

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 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. 2006AP2166-CR

Cir. Ct. No. 2004CF274

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL S. HIEBING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Paul Heibing appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the circuit court misused its discretion when it sentenced him because the court considered that he had completed a sexual

assault. Because a trial court may consider all reliable information when sentencing, we conclude that the trial court did not erroneously exercise its discretion. We affirm.

¶2 In August 2004, Heibing was charged with two counts of third-degree sexual assault for having entered the apartment of his victim and engaging her in acts of penis-vagina and penis-anus intercourse. A jury trial began in February 2005, but was aborted for reasons not related to Heibing. In August 2005, Heibing pled no contest to an amended charge of burglary with intent to commit a felony. Under the terms of the plea agreement, the parties would jointly recommend five years' probation, and the State was free to argue that the conditions of probation would include jail time and no contact with the victim of this assault, and two other women who claimed that Heibing had sexually assaulted them.

¶3 Heibing then filed a motion asking to withdraw his plea. Pursuant to a new agreement, Heibing entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). The court accepted the plea noting that it was not quite certain of the actual difference between his *Alford* plea and the no contest plea. The other terms of the plea agreement remained the same.

¶4 In January 2006, the court sentenced Heibing to an indeterminate sentence not to exceed thirty months in prison, and ordered Heibing to register as a sex offender. At the hearing, the court heard testimony from the victim, her husband, who is also a police officer, and another woman who claims that Heibing sexually assaulted her.

¶5 In May 2006, Heibing moved for postconviction relief seeking resentencing. He argued that the sentencing court improperly considered

testimony that he had sexually assaulted the victim, when the plea he entered admitted only that he intended to commit a sexual assault when he entered the victim's apartment. The court denied the motion. Heibing appeals.

¶6 In this appeal, Heibing renews his argument that the sentencing court erroneously exercised its discretion when it heard the statements of the victim, her husband, and the other woman who claimed to have been sexually assaulted. He argues that the court improperly considered that the sexual assault had been completed, and that we should remand the matter to the circuit court for resentencing. We disagree.

¶7 Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised on a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶8 In addition to the three primary factors, the sentencing court may also consider :

- (1) Past record of criminal offenses;
- (2) history of undesirable behavior pattern;
- (3) the defendant's personality, character and social traits;
- (4) result of

presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Spears, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999) (citation omitted). Sentencing courts are obliged to acquire “full knowledge of the character and behavior pattern” of the defendant. *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. The court may consider uncharged and unproven offenses, as well as the facts of offenses of which the defendant has been acquitted. *Id.* Further, the information may come from the court record or the testimony of a witness. *Id.*, ¶46.

¶9 In this case, Heibing entered an *Alford* plea to the crime of burglary with the intent to commit a felony. The felony was sexual assault. The sentencing court considered reliable but contested information about the sexual assault. The State asserts that because a court may consider evidence surrounding a crime of which the defendant has been acquitted, the court may also consider evidence related to the crime for which the defendant entered an *Alford* plea. We agree.

¶10 The sentencing court considered the appropriate factors and explained its reasons for imposing the sentence it did. The court was not “enraged,” as Heibing argues, but considered the information before it. Further, the court imposed a sentence that was one-third of the maximum possible under the law. The sentencing court properly exercised its discretion when it sentenced Heibing and when it denied his motion for sentence modification. For the reasons stated, we affirm the judgment and order of the circuit court.

¶11 There is one more matter of importance to this court. The appellant’s brief contains the required certification by counsel, Attorney Bridget Boyle, that the appendix contains “portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court’s reasoning regarding those issues.” See WIS. STAT. RULE 809.19(2)(a) (2005-06). The issue Boyle argued in the brief is that the circuit erroneously exercised its discretion during its sentencing remarks, and again when it denied Heibing’s postconviction motion. Boyle, however, did not include copies of the transcripts of the sentencing or motion hearings in the appendix. These transcripts were essential to understand the issue Boyle raised. Consequently, we conclude that Boyle filed a false certification.

¶12 As we stated recently, “[f]iling a false certification with this court is a serious infraction not only of the rule, but it also violates SCR 20:3:3(a) (2006). This rule provides, ‘A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.’” *State v. Bons*, 2007 WI App 124, ¶ 24, ___ Wis. 2d ___, 731 N.W.2d 376. This omission places an unwarranted burden on the court and “is grounds for imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate. WIS. STAT. § 809.83(2) (2005-06).” *Id.*, ¶25. Accordingly, we sanction Boyle and direct that she pay \$150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment and order affirmed.

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

