COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1890-CR **Cir. Ct. No. 01-CM-1269**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRYSTAL C. PARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Crystal C. Parker appeals from a judgment of the trial court convicting her of retail theft as a repeater and obstructing as a repeater, and an order of the trial court denying her postconviction claim that the trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

had erroneously placed too much weight on the sentencing factor of deterrence. Because the record reveals that the trial court engaged in proper sentencing rationale, we affirm.

¶2 The relevant facts are undisputed. On August 5, 2001, Bryan Raeburn, a loss prevention agent for the Nike Outlet Store in Kenosha county, observed Parker enter the Nike store and conceal merchandise. Raeburn further observed Parker leave the store without paying for the concealed merchandise. He followed Parker outside and apprehended her by grabbing her sweater. After Parker wrestled away from Raeburn, Raeburn gave chase on foot. While Raeburn chased Parker, she told passersby that Raeburn was trying to rape her. Eventually Raeburn caught up with Parker and a struggle ensued between the two, at which point Parker tried to bite Raeburn. Also during this time, Parker told Raeburn that she did not have any money and that is why she went back to her old criminal behavior of stealing which had been a compulsion for twenty-two years.

¶3 On August 7, 2001, a criminal complaint was filed in Kenosha county charging Parker with retail theft as a repeater, disorderly conduct as a repeater, and obstructing as a repeater. On September 7, 2001, a plea hearing took place before Judge Bruce E. Schroeder. Pursuant to a negotiated plea, Parker pled guilty to retail theft as a repeater and obstructing as a repeater. A presentence investigation report was ordered.

¶4 On November 1, 2001, after completion of the presentence investigation report, the sentencing hearing took place. Judge Schroeder heard sentencing arguments from both sides. The State noted that Parker had thirty-three prior criminal convictions, sixteen for retail theft between 1983 and 2000.

¶5 Parker stated that she has "a problem, you know, with shoplifting, and I believe it is a compulsion and impulse control disorders and sometimes I do suffer from diminished capacity to sometimes make wise choices." Parker's attorney argued that Parker "does have a compulsion to steal," but that "she is trying to be as truthful as she can" in admitting that she has "great difficulty controlling it." He then conceded, "While making that statement, I understand that that's not necessarily a good thing and could be used against her under the protection of society type of argument."

¶6 Judge Schroeder reasoned aloud why he believed Parker needed to be dealt with "harshly." He highlighted the undisputed evidence which led to Parker's plea and judgment of conviction: First, Parker concealed unpaid-for merchandise and left the store with it; second, she tried to bite the loss prevention agent when he apprehended her; third, she resisted and wriggled away from his grasp; fourth, while trying to escape, she told passersby that Raeburn was trying to rape her; and fifth, once apprehended, she admitted that she did not have any money and that is why she went back to her old criminal behavior of stealing which she said had been a compulsion for twenty-two years.

¶7 Judge Schroeder found it particularly "infuriating" that in an effort to escape, Parker made the "outrageous claim" that Raeburn was trying to rape her. He commented that he found it "very disturbing" that in the past Parker had been incarcerated for "habitual criminality, resisting and theft, which apparently resisting seems to be with [her] thefts." He discussed rehabilitation and the fact that although Parker had completed many rehabilitation programs, she continues to choose "the corrupt route." He opined to Parker that it is "really troubling … if indeed you do have a diminished capacity to the extent that you don't even realize the wrongfulness of your stealing … then it's even scarier because then I have to

even deal more fiercely with you to bring home the wrongfulness of what you're doing." He discussed how Parker's actions affected the community and emphasized to Parker that the "message you need to learn and that people who … know of you need to learn that we are not going to tolerate [theft] as a community in this community. We are not going to tolerate it. We want to keep prices low. We want to keep … people employed out there." Along with these considerations, he factored in the importance of deterrence and stated that it is his job to select the sentence that will deter Parker and others from committing the crime of theft.

¶8 Judge Schroeder then sentenced Parker to three years' confinement in the Wisconsin State Prison on each of the two counts to be served consecutively. She was given seventy-seven days for time served.

