

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 5, 2002**

Cornelia G. Clark  
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. 02-1513-CR**

**Cir. Ct. No. 98-CF-78**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RAYMOND J. RAPPA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed.*

¶1 PETERSON, J.<sup>1</sup> Raymond J. Rappa appeals a judgment of conviction on disorderly conduct charges and an order denying postconviction relief. Rappa argues that he should receive a new sentencing hearing because the circuit court erroneously exercised its discretion by imposing the maximum

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All statutory references are to the 1999-2000 version unless otherwise noted.

sentence after revocation of Rappa's probation. Specifically, Rappa contends that the court erroneously reassessed the severity of his offenses after originally ordering probation. He also argues that the court erroneously based his sentence in part on evidence not in the record. We disagree and affirm the judgment and order.

## BACKGROUND

¶2 In January 1998, Rappa's son, Jeremy, told a high school counselor that Rappa swore at and spanked Jeremy's sixteen-month-old brother, Ryan, and also spanked and slapped his five-year old brother, Kyle. The police were called to the school and spoke to Rappa's wife, Kelly, as well as to Jeremy. Kelly told the police that between November 1997 and January 1998, Rappa's temper was worsening and that he was physically violent toward their children.

¶3 Since 1988, Rappa has been charged with domestic abuse to Kelly, child abuse of the Rappa children, and aggravated battery for beating Kelly. Additionally, in 1997, Rappa was placed on probation for battery, disorderly conduct, bailjumping, obstructing and violating a restraining order.

¶4 Here, Rappa was charged with two felony counts of causing mental harm to a child, two counts of disorderly conduct, and one count of battery, all as a repeat offender. The felony charges were subsequently amended to misdemeanor disorderly conduct charges. On June 8, 1998, Rappa pled no contest to two counts of disorderly conduct. The remaining charges were dismissed in exchange for Rappa's plea.

¶5 During sentencing, the parties presented a joint recommendation that the court withhold sentence and place Rappa on three years' probation. Both

parties also told the court that Rappa was on probation at the time of these offenses, that the probation had been revoked, and that he had been sentenced to jail after revocation. The defense also noted that Rappa was complying with a CHIPS order. The State did not object to Rappa's request to have contact with his sons, subject to Kelly's restrictions. The court accepted the parties' joint recommendation, withheld sentence and placed Rappa on three years' probation.

¶6 In May 2001, Rappa was taken into custody on ten allegations that he violated conditions of probation. After a revocation hearing, the administrative law judge determined that Rappa had committed three of the ten violations. These included using marijuana and having or attempting to have unauthorized contact with Kelly. The administrative law judge found that there was not enough evidence to establish the remaining seven allegations. The administrator of the Division of Hearings and Appeals sustained the determination that the three offenses merited revocation.

¶7 A sentencing hearing was held on August 28, 2001. The State argued that the disorderly conduct charges for which Rappa was convicted were "aggravated," "extreme" and "grave and serious." The State asked for the maximum enhanced sentence of six years in prison, namely, three years consecutive for each of the two disorderly conduct counts. The State based its argument on the 1998 complaint. The only new evidence the State offered was photographs relating to the 1995 battery incident, as well as noting that Jeremy and Kyle were undergoing psychological evaluations. However, the results of these evaluations were not yet available and therefore not made part of the record.

¶8 In imposing the maximum six-year sentence, the court stated that it found "the gravity of the underlying offenses in this situation to be extreme." It

also relied heavily on Rappa's history of "undesirable behavior," stating that there was a need to protect the victims and the community from Rappa's abuse. Additionally, although the State noted that it disagreed with the administrative law judge's determination and was proceeding on pending criminal charges, the court stated that it did not take those allegations into account in its sentencing.

¶9 Rappa filed a postconviction motion alleging that the circuit court erroneously exercised its discretion by basing its decision on information already known to the court when it ordered Rappa's probation in 1998. Rappa also argued that the court erroneously exercised its discretion by basing the sentence on injuries and permanent effects sustained by the victims that were not reflected in the record. The court denied the motion, stating that it based its decision on a "wealth of information." The court noted that it did not change its view of the severity of the offense, and that imposing probation for a serious charge does not prohibit later imposition of the maximum sentence. Additionally, the court stated, "we all know" that the Rappa family suffered harm, and no one would argue they had not been injured. Rappa appeals.

#### STANDARD OF REVIEW

¶10 Sentencing is committed to the sound discretion of the trial court, and we review sentencing determinations under the erroneous exercise of discretion standard. *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). When reviewing a sentence, we presume the trial court acted reasonably because that court is in the best position to consider the relevant sentencing factors and the

demeanor of the defendant; therefore, the defendant has the burden of demonstrating an unreasonable or unjustified basis for the sentence. *State v. Harris*, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633 (1984).

