

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 26, 2003**

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. 03-0595-CR**

**Cir. Ct. No. 02CF000004**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT FEINER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Clark County:  
JON M. COUNSELL, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Robert Feiner appeals from a judgment convicting him of second-degree assault of a child. The issue is whether the trial court properly exercised its sentencing discretion. We affirm.

¶2 The State charged Feiner with repeated sexual assaults of a child, as a person responsible for her welfare. The assaults allegedly occurred over approximately eighteen months, while the victim was fourteen and then fifteen years old. Pursuant to a plea bargain, Feiner entered a guilty plea to one count of second-degree sexual assault of a child. The trial court accepted the plea, and sentenced Feiner to five years of initial confinement followed by seven years of extended supervision.

¶3 At the time of sentencing, Feiner was sixty years old. He had no criminal record. Feiner's admitted sexual contact with the victim included a few instances when he performed oral sex on her, and numerous instances of fondling the child's breasts and genitals. There was no allegation that sexual intercourse ever occurred, and no allegation that Feiner ever used physical force on the victim. Feiner was a friend of the victim's family, and the victim spent much time with Feiner and his wife, and often stayed with them. She was experiencing a number of adjustment problems during this time, and Feiner played the role of counselor to her. The presentence investigation reporter recommended probation, primarily on the determination that Feiner posed a low risk of reoffending.

¶4 In sentencing Feiner to prison, notwithstanding the PSI recommendation, the trial court noted the victim's vulnerability and dependency on Feiner; his betrayal of her and her family's trust; the long-term harmful effects on the victim's emotional and psychological state; and the manipulation and grooming Feiner used to initiate and maintain the sexual contact over a long period of time. In mitigation, the court considered the absence of a criminal record, the absence of physical coercion, Feiner's remorse, and the PSI recommendation. On balance, however, the trial court concluded that Feiner

committed a very serious offense, and that probation would unduly depreciate its seriousness. The court summarized:

Probation was a consideration here as the agent's report pointed out. However, I think from what I have outlined, I think greater weight needs to be placed on the circumstances of what occurred here and how it occurred, the effect that it has had, and the seriousness of what occurred in this situation. And that is why probation is not warranted in this case.

On the other hand, this is not a situation, either, where the maximum potential prison sentence is warranted given Mr. Feiner's age, the other things that have occurred here, the other consequences of this both in the community and otherwise. The amount of time involved that I have set forth I think is an adequate reflection of these issues, provides an adequate level of punishment, and adequately will serve to protect the public.

Feiner contends on appeal that the trial court failed to adequately explain its reasons, and failed to give adequate consideration to mitigating factors.

¶5 To obtain appellate review of a sentence, as a matter of right, the defendant must first move for sentence modification under WIS. STAT. RULE 809.30 (2001-02).<sup>1</sup> *State v. Scaccio*, 2000 WI App 265, ¶4, 240 Wis. 2d. 95, 622 N.W.2d 449. Feiner did not do so. That fact alone is grounds to affirm. However, to avoid any further proceedings on the sentencing issue, we also address the merits.

¶6 Sentencing lies within the trial court's discretion. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In exercising that discretion, the trial court must give primary consideration to the gravity of the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

offense, the character and rehabilitative needs of the offender, and the need to protect the public. See *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). However, the weight given each of these factors lies within the trial court's discretion, and the court may base the sentence on any or all of them. See *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). We will affirm an exercise of sentencing discretion if the record shows that the court examined the facts and articulated its reasons for the sentence, using a demonstrated rational process. See *State v. Spears*, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988). There is a strong public policy against interfering with the trial court's sentencing discretion, and we presume that the trial court acted reasonably in sentencing the defendant. See *Echols*, 175 Wis. 2d at 681-82.

¶7 The trial court adequately explained its reasons for the sentence. The sentencing court should explain the reasons for the sentence in order to facilitate review, to allow public understanding of the sentence, and to focus the trial court's attention on the appropriate factors. See *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Here, the trial court left no doubt why it imposed a substantial prison sentence: Feiner's manipulation and betrayal of a troubled adolescent and her family, and the emotional and psychological effect on the victim. The court also explained why the seriousness of the offense and its impact outweighed the mitigating factors Feiner presented, and explained why the public needed the protection of a prison sentence notwithstanding the PSI's low risk assessment. While Feiner might take issue with the court's reasoning, he cannot plausibly contend that the court did not sufficiently articulate that reasoning.

¶8 The court reasonably chose to discount Feiner's mitigating circumstances in view of the seriousness of the crime. The supreme court has

stated that an erroneous exercise of discretion may occur when the trial court places too much weight on one factor in the face of other contravening circumstances. *Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975). However, as this court has noted many times, the weight given any one factor is particularly within the trial court's wide discretion. See *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). In this case, we conclude that the trial court did not give too much weight to the seriousness and the effect of Feiner's illegal conduct. The court's decision to weigh heavily those factors fell within its wide discretion in the matter.

*By the Court.*—Judgment affirmed.

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

