

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 21, 2007**

A. John Voelker  
Acting 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. 2005AP1880-CR**

**Cir. Ct. No. 2003CF5699**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**CARLOS ZELAYA,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carlos Zelaya appeals from a judgment of conviction for the second-degree sexual assault of a child, and from a postconviction order denying his motion for sentence modification. The issues are whether the trial court sentenced Zelaya on the basis of inaccurate information,

whether Zelaya is entitled to an evidentiary hearing to correct the inaccuracies and their impact on the sentence imposed, and whether the sentence was unduly harsh and excessive. We conclude that the trial court's assessment of the various sentencing factors differently than Zelaya assesses them does not constitute an erroneous exercise of discretion. In addition, insofar as the trial court's comments contained any inaccuracies, those inaccuracies were not material to the trial court's sentence, which was not unduly harsh or excessive. Consequently, an evidentiary hearing to consider whether correction of these immaterial and arguably inaccurate impressions is not warranted. Therefore, we affirm.

¶2 Zelaya pled guilty to the second-degree sexual assault of his thirteen-year-old step granddaughter, in violation of WIS. STAT. § 948.02(2) (amended Feb. 1, 2003). The trial court imposed an eleven-year sentence comprised of six- and five-year respective periods of confinement and extended supervision, to run consecutive to any other sentence. Zelaya moved for sentence modification, contending that he was sentenced on inaccurate information and that his sentence was unduly harsh and excessive. The trial court denied the motion, clarifying in its postconviction order the context of its comments and explaining its interpretations of various facts and circumstances, which it determined did not amount to factual inaccuracies, and it thus concluded that its sentence was not unduly harsh or excessive.

¶3 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information. Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted).

A defendant who requests resentencing due to the [trial] court's use of inaccurate information at the sentencing hearing "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless.

*Id.*, ¶26 (citations omitted).

¶4 Zelaya contends that he was sentenced on inaccurate information. He challenges the accuracy of the trial court's references to: (1) "'earlier dealings' [demonstrating] that he is [not] amenable to supervision"; and (2) that "in [the trial court's] experience people who had bypass surgery typically recover and are thereafter healthy and productive. It certainly improves people's conditions." Zelaya challenges the former as unjustifiably depriving him of a sentence favoring a lengthier period of extended supervision rather than confinement. He challenges the latter as unfairly removing his allegedly failing health as a mitigating factor.

¶5 Zelaya contends that the trial court's decision not to weigh his sentence in favor of a lengthier period of extended supervision and a shorter confinement period was based on its misperception that he had previously failed in supervised placements when his only "earlier dealing[]" with supervision was a six-month probationary term served in 1985 for an immigration violation. At sentencing, the trial court elaborated on that basis, saying

[The trial court] understand[s] th[at] age changes things and health factor[s] change[] things, but he certainly was willing to achieve his ends in getting into this country, and that may be something that is no longer relevant, but it indicates to [the trial court] a mind set that he is willing to do whatever it takes.

The trial court clarified its comments when it denied Zelaya's postconviction motion. It explained that "[t]he court's reference to the defendant's 'earlier

dealings’ was not based simply upon the defendant’s prior conviction but rather his self-admitted history of illegally crossing the border between Mexico and the United States over a period of thirty years.” It then quoted from the presentence investigation report.

The defendant stated he came to the United States in the late 1980’s, after he crossed over into California illegally. He said that since that time, he has been going back and forth between the United States and Mexico for a period of thirty years. He said he became an expert at crossing [the] border, and if he got caught, he would simply try again....

¶6 In the context of all of the sentencing remarks, we reject Zelaya’s interpretation that “earlier dealings [demonstrate] that he is [not] amenable to supervision” refers specifically to supervised placements. The trial court was troubled by various incidents, including Zelaya’s rationale for using an alias, his dependence on a substance of unknown properties (mandrex), his deceptive conduct when the police approached him looking for the victim, and his “outrageous” physical and verbal responses to a vulnerable, troubled thirteen-year-old girl who misguidedly came to him for help and who held him in a position of trust and confidence. The trial court was troubled by Zelaya’s “earlier” conduct in several respects, which it determined did not demonstrate his amenability to supervision. We conclude that the trial court’s information was not inaccurate when considered in proper context. We therefore reject Zelaya’s contention that the “earlier dealings” reference was inaccurate information.

¶7 Zelaya’s second claimed inaccuracy was the trial court’s reliance on its experience involving the effect of bypass surgery. The presentence investigator addressed Zelaya’s health, as he conveyed it to her, most specifically that he is in “very poor health,” and that he had two cardiac surgeries, and remains on

medication for his “heart problems.” In response to this information and related references at sentencing, the trial court commented that it understood:

that he has heart problems, but in my experience people who had bypass surgery typically recover and are thereafter healthy and productive. It certainly improves people’s conditions. So I don’t think that his health problems play[] into his sentence in any way.

