

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2004

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 Nos. 04-1708-CR
04-1709-CR
04-1710-CR
04-1711-CR
04-1712-CR**

**Cir. Ct. Nos. 03CM002879
03CM003007
03CM003129
03CM003658
03CM004583
03CM005985**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HAROLD RICHARD NERO,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Harold Richard Nero appeals the six judgments containing the twenty-one criminal charges entered against him after he pled guilty.² He also appeals from the orders denying his postconviction motions.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

² All of Nero's cases were consolidated for appeal purposes.

Nero was charged with disorderly conduct, obstructing an officer, battery, intimidation of a victim, seven counts of violation of a domestic abuse injunction, and ten counts of misdemeanor bail jumping. All of these offenses are a result of Nero's conduct over a period of several months after his wife informed him that she wanted a divorce. Nero claims that his sentences, that amounted to eleven years and three months of incarceration, were unduly harsh and excessive. This court disagrees and affirms.

I. BACKGROUND.

¶2 On April 6, 2003, Nero was charged with disorderly conduct after he followed his wife into a Blockbuster store and allegedly threatened to kill her. Nero's wife obtained a domestic abuse temporary restraining order on April 8, 2003, against Nero, which remained in effect until a domestic abuse injunction was entered on April 22, 2003. The injunction expires on April 22, 2007. The original order and the injunction required Nero to stay away from his wife and her residence, and to refrain from having any contact with her.

¶3 On April 13, 2003, Nero was charged with battery, one count of bail jumping, and a violation of the domestic abuse restraining order after he entered his wife's car in the parking lot of a Rocky Rococo restaurant on April 9, 2003, grabbed her arm, and pulled her hair while screaming at her. On April 15, 2003, Nero again violated the temporary restraining order and the conditions of his bail in the earlier cases. He was charged with two additional counts of violation of a domestic abuse restraining order and two counts of misdemeanor bail jumping. These charges were the result of Nero going into an apartment where his wife was babysitting and asking her not to appear for the upcoming court date or call the

police. Shortly thereafter, he called her at the apartment and left a message. He also told her that he loved her, wanted to make everything “right,” and needed to know where to make the house and trustee payments.

¶4 On April 30, 2003, Nero was charged with one count of violating a domestic abuse injunction and three additional counts of misdemeanor bail jumping and one count of intimidation of a victim. These charges were filed after he entered the family home that he had been ordered to stay away from and spoke to his wife, urging her to not go to court, and telling her she had nothing to be afraid of.

¶5 On May 30, 2003, while incarcerated at the House of Correction, Nero left several messages on his wife’s phone, had relatives call her on his behalf, and sent her two letters. Because of this conduct, Nero was charged with two more counts of violation of the domestic abuse injunction. Several months later, on July 27, 2003, Nero was charged with four more counts of bail jumping, one count of violation of a domestic abuse injunction, and one count of obstructing an officer. All these counts were charged with the habitual criminality penalty enhancer, pursuant to WIS. STAT. § 939.62. These new charges were filed after Nero went to his wife’s home and she fled out of fear. When she re-entered the home at the urging of the police, Nero, who had been hiding behind a door, chased and grabbed his wife. He later refused a police officer’s order to place his hands behind his back, and instead, begged the police to shoot him.

¶6 Nero pled guilty to all of the charges and the trial court sentenced him to a cumulative term of eleven years and three months of incarceration, to be followed by five years of extended supervision. During the sentencing, Nero

became upset, disrespectful to the trial court, and swore. Later, he brought a postconviction motion, and, at the hearing, apologized for his conduct. However, the motion seeking a modification of his sentences was denied.

II. ANALYSIS.

¶7 Nero claims that the trial court’s sentence was unduly harsh. He concedes that his cumulative sentence was below the maximum possible of twenty-two years and nine months. However, he argues that the trial court did not “state for the record why this lengthy and near-maximum sentence was appropriate.” He points to the fact that the State, when commenting on its recommendation for eleven years in prison, characterized its recommendation as “a bit extreme.” He submits that the trial court failed to consider all the numerous mitigating factors, such as his lack of a serious criminal record, and assigned too much weight to the fact that Nero disregarded numerous court orders and accumulated a great number of offenses. Further, he claims his substance abuse problems contributed to his offenses and he believes that the court did not adequately consider his treatment needs. Finally, he argues that his crimes were not of an aggravated nature, and he was emotionally upset about his wife’s decision to divorce him. This court is not persuaded.

¶8 This court will uphold a sentence unless the trial court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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. *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. *Id.*, ¶18.

¶9 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. “[Trial] courts are required to specify the objectives of the sentence on the record. 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.” *Id.*, ¶40.

