

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2007

David R. Schanker
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. 2006AP2369-CR

Cir. Ct. No. 2004CF533

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM BAGESKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Bagneski appeals judgments imposing consecutive prison terms totaling fifty years' initial confinement and ten years' extended supervision for two counts of first-degree reckless homicide. He also appeals an order denying his motion for sentence modification in which he sought

restructuring of the sentences. He argues that the sentences are unduly harsh. We reject that argument and affirm the judgments and order.

¶2 Bagneski was initially charged with two counts of first-degree intentional homicide. On separate occasions, he killed his six-and one-half month-old son Joel and his eight-month-old daughter Kelby. The medical examiner initially concluded that Joel died of sudden infant death syndrome (SIDS). After Kelby's death, which the medical examiner concluded was caused by a non-accidental cerebral brain trauma, the police reopened the investigation of Joel's death. A forensic pathologist opined that Joel, like Kelby, also died of child abuse. Pursuant to a plea agreement in which the State agreed not to make a sentence recommendation, Bagneski pled no contest to reduced charges of first-degree reckless homicide.

¶3 The court imposed a thirty-year prison sentence for Joel's death. Because that crime occurred before the effective date of the truth-in-sentencing statute, Bagneski is eligible for parole on that charge. Truth-in-sentencing was in effect at the time of Kelby's death. The court imposed a consecutive term of twenty years' initial confinement and ten years' extended supervision. In his postconviction motion, Bagneski sought restructuring of the sentences to maximize the parole commission's authority to release him. The trial court denied the motion, rejecting Bagneski's arguments that (1) he should have been given additional credit because he pled no contest to killing Joel even though the State's case was weakened by the medical examiner's initial diagnosis of SIDS; (2) the court failed to give adequate consideration to positive aspects of Bagneski's character; and (3) the lengthy consecutive prison sentences were excessive.

¶4 Sentencing is committed to the trial court's discretion, and public policy disfavors interfering with its discretion. See *Briggs v. State*, 76 Wis. 2d 313, 335, 251 N.W.2d 12 (1977). The primary factors that determine the length of a sentence are the gravity of the offense, the character of the accused and the need to protect the public. See *State v. Hall*, 2002 WI App 108, ¶7, 255 Wis. 2d 662, 648 N.W.2d 41. The sentencing court may choose to weigh one factor more heavily than others. See *Bastian v. State*, 54 Wis. 2d 240, 246, 194 N.W.2d 687 (1972). A sentence within the statutory maximum is presumptively valid if it does not shock the public's conscience. See *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶5 The court properly rejected Bagneski's argument that the seriousness of the offense in Joel's death was somewhat mitigated by the initial opinion that he died of SIDS. The seriousness of an offense is not determined by the strength of the State's case. To the extent Bagneski argues that his no contest plea reflects his good character because he takes responsibility for his acts, Bagneski already received appropriate credit. The State reduced the charges from first-degree intentional homicide to first-degree reckless homicide, and the court imposed only half of the maximum sentence. In addition, during allocution, Bagneski did not acknowledge killing Joel, although he admitted partial responsibility for Kelby's death. Bagneski's acceptance of the plea agreement did not mitigate the seriousness of the offense and does not reflect so favorably on his character as to render the sentence excessive for killing Joel.

¶6 The record does not support Bagneski's argument that the court failed to weigh positive character traits against his negative traits. The sentencing court was fully aware of Bagneski's lack of a prior criminal record, his conquering of drug and alcohol problems, his military service and his supportive family. The

court appropriately chose to focus on the seriousness of the offenses and the need to protect society. Because these offenses were committed approximately two years apart, and evidence existed of Bagneski's serious abuse of another child, the court reasonably determined that positive aspects of his character did not substantially mitigate these crimes and that he posed a continuing risk to children. Although drug and alcohol rehabilitation and military service might be relevant character traits in a given case, the trial court reasonably gave them little weight in this case when it imposed sentences totaling half the maximum.

¶7 Although the court could have structured the sentences to maximize the parole commission's ability to release Bagneski, the record discloses no reason the trial court should have structured the sentence in that manner. The court expressed a desire to keep Bagneski in prison until he was seventy years old. The decision to structure the sentences in a manner that did not allow for early release is consistent with the court's assessment of the seriousness of the offenses and the need to protect society. The sentences are not so excessive or unusual as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

