**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 25, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal Nos. 04-0859-CR**
**04-0860-CR**
**04-0861-CR**
**04-0862-CR**
**04-0863-CR**

**Cir. Ct. Nos. 02CF002051**
**02CF001962**
**02CF001444**
**02CM001098**
**02CM002559**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEONDRE J. KELLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM and JAMES L. MARTIN, Judges.[1] *Judgments affirmed; order reversed and cause remanded with directions.*

[1] The Honorable Paul B. Higginbotham presided over the guilty pleas and the sentencing. The Honorable James L. Martin presided over and denied Kelley's motion for modification of his sentence.

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

¶1 CURLEY, J. Deondre J. Kelley appeals the judgments in five separate cases convicting him of two counts of forgery-uttering, two counts of felony bail jumping, one count of misdemeanor bail jumping as a habitual criminal, and two counts of disorderly conduct as a habitual criminal, contrary to WIS. STAT. §§ 943.38(2), 946.49(1)(b), 946.49(1)(a), 947.01 and 939.62(1)(a) (2001-02).[2] He also appeals from the order denying his request for sentence modification. Kelley argues that he should be resentenced because: (1) the trial court erroneously exercised its discretion in fashioning his sentences on its misperceptions concerning the treatment of drug and alcohol addictions, and the length of time such treatments require; (2) the sentences were harsh and unconscionable; and (3) a new factor requires resentencing. Because the trial court's opinions concerning the treatment of alcohol and drug dependencies, and the length of time such treatments require, ran counter to the opinion of the AODA expert witness, who testified at a post-sentencing hearing after the sentencing judge left the circuit court, and the new judge was reluctant to modify the sentences, we conclude that the trial court relied upon incorrect information at sentencing. Consequently, we remand for resentencing. In light of our decision, we decline to address Kelley's other claims. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if a decision on one point disposes of the appeal, the appellate court need not decide other issues raised).

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

## I. BACKGROUND.

¶2 During a seven-month period in 2002, Kelley was charged with cashing two forged money orders, obstructing an officer by giving a false name, and engaging in two heated arguments—one over the use of a friend's cell phone, and another with a friend's apartment manager—leading to two disorderly conduct charges. Kelley was also charged with numerous counts of both felony and misdemeanor bail jumping after he failed to come back to court for scheduled court appearances and violated the terms of his bail when he was arrested for new crimes.

¶3 As the result of a plea bargain, Kelley pled no contest to eight of the pending charges. At sentencing, the trial court told Kelley that it was fashioning his sentence, in part, to treat Kelley's alcohol and drug abuse problems. The trial court advised Kelley that only twenty percent of people addicted to crack cocaine make a successful recovery, that Kelley was getting a long sentence essentially to allow time for his cravings for alcohol and drugs to dissipate, and the trial court believed that a long prison sentence would ensure his treatment success.

¶4 Kelley received a sentence of six years of confinement and four years of extended supervision on each count of forgery-uttering, to be served concurrently. On the felony bail jumping charges, he received a sentence of two years of confinement and three years of extended supervision on each count, to be served consecutively to the forgery sentences, but concurrent to each other. Finally, on each of the disorderly conduct as a habitual offender charges and the remaining bail jumping charge, he was given a one-year sentence, to be served concurrently with the felony bail jumping charges.

¶5 Kelley filed a postconviction motion seeking resentencing, at which time he called Todd Zangl, a Certified Alcohol and Drug Abuse Counselor III,[3] to testify. Zangl, previously a probation and parole officer who had also worked at an outpatient mental health and alcohol and drug abuse clinic, testified that he had completed an AODA assessment of Kelley. Zangl explained that Kelley's treatment needs were classified as being a level five, which generally means that an outpatient program would be appropriate. Zangl also contradicted several of the sentencing court's premises for giving Kelley long sentences. A new judge, having recently been appointed to replace the original sentencing judge, presided over the postconviction motion. The judge expressed his reluctance to modify the sentence, concluding the sentences were not harsh or unconscionable. Although not addressing the remaining arguments, the judge implicitly denied Kelley's arguments that resentencing was required based on the sentencing court's misperceptions of what drug and alcohol treatment was optimal for Kelley and that a new factor had been established.

