COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP138-CR **Cir. Ct. No. 2005CF425**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSUE O. MARQUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Josue O. Marquez has appealed from a judgment convicting him of one count of taking a hostage, two counts of first-degree recklessly endangering safety by use of a dangerous weapon, one count of armed burglary, one count of attempted armed robbery, and one count of substantial

battery by use of a dangerous weapon. He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Marquez's convictions arise from an incident on March 15, 2005, in the city of Kenosha. According to the criminal complaint, on that date Marquez rang the doorbell at the residence of Edith Martinez, a woman he and his family knew. When Martinez would not allow him inside, Marquez pushed through the door, knocked Martinez over, and grabbed her four-year-old son, holding a knife to the boy's throat and saying, "Give me the money." According to the complaint, Marquez stated that he did not want to hurt the boy, but would if he did not receive money. According to Martinez, she repeatedly asked Marquez to take what he wanted and release her son, but Marquez kept poking the boy with the knife. An altercation ensued and Martinez grabbed the knife blade with both hands. The boy ultimately escaped, while Marquez punched Martinez, grabbed her throat, and tried to guide the knife toward her stomach. When the police arrived, they observed cuts on Martinez's face, neck, arms and hands.

¶3 The issues on appeal all relate to sentencing. The trial court sentenced Marquez to five years of initial confinement and ten years of extended supervision for count two, the taking a hostage conviction. It imposed a consecutive sentence of two years of initial confinement and three years of extended supervision for count five, the recklessly endangering safety conviction related to Martinez. It sentenced Marquez to three years of initial confinement and three years of extended supervision for count six, consecutive to the sentence for count five, for the first-degree reckless endangerment of Martinez's son. It withheld sentence and placed Marquez on terms of ten years of probation for the armed burglary and attempted armed robbery convictions. It withheld sentence and placed Marquez on five years of probation for the substantial battery of

Martinez. The terms of probation were made consecutive to the sentence for count six. The trial court denied Marquez's postconviction motion for sentence modification.

¶4 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied,* 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. ***Id.***

¶5 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.*** It should indicate which general objectives are of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives. ***Ziegler***, 289 Wis. 2d 594, ¶23. It must also identify the factors it considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision. ***Id.***

¶6 The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***Id.*** Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. ***Id.*** The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. ***Id.*** The weight to be given each of the sentencing factors remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶7 The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶23 (citation omitted). However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, "minimum" does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Moreover, while the trial court must provide its sentencing rationale on the record, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. *See* ***State v. Fisher***, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. ***Gallion*** requires an explanation but not mathematical precision. *See* ***Ziegler***, 289 Wis. 2d 594, ¶25.

¶8 As acknowledged by the parties, Marquez faced sentences totaling 117 years and six months of imprisonment. Prior to sentencing Marquez, the trial court listened to arguments from the prosecutor and defense counsel and considered letters filed by and on behalf of Marquez. It reviewed the PSI, which recommended that Marquez be sentenced to a total of six to eight years of initial confinement, followed by five to six years of extended supervision and three to four years of probation. The sentences ultimately imposed by the trial court totaled ten years of initial confinement followed by sixteen years of extended supervision and ten years of probation, well within the permissible maximum.

¶9 As summarized by the State, Marquez's arguments, in general terms, are that the trial court failed to adequately consider mitigating factors, failed to adequately explain its sentencing rationale, and relied on a flawed PSI. None of these claims have merit.

¶10 At the outset of its sentencing comments, the trial court correctly observed that, in addition to considering and balancing the seriousness of the offenses, punishment, and the protection of the community, it had to consider the character and rehabilitative needs of the defendant. In evaluating Marquez's character, the trial court fully considered both positive and negative facts about him. On the positive side, it noted that he was only sixteen years old at the time of these crimes and had no prior juvenile record. It also considered factors that had both positive and negative aspects to them, noting that since his incarceration Marquez had worked diligently toward his high school equivalency degree, but that it would have been better if he had pursued his education earlier and not dropped out of school in ninth grade. Similarly, it credited his attempts at employment, while recognizing that his success in employment was limited because of his alien status and inability to obtain a legitimate social security card.

