

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

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. 2007AP2176-CR

Cir. Ct. No. 2005CF4618

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ELISEO HERRERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Fine, JJ.

¶1 PER CURIAM. Eliseo Herrera pled guilty to one count of causing mental harm to a child. See WIS. STAT. § 948.04(1) (2005-06).² The circuit court

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

imposed a bifurcated sentence of five years and two months, comprised of twenty-six months of initial confinement and thirty-six months of extended supervision. Herrera filed a postconviction motion for sentence modification, arguing that the circuit court erroneously exercised its sentencing discretion and that the sentence was harsh and excessive. The circuit court denied the motion. Herrera appeals, and we affirm.

BACKGROUND

¶2 Herrera was charged with one count of repeated sexual assault of a child, one count of second-degree sexual assault by use or threat of force, and one count of incest with a child. Pursuant to a plea agreement, Herrera pled guilty to one count of causing mental harm to a child. The facts underlying the charge were Herrera’s photographing of the victim while she was naked from the waist up.

DISCUSSION

¶3 On appeal, Herrera contends that the circuit court erroneously exercised its sentencing discretion by not adequately considering various mitigating factors such as his lack of a prior criminal record, his history of employment, and his overall good character. Herrera contends that the circuit court’s general reference to some mitigating factors was insufficient because the court did not then explain “to what extent they were factored into the sentence.” Moreover, Herrera asserts that the crime had a “minimal impact” on the victim who was not physically harmed by Herrera’s conduct. Herrera complains that the

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

circuit court's emphasis on deterrence and protection of the public resulted in "the exclusion of other worthwhile and meaningful factors." According to Herrera, the sentence "was not based on his character and ... was not truly designed to rehabilitate him." Finally, Herrera contends that the circuit court "did not explain how the sentencing objectives were met ... and it did not explain how the particular length of prison chosen was needed to meet" its sentencing objectives.

¶4 Three primary sentencing factors should guide a circuit court's sentencing decision—the nature of the offense, the character of the defendant, and society's interest in punishment, deterrence and rehabilitation. See *State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Appellate review of sentencing is limited to determining if discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." *Id.* When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *Id.*, ¶18 (citation omitted). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *Id.* (citation omitted). 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." *Id.*, ¶23 (citation omitted).

¶5 "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and

deterrence to others.” *Id.*, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant and other aggravating or mitigating factors. *Id.*, ¶40 n.10.

¶6 In its sentencing comments, the circuit court first considered the nature of the offense and the impact on the victim. The circuit court described the offense as “very serious” and “egregious,” noting that Herrera had taken pictures of the victim, naked from the waist up, and then had taken the photographs with him while traveling.³ Contrary to Herrera’s appellate assertion that the victim was not harmed, the circuit court pointed to the victim’s statements in a crime impact statement that Herrera’s conduct “hurts a lot” and that she “can’t get [the incident] out of [her] mind” and she “cr[ies] a lot.” The circuit court discussed Herrera’s character. The court specifically considered Herrera’s “history of employment [and] ... of caring about people.” As required by *Gallion*, the court identified its sentencing objectives—to punish Herrera, to deter others, and to address Herrera’s rehabilitative needs. *See id.*, ¶40. The circuit court noted that Herrera had spent a “significant period” of time incarcerated during the pendency of the case. The court noted, however, that Herrera did not receive any treatment during that preconviction incarceration and that “additional time [is] needed so [Herrera] can integrate back into the community with some extended supervision thereafter.”

¶7 The record shows that the circuit court indentified the various factors that it considered in fashioning its sentence. The circuit court identified its

³ The circuit court expressly disavowed consideration of the nature of the original charges and stated that it was only considering the nature of the charge to which Herrera pled guilty.

sentencing objectives. The circuit court's conclusion that additional incarceration was needed to punish Herrera and to facilitate his rehabilitation was appropriate. The circuit court's determination that a period of extended supervision was needed to ensure Herrera's successful reintegration into the community is supported by the record. Contrary to Herrera's appellate argument, the circuit court considered the relevant mitigating factors. While Herrera may disagree with the relative weight assigned to the various factors, "[t]he weight to be given each factor is within the discretion of the [circuit] court." *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). The circuit court did not erroneously exercise its sentencing discretion.

¶8 The potential sentence for the crime to which Herrera pled was twelve and one-half years of imprisonment, comprised of seven and one-half years of initial confinement and five years of extended supervision. See WIS. STAT. §§ 948.04(1), 939.50(3)(f), 973.01(2)(b)6m. A sentence is considered harsh or excessive "only where 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." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Given the potential sentence facing Herrera and the overall circumstances, the sentence imposed is not unusual or disproportionate to the offense.

By the Court.—Judgment and order affirmed.

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

