

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 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. 2008AP1443-CR

Cir. Ct. No. 2005CF51

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONSO ELIZALDE SANTOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Alfonso Elizalde Santos appeals a judgment convicting him of repeated sexual assault of a child. He also appeals an order denying his motion for a sentence modification. Santos contends that the circuit court erroneously exercised its sentencing discretion. We disagree, and affirm.

¶2 When Santos was 22, he entered into a relationship with Sophia R., then 14. At one point, Sophia ran away to Texas with Santos. When they returned, they shared a bedroom in her mother's residence for several months, and regularly engaged in sexual intercourse. Police eventually learned of the relationship, and the State charged Santos with repeated sexual assault of a child. Several months later, Sophia, then 16, gave birth to a child. Santos is the father.

¶3 While this case was pending, Santos was charged with criminal damage to property, and two counts of felony bail jumping for missing two appearances in this proceeding. He missed one of the appearances because he had travelled to Texas, where he was arrested and extradited back to Wisconsin.

¶4 Santos subsequently entered a guilty plea to the sexual assault charge. The State agreed to dismiss the bail jumping and criminal damage charges, which remained as read-in offenses. The circuit court sentenced Santos to four years of initial confinement, with 231 days of sentence credit, and three years of extended supervision. Santos appealed after the circuit court denied his motion for a sentence modification. He contends that the circuit court failed to give adequate reasons for the sentence, imposed an excessive sentence given the numerous mitigating factors present in the case, and sentenced him on inaccurate information as reflected in the court's comments at sentencing and its listing of aggravating factors on its sentencing guidelines worksheet.

¶5 Circuit courts exercise discretion at sentencing, and we review sentences under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A proper exercise of discretion requires that the court articulate the reasons for the sentence on the record. *Id.*, ¶¶8, 38. Additionally, a defendant has a constitutional due process

right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. We review whether a defendant has been denied this due process right *de novo*. *Id.*

¶6 The circuit court adequately explained the sentencing decision. The court primarily considered the seriousness of the offense, consisting of repeated acts of sexual intercourse over a substantial period, the fact that it resulted in pregnancy, the read-in offenses, the difference in ages between the perpetrator and the victim, Santos' knowledge that his sexual relationship with Sophia was criminal, and the fact that Santos had a prior conviction and used aliases. These were all relevant and proper factors to consider, and the circuit court clearly explained its reliance on them on the record. The court's duty to articulate its decision is satisfied if the court puts forth a "rational and explainable" chain of reasoning based on facts in the record. *See State v. Taylor*, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. The court did so here.

¶7 The circuit court properly exercised its discretion with regard to the mitigating factors Santos presented. Santos identifies those mitigating factors to include (1) the absence of alcohol, drug, or gang affiliation issues, (2) no history of sexual assaults or felonies, (3) the voluntary nature of the relationship with Sophia, (4) the victim and her mother's advocacy for probation, (5) the fact that Santos and Sophia come from a cultural background that accepted their relationship, and (6) Santos' acceptance of responsibility. In Santos' view, the court erroneously exercised its discretion by either ignoring or failing to place adequate weight on these factors. However, "[i]t remains within the discretion of the circuit court to discuss only those factors it believes are relevant, and the weight that is attached to a relevant factor in sentencing is also within the wide discretion of the sentencing court." *State v. Stenzel*, 2004 WI App 181, ¶16, 276

Wis. 2d 224, 688 N.W.2d 20 (citations omitted). The court's decision to give lesser weight, or no weight, to the factors listed above was a decision within its discretion, and does not provide grounds for reversal.

¶8 Santos has failed to demonstrate that he was sentenced on inaccurate information. A defendant raising this claim must show that the information was inaccurate, and that the sentencing court relied on it. *Tiepelman*, 291 Wis. 2d 179, ¶26. If the defendant meets this burden, to avoid resentencing the State must show that the error was harmless. *State v. Anderson*, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). An error is harmless if there is no reasonable probability that it contributed to the outcome. *Id.* at 411.

¶9 Here, Santos claims that the circuit court checked off five aggravating factors in its sentencing guideline worksheet that have no basis in fact: (1) prior domestic abuse, (2) conduct more serious than the offense of conviction, (3) low education level, (4) previously on supervision and on legal status at the time of the offense, and (5) lack of remorse. As to factor (1), there was at least some evidence of domestic abuse because police first learned of the relationship between Santos and Sophia when she called to report that he had struck her. Although Sophia later denied the incident, the circuit court had the discretion to believe the initial report rather than the later denials. *See State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993) (no formal burden of proof requirement for factual findings which impact on a sentencing). As to factors (2), (3), and (5), the question was not so much the accuracy of the facts, as it was the court's interpretation of them. The court could reasonably determine that multiple acts of sexual intercourse with a child is conduct more serious than the charge of repeated sexual acts with a child, which requires only three instances of sexual contact. The court could also reasonably consider Santos' low education level as

an aggravating factor, even if it was, as he contended, not his fault. And the court could also reasonably consider that Santos did not show an appropriate level of remorse, given the fact that he offered his and the victim's cultural values as a mitigating factor. This court must accept reasonable inferences drawn by the sentencing judge. *See State v. Friday*, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶10 Only with regard to the court's checking off prior supervision and present legal status as an aggravating factor has Santos shown that the court had inaccurate information. However, there is no indication that the court relied on the information beyond checking off the spaces on the sentencing worksheet. The court made no reference to either factor in its sentencing remarks, and correctly stated that Santos' criminal record was limited to one prior misdemeanor conviction. There is no reasonable probability that the court's worksheet error resulted in a harsher sentence.

¶11 The remaining claim of inaccurate sentencing information concerns the circuit court's expressed opinion that Sophia's mother agreed to the relationship and allowed Santos and Sophia to live together in her home only to induce Sophia to return to Wisconsin after running away to Texas with Santos. As noted, there is no formal burden of proof issue with regard to sentencing information. The prosecutor had previously informed the court of this account of Sophia's and Santos' return to Wisconsin, and the court was entitled to accept that account, although different accounts were available.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

