and in its order denying Martinez’s request for resentencing—that it did not base its sentencing determination on a specific amount of restitution. At sentencing, the court stated, “in taking into consideration the amount” of restitution, it “isn’t going to set a sum certain.” Rather, as the court clarified in its postconviction order denying resentencing, it based Martinez’s sentence “on the number of victims, the nature and repetition of the activity, and the absolute need

for community protection—not on the specific or individual claims of restitution.” See *State v. Schael*, 131 Wis. 2d 405, 414, 388 N.W.2d 641, 645 (Ct. App. 1986) (“[W]e are persuaded by the trial judge’s comments during sentencing as well as his statement at the postconviction motion hearing that [the inaccurate information] had ‘nothing to do with the sentence that was imposed.’”). Since the actual amount of restitution was “not a factor utilized in passing sentence,” *id.*, Martinez was not denied due process. Accordingly, the trial court properly denied Martinez’s request for resentencing.

*B. Violation of WIS. STAT. § 973.20(13)(c).*

¶7 Martinez next argues that his due process rights were violated when the trial court held a restitution hearing after sentencing. Martinez argues that, according to WIS. STAT. § 973.20(13)(c), when the amount of restitution is disputed, a restitution hearing must be held prior to sentencing so that restitution may be incorporated into the sentence.<sup>1</sup> Martinez, however, never objected to

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<sup>1</sup> WISCONSIN STAT. § 973.20(13)(c) provides, as relevant here:

**Restitution.** The court, before imposing sentence ... shall inquire of the district attorney regarding the amount of restitution, if any, the victim claims. The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim....If the defendant stipulates to the restitution claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, the court shall determine the amount of restitution before imposing sentence....In other cases, the court may do any of the following:

1. Order restitution of amounts not in dispute as part of the sentence ... and direct the appropriate agency to file a proposed restitution order with the court within 90 days....
2. Adjourn the sentencing proceeding for up to 60 days pending resolution of the amount of restitution....

proceeding to sentencing before the trial court had fully analyzed the restitution amounts. Indeed, the record reveals that this is exactly what Martinez wanted. At sentencing, Martinez's lawyer described the restitution issue as a "monumental task" and that "it would be addressed in a forum other than this sentencing." In addition, Martinez told the trial court, "There are some discrepancies [in restitution]. At this point they're not important. I do look forward to a hearing..." By failing to object, Martinez waived his right to complain on appeal and we decline to address this issue. *State v. Holt*, 128 Wis. 2d 110, 137, 382 N.W.2d 679, 692 (Ct. App. 1985); *see also Wirth v. Ehly*, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally appellate court will not review issue raised for first time on appeal).

C. *Conflict of interest.*

¶8 Martinez also contends that the trial court improperly presided over his case when a conflict of interest existed. Martinez asserts that the circuit court created a "conflict of interest" when it relied on the Board of Attorneys' Professional Responsibility's restitution findings, which included reference to a victim whom Martinez had represented before the same court. Martinez, however, never asked the trial court to recuse itself. Accordingly, Martinez has not adequately preserved this issue and we deem it waived.<sup>2</sup> *See Poling v. Wisconsin Physicians Serv.*, 120 Wis. 2d 603, 610, 357 N.W.2d 293, 297–298 (Ct. App. 1984) (matters not argued in the trial court but raised for the first time on appeal are deemed waived); *cf.* WIS. STAT. § 971.31(2) ("[O]bjections based on defects in

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<sup>2</sup> Martinez claims that he raised this issue in his postconviction motion. Our review of the record, however, reveals that he did not raise the issue. Rather, he merely referred to the client and attempted to explain why he "owe[ed] [the client] nothing."

the institution of the proceedings ... shall be raised before trial by motion or be deemed waived.”).

*D. Sentencing discretion.*

¶9 Finally, Martinez claims that the trial court erroneously exercised its sentencing discretion by not properly considering the three primary sentencing factors, considering inaccurate information, and imposing an excessive sentence. We disagree.

¶10 The principles governing appellate review of a court’s sentencing decision are well established. *See State v. Larsen*, 141 Wis. 2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court’s sentencing discretion. *See id.* We will not reverse a sentence absent an erroneous exercise of discretion. *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). In reviewing whether a trial court erroneously exercised its sentencing discretion, we consider: (1) whether the trial court considered the appropriate sentencing factors; and (2) whether the trial court imposed an excessive sentence. *State v. Glotz*, 122 Wis. 2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *Larsen*, 141 Wis. 2d at 427, 415 N.W.2d at 541. Sentence length is a matter of trial court discretion. *Cunningham v. State*, 76 Wis. 2d 277, 284, 251 N.W.2d 65, 68 (1977). A trial court exceeds its discretion, however, when it imposes a sentence “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, 461 (1975).

¶11 In imposing sentence, the trial court considered the appropriate factors.<sup>3</sup> The sentencing court indicated, “These are extremely serious violations of the law,” and “[y]ou were repeatedly dishonest.” The court looked at Martinez’s character, family background, and health problems. It also considered the interests and protection of the community, but concluded, “I do believe that the egregiousness of your acts in light of the circumstances warrants a period of incarceration.” Although Martinez believes the sentencing court gave inadequate weight to several alleged mitigating factors, the weight to be afforded each factor is within the discretion of the sentencing court. *Cunningham*, 76 Wis. 2d at 282, 251 N.W.2d at 67-68. Moreover, we cannot conclude that Martinez’s sentence was excessive. Martinez committed crimes over many years, taking advantage of the clients he was supposed to serve. Accordingly, we conclude the trial court properly exercised its sentencing discretion.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999–2000).

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<sup>3</sup> As we have already concluded, the trial court also did not rely on inaccurate restitution information when it sentenced Martinez.





