

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 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. 2008AP2288-CR

Cir. Ct. No. 2006CF542

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK V. KRAMER, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Kramer, pro se, appeals a judgment of conviction for second-degree sexual assault of a child. Kramer contends the court erroneously exercised its sentencing discretion. We affirm the judgment.

BACKGROUND

¶2 Kramer was initially charged with first-degree sexual assault of a child. Kramer inappropriately touched his granddaughter and attempted to make her touch his penis.

¶3 Pursuant to a plea agreement, the State amended the charge to second-degree sexual assault of a child and recommended that sentence be withheld with a maximum probation term, conditioned upon jail time. The State's recommendation was based on a psychotherapist's representations that Kramer had been forthright about his actions and was invested in treatment. Determining that a prison sentence was necessary to promote the objectives of punishment and deterrence, the court rejected the State's and Kramer's recommendations and sentenced Kramer to ten years' initial confinement, followed by fifteen years' extended supervision.

DISCUSSION

¶4 Kramer asserts the court erred by (1) relying on factual inaccuracies in a presentence investigation report; (2) not giving adequate considerations to expert opinions and recommendations; (3) ruling out rehabilitation as an option; and (4) sentencing him to ten years' incarceration to deter other possible offenders and to punish him.¹ The State contends the court properly exercised its sentencing discretion and that Kramer's appeal should be dismissed because Kramer did not file a postconviction motion challenging his sentence.

¹ Kramer does not challenge the total length of his sentence, but insists too much of his sentence consists of incarceration.

¶5 WISCONSIN STAT. § 973.19² provides two alternative methods of challenging a sentence. If a defendant desires to appeal other issues in addition to sentencing, the defendant must file a motion under WIS. STAT. § 973.19(1)(b). *State v. Norwood*, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991). Alternatively, a defendant may move to modify a sentence under WIS. STAT. § 973.19(1)(a), which is a more streamlined process, but results in the defendant forfeiting the right to appeal other issues. *Norwood*, 161 Wis. 2d at 681. Absent compelling circumstances, a motion to correct a sentence must be made to the circuit court before the sentence can be challenged on appeal. *Id.* at 680.

¶6 Kramer does not dispute that he failed to file a postconviction motion or that such a motion was required. Instead, he argues that the information available to him from the state public defender's office and the Guide to Appellate Procedures for the Self-Represented did not make clear that a postconviction motion was required.

¶7 We are not convinced compelling circumstances justify Kramer's failure to file a postconviction motion. He cites no law regarding compelling circumstances, nor does he develop an argument explaining how his circumstances amount to compelling circumstances under the law. Therefore, absent a postconviction motion, we need not address the merits of Kramer's appeal. *See id.*

¶8 Nevertheless, we conclude that, even on the merits, Kramer's challenge to the court's exercise of its sentencing discretion fails.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the circuit court, we start with the presumption that the circuit court acted reasonably. We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted). A court must state the objectives of its sentence on the record, which may “include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The court must consider three primary sentencing factors: the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentence should provide the minimum amount of custody or confinement consistent with these factors. *Gallion*, 270 Wis. 2d 42, ¶23. The court may also consider a wide range of other factors, though it has discretion to determine which factors are relevant and the weight to give each. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶9 We first reject Kramer's claim that the court relied on inaccurate information. A defendant requesting resentencing due to a court's use of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information when sentencing the defendant. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. At the sentencing hearing, Kramer's attorney pointed out facts in the presentence investigation report that Kramer claimed were inaccurate. For example, Kramer's son told the PSI writer that Kramer confessed to another incident of inappropriate

sexual conduct. Kramer claimed that conversation never happened. The circuit court acknowledged Kramer's challenges to the facts in the PSI and noted that it had those facts "bracketed."

¶10 Kramer points to no part of the record indicating the court relied on any of the allegedly inaccurate information. Instead, Kramer relies on the fact that the court stated it "bracketed" the challenged information, rather than expressly stating it would not consider that information. Kramer's argument ignores that he, not the court or the State, has the burden of showing the sentencing court actually relied on inaccurate information. *See id.* In addition to failing to establish the court relied on the allegedly inaccurate information, Kramer fails to establish that any of that information was inaccurate. *See id.*, ¶¶29-30.

¶11 The rest of Kramer's claims essentially disagree with the court's sentence and reasoning. Kramer asserts the court erred by not giving adequate consideration to expert opinions and recommendations; ruling out rehabilitation as an option; and sentencing him to ten years' incarceration to deter other possible offenders and to punish him. However, the record demonstrates the court did consider the relevant factors and properly exercised its discretion when imposing sentence.

¶12 The court considered both the experts' opinions and rehabilitation, noting that its decision not to give a harsher sentence was supported by an expert's report regarding Kramer's amenability to treatment, which would be made available to him in prison. Addressing Kramer's character and the need to protect the public, the court emphasized that Kramer had prior convictions for "deviant sexual conduct" and he had been on probation twice before, without serving jail time. While the court acknowledged Kramer's efforts not to relapse after his

previous crimes, the court stressed the severity of this crime and concluded Kramer should not have another opportunity to relapse. The court also stated a prison sentence would be necessary to deter other possible offenders. Additionally, the court addressed the seriousness of the offense, stating that “[s]hort of full blown intercourse ... this is an extreme[sic] serious offense.” The court discussed the effect of Kramer’s crime on the victim and her family and concluded that Kramer should be punished.

¶13 Reiterating the objectives of deterrence and punishment, the court noted that the ten years’ initial confinement was partially based on the victim’s age, such that Kramer’s incarceration would not end before she is twenty-one years old. The court further stated that the fifteen years’ extended supervision should be sufficient to protect the public after Kramer is released.

¶14 Contrary to Kramer’s assertions, the court’s sentencing reasoning demonstrates it considered the experts’ opinions, probation and rehabilitation. The court weighed the factors supporting Kramer’s and the State’s recommendations against other factors and the goals of deterrence, protection of the public and punishment.³ Kramer’s real grievance is the weight placed on various factors and that the court pursued deterrence, punishment and protecting the public as its primary sentencing objectives, rather than rehabilitation. However, the objectives of the sentence and the weight given to the experts’ and parties’ recommendations are left to the court’s discretion. *See Stenzel*, 276 Wis. 2d 224, ¶16; *Gallion*, 270 Wis. 2d 535, ¶40. The record demonstrates the court exercised its discretion, and

³ Regarding probation, the court’s reasoning makes clear it did not believe probation was appropriate given the seriousness of the offense and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197.

Kramer fails to show the sentence was without a reasonable or justifiable basis in the record. *See Lechner*, 217 Wis. 2d at 418-19.

By the Court.—Judgment affirmed.

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

