COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2009

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. 2008AP1451-CR **Cir. Ct. No. 2007CF1092**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANICE M. WELTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Janice M. Welton pled guilty to one count of conspiracy to commit theft by fraud, less than $10,000, and one count of misappropriation of personal identifying information. *See* WIS. STAT.

§§ 943.20(1)(d), 939.61, & 943.201(2)(a) (2005-06).[1] The trial court sentenced Welton to fifteen months of initial confinement and sixty months of extended supervision for the theft by fraud charge, and to a concurrent sentence of twelve months of initial confinement and twelve months of extended supervision for the identity theft charge. The only issue on appeal is whether the trial court properly exercised its sentencing discretion. We conclude that it did and, therefore, affirm.

BACKGROUND

¶2 Between December 2004 and January 2007, Welton and her co-defendant, Stanford L. Clacks, operated a wide-ranging conspiracy to defraud banks and check-cashing businesses. The criminal complaint alleged that Welton and Clacks opened checking accounts at various banks, using either their names or the names of several other individuals involved in the scheme. Those accounts would be funded either with minimal balances or with money transferred from other fraudulently established accounts. The co-defendants purchased "trac fones" with the newly-opened accounts.[2] After the accounts were opened, Welton would create false bank statements for the accounts that would show a significant positive balance. Welton also created false payroll stubs in the names of the persons who opened the accounts. Welton created those false documents on her home computer. Those false bank statements and pay stubs would then be presented to check-cashing businesses in support of loan applications. On the loan applications, the telephone number of a trac fone was given as the telephone

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] A trac fone is a prepaid cellular telephone.

number of the applicant's employer. When the check-cashing business would call the telephone number to confirm the applicant's employment, another co-conspirator would answer the telephone and falsely confirm the applicant's employment.

¶3 The criminal complaint identified eighteen persons who were either actively involved in the scheme or had their names used by the co-defendants. The complaint described how Welton met several of the individuals involved in the scheme and how she introduced them to the specifics of the operation. The complaint further alleged that Clacks had told police that Welton "solicit[ed] people in poor areas to assist … in these scams."

¶4 Welton was charged with two counts of conspiracy to commit theft by fraud, less than $10,000, and two counts of misappropriation of personal identifying information. Pursuant to the plea agreement, one count of each crime was dismissed and read in at sentencing. For the conspiracy to commit theft by fraud count, the State agreed to recommend a sentence of fifteen to eighteen months of initial confinement, followed by five years of extended supervision. For the identity theft count, the State agreed to recommend a lesser concurrent sentence. The trial court largely followed the State's recommendation.

¶5 In a postconviction motion, Welton argued that the trial court erroneously exercised its discretion when it: (1) "considered and relied upon information … received in connection with the sentencing" of others involved in the conspiracy, "the nature and extent of which was not revealed" to Welton; (2) "dismissed [Welton's] complete acceptance of responsibility … as 'de minimus'" and considered that to be an aggravating factor; and (3) "failed to take into account the effect that [Welton's] history [as a victim] of physical,

psychological and sexual abuse had on her willingness to participate" in these crimes. The trial court denied Welton's motion, and she now appeals.

DISCUSSION

¶6 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. 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.***

¶7 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, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others." ***Id.*** "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." ***Ziegler***, 289 Wis. 2d 594, ¶23. However, the weight to be given each sentencing factor remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶8 With those principles in mind, we turn to Welton's specific arguments.

¶9 After Welton's allocution in which she asserted that she "never recruited anyone," the trial court began its sentencing comments with the following observations:

> Well, as I think you are aware, Ms. Welton, and as [the assistant district attorney] for the State has laid out, I have heard from the other people involved in this scheme various times. They've been in court admitting their involvement in the case and then being here for sentencing where I think almost all of them chose to say something to the Court[.] … [T]he [criminal] complaint allege[d] that Mr. Clacks was sort of the kingpin, but also it alleged that you and he together pulled in other people, none of these other people … put this plan together, and a number of them mentioned not just Mr. Clacks, but you as someone who brought them into it, so it is troubling that in your mind somehow you didn't recruit.