## II. ANALYSIS.

¶6 It is well-settled that a trial court exercises discretion at sentencing. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. This court will uphold a sentence unless the trial court erroneously exercised its discretion. ***Id.*** We presume the trial court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. *See*

[3] Zangl testified that there are three levels of certified counselors: (1) Registered Alcohol and Drug Abuse Counselor; (2) Certified Alcohol and Drug Abuse Counselor II; and (3) Certified Alcohol and Drug Abuse Counselor III. The third level is the highest in terms of alcohol and drug abuse counselors.

***id.***, ¶¶17-18. Public policy strongly disfavors appellate court interference with the sentencing discretion of the trial court because that court is best suited to consider the relevant factors and the defendant's demeanor. *See* ***id.***, ¶18. However, the "sentence imposed in each case should call for the minimum amount of custody or confinement [that] is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶23 (citation omitted).

¶7 Rehabilitation of a defendant is a proper objective for a sentence, ***id.,*** ¶40, but a defendant also has a due process right to be sentenced on the basis of accurate information, ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). "However, a defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***Id.***

¶8 At sentencing, the trial court advised the parties that he was writing notes during the sentencing arguments, one of which said that, based on research, it "'takes five years to get rid of the cravings from cocaine.'" Later, when discussing the serious problems that alcohol and cocaine can cause an abuser, the trial court observed that it was familiar with research regarding drug and alcohol treatment due to the problems encountered by some family members, and remarked that "[t]he odds of getting off this stuff are about 20 percent." Finally, in explaining Kelley's sentences, the trial court acknowledged that its sentences were motivated by a desire to get drug and alcohol treatment for Kelley, and remarked:

> In addition, I've also got to think, Mr. Kelley, about how long it's going to take for the cravings to stop. I am interested in trying to help you get off of the drugs and the alcohol, but it's going to take a while.
>
> ….
>
> Lastly, Mr. Kelley, and I really want you to listen up. There's going to be days, and maybe even you feel this now, you think that I've been unjust or extreme. But you are absolutely a serious drug abuser and you are an absolute alcoholic; it takes a very long time to get off of these things. And that is why I have taken you off the street for a long time, because I'm going to force you into that position, such that by the time you get out, and I have even structured in things in such a way that you, once you get out, you get off of this stuff and move on in your life in a positive way.

¶9 At the postconviction motion, Zangl, the expert witness called by the defense, contradicted several of the beliefs expressed by the trial court regarding drug and alcohol treatment. Zangl explained that treatment was best when it occurred outside a prison setting:

> Q. Now, is there any advantage to dealing with the craving … in the outside world or the real world?
>
> A. I think in any kind of treatment approach there's an advantage to dealing within the real world, so to speak, in a less artificial setting, whether it's alcohol and drug abuse dual, what have you.
>
> Q. What is the advantage?
>
> A. Well, the advantage is that people are dealing with real life situations, they're dealing with real life stressors, they're dealing with real life family members, bills, jobs, coworkers, bosses, those kinds of things that, you know, the institution often times, other than deal with the institutional setting itself, you know, [they're] insulate[d] from that. Making decisions, you know, and in the institution we, for better or worse we make decisions for people and we get them to rely on somebody making decisions for them. One of the key components of

> treatment in the outside is teaching people how to make decisions, how to make right decisions.