¶9 Subsequently, Parker filed a postconviction motion asking for sentence modification, claiming that the trial court had put too much weight on the factor of deterrence. At the motion hearing, Judge Schroeder listened to testimony from Parker and from Dr. Bruce Weffenstette, a psychiatrist working for the Department of Corrections at the Taycheedah Correctional Institution. Weffenstette said that he had seen Parker on March 15, 2002, for a psychiatric follow-up. Weffenstette could not say to a reasonable degree of psychiatric certainty that Parker had obsessive-compulsive disorder and/or that OCD was a cause of Parker's habitual stealing. Specifically, he testified:

> Your Honor, I haven't seen [Parker] enough to make an absolute determination about [whether Parker has obsessive compulsive disorder or is a career criminal]. I think there's a possibility that she has a problem that could be helped by some sort of treatment, but I do think there's a strong possibility that she has a criminal problem, that she's a career criminal.

¶10 Parker's attorney then made an argument that a new factor had been brought to the court's attention: "[T]hat Crystal Parker has a possible obsessive compulsive problem that would be potentially treatable with drugs. She compulsively shoplifts when she's under stress. She's now on the drug Prozac to deal with this disorder which will hopefully address and control this action and avoid repeated criminal activity."

¶11 In addition, Parker's attorney argued that "the Court, in exercising its sentencing discretion, giving maximum sentences—consecutive sentences in this case … had placed undue emphasis on the protection of the community versus the other factors, which include the rehabilitative needs of the defendant. And we believe that constitutes an abuse of discretion."

¶12 Also, Parker testified that she had been previously raped by her stepfather and subjected to violence in her life. Parker's attorney then argued that this testimony demonstrates that Parker's behavior at the time she was apprehended, particularly her cry of rape, was not so "outrageous" because she had been raped in the past and was afraid when Raeburn apprehended her.

¶13 The State responded by arguing that a new factor has not been presented. It pointed out that the presentence investigation report as well as the transcript is replete with Parker's contention that she has a compulsive problem. It argued that the trial court had sentenced Parker properly because a court has wide sentencing discretion. Finally, it countered Parker's claim that she had good reason to cry rape when she was apprehended by restating the fact that Parker refused to stop and wriggled out of her own sweater when Raeburn grabbed hold of the sweater to stop her. The State contended that for the court to consider

Parker's cry of rape in this situation "outrageous" and factor it into its sentencing decision is within the court's discretion to do so.

¶14 Judge Schroeder stated that he had read the sentencing transcript and though "it doesn't read like a novel," it shows that he properly exercised his discretion. He considered the sentencing factors of rehabilitation and protection of the public. He reiterated that he believed that Parker's cry of rape created an "aggravated circumstance" for him to take into account. Additionally, Judge Schroeder agreed with the State that Parker had not presented a new factor to the court in regard to her claim of having OCD. He stated that he did not find Parker's testimony credible in any way. Finally, Judge Schroeder observed that if Parker cannot control her behavior "as she says," then her approach should have been to make a plea in accordance with the inability to control her behavior. He then denied Parker's motion for sentence modification. Parker appeals.

¶15 On appeal, Parker argues that "the trial court's erroneous belief that its job was to impose the sentence needed to deter crime by that offender and other offenders tainted the sentencing herein and warrants resentencing."

¶16 Our standard of review is whether the trial court erroneously exercised its discretion. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). We begin with the presumption that the trial court acted reasonably. ***Id.*** The defendant must demonstrate an unreasonable or unjustifiable basis in the record for the sentence. ***Id.*** We will affirm a discretionary decision if the court in fact exercises discretion and the decision is based on the facts in the record and a "logical rationale founded upon proper legal standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Strong public policy

considerations support deference to the trial court's sentencing determination. ***Id.*** at 281.

¶17 The primary factors a court considers in fashioning a sentence are the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Iglesias***, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994). The weight of the factors is within the circuit court's discretion. ***Id.*** Both rejection of probation and imposition of a particular sentence may be based on any and all of the three primary factors after all relevant factors have been considered. *See* ***Krueger***, 119 Wis. 2d at 336-37.