¶10 After discussing various sentencing factors, the trial court then stated that it had "considered what the P[re][s]entence] I[nvestigation] reporter said, … listened to" Welton[']s allocution], and "considered things … heard in the companion cases." Welton complains that the trial court did not "further elucidate what these 'things' [we]re or how these 'things' affected the sentence." Welton asserts that the trial court "did not reveal the nature and extent of these 'things'" and, therefore, she did not have an "adequate opportunity to address them." Welton concludes that the trial court denied her due process.

¶11 We are not persuaded. First, we note that the criminal complaint set forth a detailed account of the operations of the scheme, including statements from several persons who described how they met Welton and what she did to introduce them to the enterprise. During the plea colloquy, Welton told the court that she had read the criminal complaint and she admitted that its factual allegations were true. Thus, Welton's implicit assertion that she was not aware of statements made by her co-actors concerning their involvement in the scheme rings hollow.

¶12 Second, Welton did not object at sentencing when the trial court referred to the various companion cases. To the extent that Welton did not know more details about what the trial court had learned from those cases, she is to blame for not objecting and asking that the court disclose more detailed information.

¶13 Third, and most importantly, the trial court expressly stated that it was considering what it had "heard from the other people involved in this scheme" "as [the assistant district attorney] for the State has laid out." In his sentencing remarks, the assistant district attorney had noted that the court "had the opportunity … to meet a number of [the] people" recruited by Welton and "[t]hey were … all people who in a sense were taken advantage of by [Welton], and although they did wrong and they benefited, they are in a certain sense also victims of [Welton's] theft scheme." The assistant district attorney also had discussed statements, set forth in the presentence investigation report, made by two sisters who were approached by Welton and asked to participate in the scheme. Finally, the assistant district attorney had named several co-actors that had been sentenced by the court when addressing the specifics of any restitution order. In short, the record shows that the "nature and extent" of information gleaned from the companion cases was disclosed to Welton at sentencing.

¶14 Welton also takes issue with the trial court's consideration of her remorse. As noted, Welton denied "recruiting" anyone to participate in the scheme. Standing in opposition to that denial were numerous statements from co-actors in the criminal complaint and presentence investigation report that described how Welton introduced them to the operation and oversaw their criminal conduct. The trial court described Welton's "level of acceptance of

responsibility" as "de minimus" and "just not satisfactory or sufficient … to address the degree of harm that was caused."

¶15 Appellate deference in the sentencing context means that this court will not "second-guess" the trial court's assessment of Welton's level of sincerity or remorse. *See* ***State v. Kaczynski***, 2002 WI App 276, ¶12, 258 Wis. 2d 653, 654 N.W.2d 300. A court may consider a defendant's refusal to admit guilt as an indication of lack of remorse. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915-16, 512 N.W.2d 243 (Ct. App. 1994). While Welton may disagree with the relative weight that the trial court assigned to the various mitigating and aggravating factors, "[t]he weight to be given each factor is within the discretion" of the court. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶16 Lastly, Welton argues that the trial court "failed to take into account the effect" that her "history of physical, psychological and sexual abuse had on her willingness to participate in the crimes." The record defeats this argument. While discussing Welton's character, the trial court acknowledged that Welton had "been a victim probably from birth" and that was a "positive[]" or "at least sympathetic aspect[]" to Welton's character. The trial court expressly considered that Welton's childhood involved "an abusive situation," that there was "neglect" and "sexual abuse," and that Welton was "in many ways a survivor of a very unhealthy, sick, sad upbringing." The court credited Welton with "still working on [her] education, still [being] concerned about [her] child, [and] still trying to get ahead" despite the history of abuse. The court noted, however, that Welton "[u]nfortunately … [was] not able to choose in this case the legal manner to get ahead."

¶17 Contrary to Welton's contention, the trial court expressly did consider the history of abuse and its impact on Welton's character. As with Welton's remorse, disagreement with the weight that the trial court attached to the sentencing factor does not mean that the trial court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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