On the negative side, it noted that Marquez had fathered a child that he could not take care of and that, despite his youth, he had engaged in the use of alcohol and controlled substances.[1] Moreover, while considering Marquez's acceptance of responsibility for the crimes and his letter expressing remorse and stating that he never meant to hurt anyone, the trial court downplayed Marquez's claims based on the violent nature of his crimes. It also reasonably questioned Marquez's claim that he was motivated by financial desperation when he committed the crimes, reasonably concluding that this did not explain the violence of the robbery attempt.

¶11 As this discussion reveals, the trial court did not ignore mitigating circumstances or positive factors, nor did it unduly emphasize Marquez's alcohol and drug use. Instead, it considered and balanced the relevant factors in assessing his character.[2] The mere fact that the trial court failed to give particular factors the weight that Marquez wished does not constitute an erroneous exercise of discretion. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶12 We also reject Marquez's argument that the trial court failed to adequately explain its sentencing rationale. The trial court expressly addressed the

[1] In his appellant's brief, Marquez contends that the trial court erroneously exercised its discretion by labeling him as a drug abuser and treating this as an aggravating factor. However, Marquez admitted to the PSI writer that he began to drink alcohol at age fifteen and drank beer more than three times a week. He also told the PSI writer that he used marijuana twice and cocaine once. The trial court therefore reasonably and accurately concluded that he engaged in the use of alcohol and controlled substances. Contrary to Marquez's contention, the trial court did not describe Marquez as a serious drug abuser or addict, or overemphasize his drug use.

[2] While the trial court did not specifically discuss the impact on Marquez of the death of his father, including information indicating that Marquez felt financially responsible for his family, the trial court was aware of this information through the PSI and the statements of counsel at sentencing. The trial court was not obligated to conclude that this information compelled a lesser sentence.

seriousness of the offenses, including their violent nature, the physical and psychological injury to the victims, and the lengthy maximum sentences that could be imposed for the offenses. In imposing sentence, the trial court specifically rejected the defense request for probation, concluding that probation "would seriously diminish and not be appropriate" due to the serious nature of the offenses.

¶13 As permitted by well-established sentencing law, the trial court also considered the general objective of deterrence, noting that it was necessary to send a message that this type of conduct in someone's home warrants punishment. *See* ***id.***, ¶8. In addition, after reiterating that needing money did not explain the violence of Marquez's conduct, it addressed the need to protect the public and deter Marquez from engaging in this type of violent behavior in the future. In addressing this matter, it stated that it could not determine that Marquez would not repeat this type of conduct in the future because it was unclear why he engaged in such violent conduct in the first place, even accepting his claim that he was desperate for money.

¶14 The trial court also properly considered all sentencing recommendations. It rejected the State's recommendation as too harsh and, as already discussed, rejected the defense recommendation as too lenient. It also acted within the scope of its discretion in concluding that the recommendation of the PSI writer was too lenient, concluding that lengthier periods of initial confinement and extended supervision were necessary to protect the public. "Trial courts … are not required to blindly accept or adopt sentencing recommendations from any source." ***State v. Trigueros***, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54. Moreover, a trial court has no obligation to explain its reasons for failing to follow the PSI recommendation. ***State v. Brown***, 2006 WI 131, ¶24, 298

Wis. 2d 37, 725 N.W.2d 262. Because the trial court considered relevant facts when it assessed Marquez's character and need for rehabilitation, the gravity of the offenses, and the public's need for protection from Marquez, and because it reasonably relied on those factors in choosing the sentences and sentence structure it imposed, no basis exists to conclude that its sentencing rationale was inadequate.

¶15 In reaching this conclusion, we also reject Marquez's argument that the trial court failed to provide an adequate explanation for making his sentences consecutive.[3] Whether to impose consecutive, as opposed to a concurrent, sentences is committed to the sound discretion of the trial court. ***Ramuta***, 261 Wis. 2d 784, ¶24.

