COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 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. 2007AP164-CR

Cir. Ct. No. 2005CF102

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER J. GOLDSCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jennifer Goldschmidt appeals a judgment of conviction, entered upon her no contest plea, on one count of second-degree sexual assault of a child. She further appeals the court's denial of her postconviction motion for sentence modification. Goldschmidt claims she was

sentenced on inaccurate information and her sentence was excessive. We conclude Goldschmidt was not sentenced on inaccurate information but, rather, on appropriate considerations, and her sentence was not excessive. Accordingly, we reject her arguments and affirm the judgment and order.

Background

¶2 Goldschmidt's oldest son had a friend, then-fourteen-year-old Landon N., visiting the Goldschmidt home for the weekend of March 18, 2005. Goldschmidt allowed the boys to drink beer and whiskey, which she also consumed. Around 11 p.m. on March 18, Goldschmidt, who was intoxicated, called Landon into the living room, where they talked briefly before going to Goldschmidt's room. There, Goldschmidt and Landon had sexual intercourse in Goldschmidt's bed.

¶3 This information came to light after Sara Plansky, from the Marinette County Department of Health and Human Services, had occasion to interview Landon. Plansky believed Landon had been sexually assaulted by Goldschmidt. Although Landon denied this in his interview with Plansky, Plansky nevertheless informed the sheriff's department. Sergeant Michael Sievert interviewed Landon, who gave Sievert a written statement detailing the events of March 18.

¶4 Police then interviewed Goldschmidt. She waived her ***Miranda***[1] rights, admitted she had intercourse with Landon, and gave a written statement. She was charged with one count of second-degree sexual assault of a child. In

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

exchange for her no contest plea, the State agreed to recommend probation with no more than six months in jail as a condition.

¶5 At sentencing, both parties recommended lengthy probation in accord with the plea agreement. The court received a presentence investigation report and a psychological report prepared at the defense's request. The court rejected the plea agreement, sentencing Goldschmidt to five years' initial confinement and three years' extended supervision.

¶6 Goldschmidt filed a postconviction motion for a sentence reduction to either the recommended probation sentence or a shorter period of confinement. The PSI had suggested that a male offender, convicted on a single count of second-degree sexual assault of a child, would receive a prison sentence rather than probation. As part of her postconviction motion, Goldschmidt offered evidence that this assumption was in error. Instead, she argued, the majority of those male offenders would likely receive a probation sentence. She further pointed out that those offenders had likely pled down from multiple counts, while she was pleading to the single, original count with which she had been charged. She also attempted to demonstrate that offenders convicted of the same crime had received lesser sentences. She argued, therefore, that five years' initial confinement was excessive.

¶7 The court denied her motion. It rejected any suggestion there was a double standard in sentencing based on gender and further emphasized multiple factors, which had been stated on the record, that justified the sentence. Goldschmidt appeals.

Discussion

I. Accurate Information

¶8 Sentencing is committed to the trial court's discretion. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). We therefore review the decision for an erroneous exercise of that discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A sentence based on clearly irrelevant or improper factors constitutes an erroneous exercise of discretion. ***Id.***

¶9 A defendant has a right to be sentenced on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether this right has been denied is a question we review de novo. ***Id.*** To establish a denial of this right, the defendant must show that there was inaccurate information before the court and that the court actually relied on the incorrect information. ***Id.***, ¶31.

¶10 Goldschmidt asserts the trial court had inaccurate information from the PSI, which suggested that a thirty-one year old male perpetrator of second-degree sexual assault of a fourteen-year-old female was more likely to be imprisoned than granted probation. Given that the State and defense were jointly recommending probation for Goldschmidt, the court inquired whether there was a double standard in the recommendation. Goldschmidt essentially claims that she was given a prison sentence because the court was under the mistaken impression that a male in her position would also be given a prison sentence. In her postconviction motion, Goldschmidt offered evidence to show the PSI had been in error and, in fact, probation is the more common sentence for individuals convicted of the same charge as her.

¶11 At the initial sentencing hearing, though, Goldschmidt had an opportunity to inform the court that probation was the more common sentence for her situation. When the trial court inquired about a double standard, defense counsel noted twice that probation, not prison, was the preferred sentence for an individual convicted of a single count of second-degree sexual assault.

¶12 In any event, regardless of which sentence is more common, Goldschmidt fails to show the trial court actually relied on any inaccurate information. Viewed in its entirety, nothing in the record indicates the trial court relied on the perception, correct or not, of a double standard between the genders, nor did it rely on the general assertion of the more common sentence. Rather, the court relied on multiple, gender-neutral factors, which are detailed below. Goldschmidt was sentenced on accurate information.

II. Excessive Sentence

¶13 Goldschmidt also asserts her sentence is excessive because she was a first-time offender, she was remorseful and accepted responsibility for her actions, there was no dispute she would likely succeed on probation, and most offenders in her position would have received probation. She also contends the sentence is excessive because it is not “the minimum amount of custody or confinement” consistent with the sentencing objectives if she would be a successful probationer. *See* ***Gallion***, 270 Wis. 2d 535, ¶25.

