

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2011

A. John Voelker
Acting 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. 2010AP3110-CR

Cir. Ct. No. 2009CF4286

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JACK A. KASPRZAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jack A. Kasprzak appeals from a judgment of conviction and a postconviction order denying sentence modification. He challenges the circuit court's exercise of sentencing discretion. We affirm.

I.

¶2 Early one morning, Kasprzak went to the home of Janet Kasprzak, his estranged wife, and demanded that she let him in. When she did not comply, he opened fire with an assault rifle. Dozens of bullets shattered windows and penetrated the doors and walls of her home and of houses nearby. Fortunately, no one suffered serious injury. Kasprzak fled the scene, but police located him a few blocks away and he immediately surrendered. The State charged him with three counts of first-degree recklessly endangering safety and three counts of endangering safety by reckless use of a firearm. He pled guilty as charged, and the circuit court imposed an aggregate term of twenty-four years of imprisonment, bifurcated as fifteen years of initial confinement and nine years of extended supervision.

¶3 Kasprzak moved for sentence modification, emphasizing some of the facts that he highlighted at the sentencing hearing. He reminded the circuit court that he suffers from cirrhosis of the liver as a result of his chronic alcoholism, that he requires a liver transplant, and that his life expectancy is short. The circuit court denied relief. Kasprzak appeals, raising a single issue, namely, whether the circuit court properly exercised its sentencing discretion in light of his deteriorating health and diminished life expectancy.

II.

¶4 As Kasprzak recognizes, our standard of review is deferential. We review a circuit court's sentencing decision for an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. We have a “duty to affirm the sentence on appeal if from the facts of record it is

sustainable as a proper discretionary act.” *State v. Berggren*, 2009 WI App 82, ¶44, 320 Wis. 2d 209, 239, 769 N.W.2d 110, 124 (citation omitted).

¶5 A sentencing court must consider the three primary sentencing factors of “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, 606, 712 N.W.2d 76, 82. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *Gallion*, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d at 558 & n.11, 678 N.W.2d at 207 & n.11. The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 237, 688 N.W.2d 20, 26.

¶6 The circuit court must “specify the objectives of the sentence on the [R]ecord. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207.

¶7 Kasprzak concedes that the circuit court considered the mandatory sentencing factors and selected appropriate sentencing objectives. We briefly review those components of the sentencing proceeding here.

¶8 When discussing the gravity of the offense, the circuit court stated that Kasprzak “created a war zone” and that the hail of penetrating gunfire on a residential street “could have killed three people or more.” The conduct was further aggravated because Kasprzak, a retired police officer, fired numerous shots into the door of Janet Kasprzak’s house and blocked her escape. Therefore, “she

crawled out the bathroom window,” and as she did so “the toilet in the bathroom ... shattered into dozens or hundreds of pieces” from the gunfire.

¶9 The circuit court considered Kasprzak’s character, taking into account the numerous letters submitted by the Kasprzaks’ neighbors and acquaintances. The letters reflected, in part, that Kasprzak had an “unhealthy desire to be with Janet [Kasprzak]” and that he had become “more and more controlling, jealous, potentially dangerous and somewhat irrational” as the years passed. The circuit court also noted Kasprzak’s past acts of domestic violence.

¶10 The circuit court discussed the need to protect the public, stating that Kasprzak’s actions in this case “were so dangerous and so aggravated that basically everyone in the vicinity ... random citizens, were in grave danger.” The circuit court found that Kasprzak posed a particular risk to Janet Kasprzak and to anyone who might inadvertently “stumble upon” a future confrontation between Kasprzak and his estranged wife.

¶11 The circuit court found that the most important sentencing goal was “protecting the community [from] the danger” Kasprzak presented. The circuit court also determined that Kasprzak must be punished for his “potentially lethal” behavior.

¶12 Kasprzak nonetheless challenges the circuit court’s exercise of sentencing discretion, emphasizing his poor health and reduced life expectancy. We reject his contentions.

¶13 The circuit court gave extensive consideration to Kasprzak’s medical condition and its likely effect. Early in the sentencing remarks, the circuit court noted that:

the health issues that Mr. Kasprzak has suffered in the last number of years[] includ[e] a stroke within the last few years, 2007 or 2008[.] [T]here [are] certainly some other issues including[] high blood pressure, those kind of issues. Most importantly, Mr. Kasprzak presents to the [c]ourt as a result, it appears, of years of drinking and alcoholism as one who is suffering from cirrhosis of the liver as noted too in a report, in the PSI, by defense counsel. Mr. Kasprzak has been in need of a transplant for a period of time.

¶14 Kasprzak believes that the circuit court should have viewed his poor health as a mitigating factor. “Whether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case.” *State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729, 733 (Ct. App. 1992). The decision rests in the circuit court’s discretion. *See id.*, 172 Wis. 2d at 267, 493 N.W.2d at 734.

¶15 In this case, the circuit court explained that it viewed Kasprzak’s medical condition as increasing his risk to reoffend. Relying on the observation of a defense psychologist that Kasprzak’s manner appeared “fatalistic,” the circuit court stated:

I think that Mr. Kasprzak, knowing he was not doing well, knowing he was suffering from serious effects of alcoholism, effects brought on by his own choices, knowing that he is diagnosed with cirrhosis of the liver, knowing that he may have a shorter period of time to live, maybe a very short period of time to live, Mr. Kasprzak engaged in a behavior that was somewhat fatalistic. I’ll take out Janet Kasprzak possibly take her out and kill her, because I’ll die shortly anyway. If I die in the next two months, six years, or nine months in a prison cell or in custody, what’s the difference? I’m going out and [taking] not only myself but somebody else out.

The circuit court therefore concluded that “if [Kasprzak] were released any [time] in the near future ... he would attempt this kind of behavior again and [Janet] Kasprzak could be killed. Period.”

¶16 The circuit court may base a sentence on inferences reasonably derived from the Record. *See Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d at 549–550, 678 N.W.2d at 203. Here, the circuit court found that Kasprzak’s poor health and reduced life expectancy were part of the constellation of factors that made him “incredibly dangerous,” particularly to Janet Kasprzak. The inference is a reasonable one and we will not disturb it.

¶17 Although Kasprzak believes that his poor health and accompanying diminished life expectancy warrant less confinement than the circuit court imposed, the circuit court concluded that those factors increased the need to confine him. He is not entitled to relief merely because the circuit court did not assess the sentencing factors in the way that he would have preferred. *Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26.

By the Court.—Judgment and order affirmed.

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