¶10 An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. In addition, to properly exercise its discretion, a sentencing court must provide a rational and explainable basis for the sentence. *Id.*, ¶39. It must specify the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.*, ¶40. It must identify the general objectives of greatest importance, which may vary from case to case. *Id.*, ¶41. The trial court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. *Id.*, ¶42. Similarly, it must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the sentencing decision. *Id.*, ¶43.

¶11 In addition to the three primary sentencing factors, other relevant factors that the court may consider include: (1) the defendant's past record of

criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character, and social traits; (4) the presentence investigation; (5) the nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background, and employment record; (9) the defendant's remorse and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *Harris v. State*, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). The court must also consider any mitigating or aggravating factors applicable under the circumstances. *Gallion*, 270 Wis. 2d 535, ¶43. The circuit court need discuss only the relevant factors in each case. *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. *State v. J.E.B.*, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991).

¶12 A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual, and disproportionate to the offense committed “as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶13 Here, the trial court followed the *Gallion* dictates. At both the sentencing and the postconviction motion hearing, the trial court explained its reasoning. The trial court stated that Nero was a very dangerous person simply because he did not care what happened to him when he was committing these acts. The trial court explained that certain factors present in this case pointed to Nero's potential to be extremely dangerous:

We have some factors that ... [those] working in D.V. court and in other courts called lethality factors, [-first factor] recent separation of a couple.

I had in front of me threats of homicide or suicide of the abuser, I had that in front of me, [fantasies] about homicide or suicide. You had actual[ly] request[ed] of the police to shoot you.

You're talking to Mrs. Nero about killing yourself and killing her.

Stalking behavior by the abuser, [it] appear[s] that I have that in front of me.

Preoccupied or obsessed with the victim by the abuser. Clearly that was before [me], even your attorney said you had a hard time letting go.

Ownership of the victim. You're jealous, you were jealous of your step-brother, you thought something was going on between your wife and your step-brother.

Imagin[ing] victims having affairs with others, you stand trial [sic] of the victim.

Use of drugs, depression. Those are at least seven or eight factors that I consider in determining how dangerous a person you are; and yes, without treatment, yes, I believe, as Ms. Nero believes, that you're going to harm her, that you're going to go after her and that's what you showed me, that's the picture that I had in front of me.

¶14 The trial court also remarked that Nero's criminal actions were escalating in terms of seriousness. It observed that Nero's first criminal offense was disorderly conduct when he created a disturbance at a video store, but by the time of Nero's last offense, he had battered and intimidated his wife, and in the last incident, he showed a complete lack of control by chasing and grabbing his wife inside her home with the police standing outside the door. Later that evening, he obstructed an officer while begging the police to shoot him.

¶15 The trial court also discussed the debilitating effects Nero's conduct had on his wife. Mrs. Nero testified that she was extremely fearful of him and her fears were grounded in his persistent contact and numerous threats to kill her.³ Given his conduct, the trial court noted that Nero was lucky he had not been charged with felony stalking.

¶16 The trial court also discussed the harm Nero's actions caused the community. The trial court believed that Nero never had any intention of following any court orders. The trial court felt that Nero's total disregard of court orders could not be tolerated, as his conduct was an assault on our criminal justice system. Additionally, it stated that because Nero committed some of these assaultive offenses in public, he posed a danger to the entire community. The trial court was also struck by the sheer number of charges that Nero collected, and noted that, had the district attorney chosen to charge every single offense, there would be another eighty charges. The trial court stated that it understood Nero had substance abuse issues, but said Nero needed to be in prison to ensure that he had these problems under control. Further, the trial court advised Nero that he could have fined him, but chose not to do so because of Nero's financial problems.

¶17 Addressing Nero's lack of a serious criminal record, the court noted that Nero did have a prior criminal record, but it was not serious and occurred years earlier. However, in the court's mind, this factor was diminished by the fact

³ Nero suggests his wife was not frightened because she visited him in jail, but she explained to the trial court that her visits were driven by her need for information concerning the divorce, an impending bankruptcy and tax problems. She also explained that her visits were a way to protect herself by mollifying Nero, since the authorities appeared powerless to stop him.

that Nero had had similar complaints made against him by his wife in the past that were never prosecuted.

¶18 Finally, Nero’s conduct at the sentencing, when he made what the State termed Nero’s “vulgar and defiant retorts” to the trial court, proved another reason for the trial court’s sentences. By acting in this fashion, Nero revealed himself as totally lacking remorse for his actions and having no respect for the law.

¶19 Consequently, ample reasons were given by the trial court for Nero’s sentences. While the trial court’s sentences were severe, Nero’s conduct called for severe sentences. Thus, the trial court properly exercised its discretion. In light of the above-mentioned factors, the trial court’s sentences were not excessive, harsh, or disproportionate to the offenses. As a result, the trial court is affirmed.

By the Court.—Judgments and orders affirmed.

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