¶14 A trial court has discretion in setting the length of a sentence within statutorily prescribed ranges. ***State v. Taylor***, 2006 WI 22, ¶19, 289 Wis. 2d 34, 710 N.W.2d 466. The trial court erroneously exercises its discretion if the sentence 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." ***Id.*** (citations omitted).

¶15 In fashioning a sentence, there are multiple factors a court should consider in its exercise of discretion. "The primary factors … are the gravity of the offense, the character of the offender, and the need to protect the public." ***Wickstrom***, 118 Wis. 2d at 355. Elements of these factors include "the defendant's personality, character and social traits, the results of the presentence investigation, the vicious or aggravated nature of the crime, the degree of the defendant's culpability, the defendant's demeanor at trial, the defendant's remorse, and the rights of the public." ***Id.*** We will affirm a sentence "if [the] facts of record show it is sustainable as a proper discretionary act." ***Id.***

¶16 Our review of the sentencing transcript reveals the court considered proper factors. It noted that there is a legislative policy that persons under the age of sixteen are not competent to consent to sexual intercourse.[2] Therefore, no matter how willing the minor is to participate, "the burden is on the adult to make sure this kind of thing simply never happens…." According to Landon's statement, however, Goldschmidt kept saying, "come on, come on," in effect enticing him to have intercourse with her.

¶17 The court utilized the sentencing guidelines worksheet, noting several things that might be mitigating factors, such as an extremely dysfunctional family, troubled marriages, mental health issues, and alcohol abuse. The court

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[2] The court considered the evidence of this policy to be in the statutory rape section, WIS. STAT. § 948.02(2) (2005-06). *See also* ***State v. Jadowski***, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810.

accepted the psychologist's report that Goldschmidt had a lower probability of reoffense. However, the court also noted that Goldschmidt knew she had an alcohol problem, and that "when she does drink she goes overboard and gets so drunk that she doesn't realize how much alcohol she has consumed."

¶18 The court also stated:

> What troubles me I think most is when you look at the aggravating factors involved in offense severity. … [T]hose, in my mind, include the fact that this was sexual intercourse. It was full-blown sexual intercourse. … I think it's clear this has caused the victim [and] the family great emotional turmoil. It's been highly disruptive.
>
> When you read the report of the victim's family, it's pretty clear this has had a pretty devastating effect on the family. … It's [a]ffected the family's life-style. They are trying to keep things as normal as possible and let life continue on, but the incident is always on our minds. We don't know who we can trust. Our child's rights have been violated, and we are worried about other family members and how this event is going to impact on them, and they -- they felt violated because they trusted the defendant.
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> … [T]here was trust to allow Landon to sleep over … and this trust was violated, and they have a right to demand a just sentence, and I think that when you look at the needs of society, the moral need for punishment is a fair and valid consideration at sentencing.
>
> I think also deterrence is a big part of this sentence. I'm -- we have to deter the defendant and others who, on occasion, may find themselves in this circumstance and because of the lessening of prohibitions due to alcohol intoxication, get interested in having sex with a child …. I think that putting her on probation would send the wrong message. … I think it would actually depreciate the seriousness of the offense if probation were imposed. The message has to be clear that this type of … full blown sexual intercourse with a child who wasn't yet 16 … is just totally unacceptable and highly inappropriate.

¶19 The court also noted that Landon was fourteen at the time and Goldschmidt was thirty-one. She was, on that night, acting as the parent. Further

aggravating the situation was the fact that Goldschmidt had illegally provided alcohol to Landon.

¶20 "The sentence may be based on any or all of the three primary factors after all relevant factors have been considered." ***Wickstrom***, 118 Wis. 2d at 355. The weight to be given each factor is within the trial court's discretion. ***Id.*** Here, the court considered a multitude of factors—all appropriate—and ultimately concluded the gravity of the offense and the public's protection required a prison sentence more than Goldschmidt's character justified probation. This was not an erroneous exercise of discretion.

¶21 As to the actual length of Goldschmidt's sentence, we reject any invitation to compare her sentence with the sentences of others convicted of the same offense.

> It is not the philosophy of modern criminal law that the punishment fit the crime alone and that for every violation of a particular statute there be an identical sanction. In light of the function of the law to deter similar acts by the defendant and others and to rehabilitate the individual defendant, it is essential that a sentencing court consider the nature of the particular crime, *i.e.*, the degree of culpability – distinguishable from the bare-bones legal elements of it—and the personality of the criminal.

State v. Macemon, 113 Wis. 2d 662, 669, 335 N.W.2d 402 (1983) (citation omitted). Goldschmidt received a sentence well below the forty-year maximum

prescribed by statute, in accordance with the sentencing guidelines, and justified by factors articulated on the record.[3] Her sentence is not excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[3] For this reason, even had the court relied on inaccurate information when it pronounced sentence, any such error would have been harmless. *See* ***State v. Tiepelman***, 2006 WI 66, ¶3, 291 Wis. 2d 179, 717 N.W.2d 1. The court's concern with particular aggravating facts in this case, along with a need for deterrence, convince us beyond a reasonable doubt that Goldschmidt would have received the same sentence, even without any discussion of a "usual" sentence or gender disparities. *See* ***id.***, ¶¶48, 50 (Roggensack, J., dissenting).