¶16 As already discussed, the trial court considered and weighed proper sentencing factors when it adopted the sentences and sentence structure set forth above. While it did not explicitly state why it was making the sentences for counts two, five and six consecutive, it is apparent from its sentencing discussion that it recognized that Marquez had caused multiple distinct harms when he took Martinez's son hostage, threatened him with a knife to his throat, and attacked Martinez with his knife. Similarly, Marquez caused multiple distinct harms when he committed the three crimes for which consecutive probation was ordered. Because separate and distinct crimes were committed, the trial court acted within the scope of its discretion in imposing consecutive sentences. *See* ***State v. LaTender***, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979). Its underlying rationale

[3] In challenging the trial court's decision to impose consecutive sentences, Marquez cites to American Bar Association (ABA) standards for imposing consecutive sentences. However, the Wisconsin courts have repeatedly refused to adopt the ABA guidelines for the imposition of consecutive sentences. *See, e.g.*, ***State v. Paske***, 163 Wis. 2d 52, 65-67, 471 N.W.2d 55 (1991).

for the aggregate sentences also adequately explained why consecutive sentences were appropriate.

¶17 Marquez's final argument is that the PSI was flawed because one agent conducted the interviews and investigation, while a second agent drafted the impressions and recommendation portion of the PSI. The second agent stated that it was difficult to obtain an accurate impression of the defendant because he did not interview him, but that the overriding concern in this case was that the offense was very serious and violent.

¶18 Marquez contends that the statements by the second PSI agent reflect that the PSI recommendation was based entirely on the seriousness of the offenses without taking into account character and background facts that mitigated the offense. He contends that this single focus rendered the recommendation biased and unobjective and that if the agent had recommended a more lenient sentence, the trial court might have arrived at a lower sentence, too.

¶19 Marquez's arguments are unavailing. A PSI must be accurate, reliable and objective. ***State v. Thexton***, 2007 WI App 11, ¶4, 298 Wis. 2d 263, 727 N.W.2d 560, *review denied*, 2007 WI 61, 300 Wis. 2d 194, 732 N.W.2d 859. However, an agent may rely on information from another agent. *See* ***id.***, ¶¶3-5. Moreover, as conceded by Marquez, there is no statutory requirement that the PSI writer interview the defendant in person or that one writer complete the entire report. WISCONSIN ADMIN. CODE § DOC 328.29(4) (2006) merely requires that an attempt be made to interview the offender during the preparation of the report. The primary purpose of the PSI is to provide the sentencing court with accurate and relevant information. WIS. ADMIN. CODE § DOC 328.27 (2006).

¶20 Here, Marquez was interviewed and an investigation was conducted, and the information obtained by the original agent was included in the PSI. The trial court was aware that the agent who made the recommendation in the PSI was not the same agent who interviewed Marquez and prepared the investigatory portions of the PSI, and was fully informed of the basis for the second agent's recommendation. Moreover, as noted by the trial court, the PSI provided background information on Marquez, and Marquez was free to address the contents of the report and to present whatever additional information he wanted the trial court to consider at sentencing.

¶21 Since nothing in the law bars two agents from being involved in preparing a PSI, and no basis exists to conclude that the PSI report and recommendation was biased or unobjective, Marquez's sentences cannot be disturbed based upon his objections to the PSI. As discussed above, the trial court was required to independently decide what sentences were appropriate in light of the goals of sentencing as applied to the facts of the case, not to give any particular deference to the PSI recommendation. ***Trigueros*** 282 Wis. 2d 445, ¶9. Because it fulfilled this duty, the trial court's judgment is affirmed.

¶22 Marquez's motion for postconviction relief raised issues which pertained only to sentencing. Because we have upheld the trial court's exercise of discretion at sentencing, the order denying postconviction relief is also affirmed.[4]

[4] In concluding, we also note that when counsel for the appellant filed the appellant's brief and appendix, she certified that the appendix contained the "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. § 809.19(2)(a) (2005-06). However, while all of the issues on appeal related to sentencing, counsel failed to include a copy of the sentencing transcript in the appendix. This transcript was essential to understand the issues counsel raised. Consequently, we conclude that counsel filed a false certification.

(continued)

By the Court.—Judgment and order affirmed.

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

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 367. This omission places an unwarranted burden on the court and is grounds for the imposition of a penalty or costs on a party or counsel as this court considers appropriate. ***Id.***, ¶25.

Counsel apparently realized her error and filed a supplemental appendix containing the sentencing transcript on October 10, 2007. While this filing was late and did not render the certification filed in the original brief truthful, based upon counsel's remedial action we will not impose a sanction for the false certification. We caution counsel to file accurate certifications in the future.