¶18 A court may exceed its discretion when it places too much weight on any one factor in the face of contravening considerations, or when the sentence is so excessive 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). However, the weight to be accorded to particular factors in sentencing is for the trial court, not the appellate court, to determine. ***In re Felony Sentencing Guidelines***, 120 Wis. 2d 198, 202, 353 N.W.2d 793 (1984). Thus we may not substitute our judgment or preference for a sentence merely because, had we been in the trial court's position, we would have imposed a different sentence. *See* ***McCleary***, 49 Wis. 2d at 281.

¶19 Parker claims that Judge Schroeder's imposition of the maximum sentence was not the product of proper individualized sentencing. She contends that Judge Schroeder did not properly exercise his discretion because both at sentencing and in postconviction proceedings, he expressed his belief that his job is to select a sentence to best deter the offender and others from committing the crime. In short, Parker argues that this belief is tantamount to proof that Judge

Schroeder gave too much weight to the sentencing factor of deterrence.[2] We are unpersuaded.

¶20 Our review of the record reveals that Judge Schroeder properly considered all relevant factors. This is true despite Judge Schroeder's sentencing remarks revealing a belief that his job is to select a sentence to best deter the offender and others from committing the crime. This belief does not constitute a misuse of discretion as long as the record shows that the court considered all three primary sentencing factors in sentencing the defendant. In addition to the three primary sentencing factors, the trial court may consider other factors, including: a past record of criminal offenses; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; and the rights of the public. *See* ***Krueger***, 119 Wis. 2d at 336-37.

¶21 We find no indication that the trial court misused its discretion in sentencing Parker. The court had before it the arguments of counsel, an extensive presentence investigation report, and the presence of the appellant, as well as the facts of the crime. In sentencing Parker, Judge Schroeder recapped the evidence and then considered the three primary sentencing factors. First, with regard to the gravity of the offense, he believed the offense to be serious because not only was Parker a habitual criminal but she was also willing to make the "outrageous claim"

[2] Parker does not renew a new factor argument on appeal.

that Raeburn was trying to rape her in her effort to escape being caught for stealing. Second, with regard to Parker's character and rehabilitative needs, Judge Schroeder remarked that although Parker had completed many rehabilitation programs, she continued to choose "the corrupt route." He mentioned that if Parker does have a diminished capacity, as she claims, to the extent that she does not even realize the wrongfulness of her stealing, "then it's even scarier" because then he has to deal more fiercely with her. Third, with regard to protection of society, he discussed how Parker's actions affected the community. Specifically, he emphasized to Parker that the "message you need to learn and that people who … know of you need to learn that we are not going to tolerate [theft] as a community in this community. We are not going to tolerate it. We want to keep prices low. We want to keep … people employed out there."

¶22 The trial court did not rely too heavily on one factor, nor was it improper for the trial court—having considered the primary sentencing factors—to factor in its belief in the importance of deterrence. The trial court properly evaluated the relevant factors and adequately explained its rationale for imposing the sentence. Parker did not demonstrate an unreasonable or unjustifiable basis in the record for the sentence. *See* ***id.*** at 336. We cannot say that upon these facts imposition of the maximum sentence is so excessive as to "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."[3] *See* ***Ocanas***, 70 Wis. 2d at 185. We therefore

[3] We note that had we been in the trial court's position, we may have chosen a lesser sentence, but this is not relevant to our decision because, as stated earlier, the weight to be accorded to particular factors in sentencing is for the trial court, not the appellate court, to determine. ***In re Felony Sentencing Guidelines***, 120 Wis. 2d 198, 202, 353 N.W.2d 793 (1984). Thus, we may not substitute our judgment or preference for a sentence merely because, had we been in the trial court's position, we would have imposed a different sentence. ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

conclude that the trial court did not misuse its discretion in refusing to modify Parker's sentence.

By the Court.—Judgment and order affirmed.

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