Commenting on the deleterious effects of long sentences in the context of drug treatment, Zangl said:

> From just a treatment rehabilitation standpoint, it depends upon what you say is a long sentence. You know, you get to a point of the law of diminishing return[s].
>
> Q. Say an eight year[] prison sentence?
>
> A. I think there you've gotten into the law of diminishing returns. By the time they get into treatment, they've forgotten, they've removed themselves from the using behavior and so the treatment that actually is given to them does not have the same kind of effect as if it's closer to when they were actually using.

¶10 Zangl also explained why it was better to have treatment sooner rather than later:

> The benefits of having treatment sooner is one of the things that I always talk about with individuals [because you] remember the pain, you know, remember the suffering because of your use whatever that suffering was. And people tend to remember the pain when they're closer to it. When we get farther away from using, when individuals get farther away from using, instead of awfulizing [sic] the use, they almost … romanticiz[e] … the use. You know, it becomes the war stories the farther we get removed from it, because it's I remember when it did that, or did that. So there's a real benefit of striking when the iron is hot so to speak.
>
> ….
>
> A. The ideal would be, you know, somebody is incarcerated, they're punished for their offense, it's immediate; they get into treatment fairly soon, go through that treatment process and then can be released into a community setting, halfway house, pre-release center, still be involved in treatment, get set up with an aftercare program in the institution, be monitored, you run samples, what have you. That's the optimum.

¶11 Zangl also addressed the issue of "cravings":

> Q. Is it realistic to think that you can incarcerate someone long enough to get rid of all the cravings?
>
> A. Not based on my experience of talking to individuals who have had cravings many years after they have had sobriety.

When asked how long it took to predict the success of drug and alcohol treatment, Zangl offered the following:

> Well, the longer somebody maintains their sobriety, the better chance it is that they will maintain their sobriety. It seems like a trite statement, but it really isn't. But there becomes again where what period of time is that, and most individuals, the DSM IV, AA kind of in a way, because the emphasis on the one year and it varies if somebody maintained their sobriety for one year. It's, the chances are fairly significant that they'll maintain their sobriety, not 100 percent, probably not even 80 percent or 75 percent, but certainly more significant than somebody who has been sober for three or six months. A DSM IV, I mean they classify sustained full remission as being one year.

¶12 As is obvious from the excerpts, the expert witness, who had years of experience in working with drug- and alcohol-addicted incarcerated persons and who had conducted an assessment of Kelley's needs in this area, did not share the sentencing court's opinions concerning several key aspects of treatment. Zangl believed that the optimal program for Kelley was for him to receive immediate treatment rather than wait for treatment towards the end of his seven-year sentence, as the chance for success was best when treatment began immediately, and long sentences such as Kelley's are counter-productive to successfully treating drug and alcohol addictions. Zangl believed that sobriety of one year was a good indicator of success—not five years, as expressed by the sentencing court, and noted that Kelley qualified for outpatient treatment, not the intensive treatment

programs available in prison. Zangl also did not believe you could incarcerate someone long enough for the cravings to completely dissipate.

¶13 While a trial court is not "bound by the opinion of an expert[, and] can accept or reject the expert's opinion[,]" ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999), here, the sentencing court never heard the expert's contrary opinions. Further compounding the problem was the post-sentencing court's reluctance to change the sentences imposed by the earlier court:

> But my main thrust, with respect to your motion is, is that I don't believe that based on what my role is and my station with respect to [the sentencing court], that I am an appropriate body to upset his determination.

Consequently, the postconviction court never addressed whether the sentencing court relied on inaccurate information or whether a new factor had been proved. Kelley has not had the opportunity to present the expert's testimony to a sentencing judge who has the obligation to actually sentence Kelley. The post-sentencing judge's only role was to decide whether to modify the original sentences. Thus, Kelley has met his burden of showing that the trial court sentenced him on what may well have been inaccurate information and that the trial court relied on this possibly inaccurate information at sentencing. Consequently, we believe Kelley is entitled to provide this information to the sentencing judge. Therefore, we remand this case to the trial court for resentencing.

*By the Court.*—Judgments affirmed; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.