In its postconviction order, the trial court rejected this challenge, stating:

[Zelaya] urges that there is no evidence in the record that he is recovered, healthy or productive as a result of surgeries he had undergone to treat his heart problems. The court was speaking in general terms, and whether or not it applies to this defendant was not a significant consideration. The defendant reported to the presentence writer that he had undergone two heart surgeries three years beforehand, one for his arteries and one for a bypass. These surgeries evidently had no effect on the defendant’s ability to commit this heinous offense, and therefore, the court gave very little weight to his physical health problems.

¶8 This is not the type of information that should be characterized for its accuracy; it is essentially gratuitous and legally insignificant in the context of the trial court’s remarks at sentencing and later in denying Zelaya’s sentence modification motion. At sentencing and again in its postconviction order, the trial court explained that Zelaya’s heart surgeries and related problems played little or no role in its sentencing determination. We reject Zelaya’s contention that the trial court’s personal experience with bypass victims was inaccurate, depriving him of his due process right to be sentenced on accurate information. Insofar as it was inaccurate (or marginally relevant), the trial court contemporaneously and subsequently explained that it had little or no impact on its sentence.

¶9 Zelaya also challenges the trial court’s exercise of discretion for failing to consider his rehabilitative prospects because of his age. Protecting the

public from a convicted defendant is a primary sentencing factor. *See State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). A convicted defendant's rehabilitative prospects is a secondary sentencing factor, which the trial court may although need not address. *See id.* at 426-27. Zelaya's challenge is to the trial court's intentional disregard of his rehabilitative prospects because he is sixty-four years old. He claims that it would have been an erroneous exercise of discretion had the trial court refused to consider a convicted defendant's rehabilitative needs on the basis of race or gender, and that it is similarly erroneous to refuse to consider the rehabilitative factor because of his age.

¶10 In his sentencing presentation, defense counsel recommended no more than a three-year confinement component of the sentence, urging the trial court to instead impose a lengthier (ten- or fifteen-year) period of extended supervision. In doing so and urging the trial court to disregard the lengthier recommendations, defense counsel characterized the presentence investigator's recommendation of a confinement period in the range of six to eight years and the prosecutor's confinement recommendation of unspecified duration as a "death sentence." In response, the trial court mentioned the factor of rehabilitation, but remarked that it did not consider "rehabilitation [a]s one of [its] primary goals with a 64 year old person. I[t] do[es]n't know how much rehabilitation is possible or desirable or necessary. So rehabilitation is not one of the things that [it is] primarily considering."

¶11 We reject this age challenge for two reasons. First, the trial court did not refuse to consider Zelaya's rehabilitative prospects; it merely reasoned that rehabilitation was not its primary concern for a sixty-four-year-old sex offender whom everyone agreed would spend some time in confinement. Second, Zelaya's discrimination analogies (on the basis of race and gender) are not valid because

they assume that the intentional disregard of rehabilitation prospects occurred unfairly. Affording less than primary consideration to the rehabilitative prospects of a sixty-four-year-old man who will be spending time in prison for sexually assaulting a child is not unfair or erroneous. The trial court explained its reason for failing to strongly consider that secondary sentencing factor. The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See id.* at 426-28. Its reason is reasonable and therefore constitutes a proper exercise of discretion.

¶12 Zelaya also challenges the confinement component of the sentence as unduly harsh and excessive. A sentence is unduly harsh when it 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.” *State v. Taylor*, 2006 WI 22, ¶19, 289 Wis. 2d 34, 710 N.W.2d 466 (quoting *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). “[A] trial judge clearly has discretion in determining the length of a sentence within the permissible range set by statute.” *Id.* (citation omitted).

¶13 Zelaya concocted an “outrageous” story to persuade his thirteen-year-old troubled step granddaughter that having sexual contact with him would facilitate her moving to California where he promised her a better life.<sup>1</sup> He

---

<sup>1</sup> According to the prosecutor,

[Zelaya] told [the victim] in order to take her to California there was some risk there because if the police stopped them then they would want to know if she was a virgin, and if she was, then she'd have to go home because they would be able to tell somehow that she didn't belong with [Zelaya]. But if she wasn't a virgin, they would think she and Mr. Zelaya were together.

facilitated her leaving her mother (with whom she was having “some issues”), lied to the police who were looking for her, and allowed her to hide away with him. During the assault she told him “no,” but he continued. Even defense counsel claimed that despite Zelaya’s claimed “good intentions, at some point they went wacko.” The maximum potential penalty for the second-degree sexual assault of a child is forty years. *See* WIS. STAT. §§ 948.02(2) (amended Feb. 1, 2003); 939.50(3)(c) (amended Feb. 1, 2003). To impose an eleven-year sentence comprised of six- and five-year respective periods of confinement and extended supervision does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Taylor*, 289 Wis. 2d 34, ¶19. We consequently reject Zelaya’s unduly harsh and excessive challenge.

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

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