¶11 The primary factors the court is to consider in sentencing are: (1) the gravity and nature of the offense; (2) the offender's character and rehabilitative needs; and (3) the public's need for protection. *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment ....” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

## DISCUSSION

¶12 Rappa first contends that the circuit court erroneously exercised its discretion by imposing the maximum sentence after originally accepting the recommendation of probation in 1998. Rappa contends that in ordering probation in 1998, the court implicitly found that the offenses were not extreme or outrageous. Subsequently, at sentencing after revocation, the court commented on the extreme and outrageous nature of the offenses. Rappa argues that this amounts to a reassessment of the severity of the offense, which should only be allowed where there is new information about the offense. *See State v. Reynolds*, 2002 WI App 15, ¶13, 249 Wis. 2d 798, 643 N.W.2d 165. Because the court relied on the same police report available in 1998, Rappa argues there is no basis to change its assessment of the severity of the offenses. Furthermore, relying on *Reynolds*, Rappa contends that after revocation, the circuit court must consider its original assessments when imposing sentence. *See id.* at ¶10. Because the court did not do

so in this case, Rappa argues that the sentencing was not based on a full understanding of the entire record and was therefore an erroneous exercise of discretion.

¶13 The flaw in Rappa's argument is its premise that the trial court reassessed the seriousness of the crimes. In particular, Rappa has not shown that the trial court originally thought the crimes were less serious. Certainly, the trial court never explicitly said so. Rather, Rappa argues his conclusion is implicit because otherwise the court would not have approved probation.

¶14 However, there are many other factors that weighed in the court's probation decision. Most important, this was a plea agreement and both parties recommended probation. In addition, Rappa was already serving jail time on another probation revocation and was subject to a CHIPS order. The court may well have thought that though the offenses were serious, enough controls were in place to give Rappa one last chance. For these reasons, we are not persuaded that the court implicitly considered Rappa's crimes less serious at the time he was placed on probation.

¶15 Rappa's argument also ignores intervening events. He assumes that at sentencing after revocation the court considered only the original crimes. The court did indeed comment extensively on the gravity of the offenses. However, the court also observed that probation and jail had not worked, and therefore the chances for rehabilitation were better if Rappa were confined to prison. In addition, the court commented on Rappa's attitude. Rappa spoke at the sentencing after revocation hearing and, in part, blamed his wife and son. The court responded that Rappa showed "a complete lack of understanding and what I can

only term as a demented perception of reality.” The court concluded that Rappa was unwilling to accept responsibility for his actions.

¶16 Rappa’s argument also relies on *Reynolds*. In *Reynolds*, the trial court initially made specific findings regarding the severity of the offense in that case. *Reynolds*, 2002 WI App 15 at ¶4. Upon review, we determined that the court should have recognized those findings at sentencing after revocation. *Id.* at ¶14. Here, however, the court made no findings regarding the severity of Rappa’s offenses when it accepted the parties’ recommendation and imposed probation. Thus, there was nothing for the court to use as a benchmark.

¶17 Rappa further argues that the circuit court erroneously based the sentence in part on injuries sustained by the victims and the permanent effects of Rappa’s behavior on those victims. Rappa contends there was no evidence in the record of these injuries since the psychological evaluations were not yet complete. Notwithstanding this fact, the judge stated, “we all know” the victims had been harmed. Rappa argues this was in error.

¶18 We note that the State has not responded to this argument. Generally, unrefuted arguments are deemed admitted. *Charolais Breeding Ranches v. FPC Secs.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). However, here, the record itself directly refutes Rappa’s contention. At the postconviction hearing, the court explained the basis for its conclusion regarding the injuries:

What I did know that day was that one child was having a psych evaluation because he was so angry that he had expressed fear about his own anger. I knew that another child suffered from anxiety problems. I knew that the children in this situation, and the mother, had been exposed to extreme violence and humiliation over a course of time.

....  
I'm not so sure it takes an expert's opinion for me to say that there were injuries in this case.

¶19 We will not reverse a trial court's sentencing decision where the court relies on facts that are fairly inferable from the record, and the reasons for the sentencing indicate a consideration of legally relevant factors. *State v. Wegner*, 2000 WI App 231, ¶10, 239 Wis. 2d 96, 103, 619 N.W.2d 289. We are satisfied that with Rappa's long history as an abuser, the court could logically infer from facts on the record that the victims in this case suffered injuries. Therefore, we conclude that it was not error to base Rappa's sentence in part on those injuries.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.



