COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1709-CR **Cir. Ct. No. 2010CM273**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK W. SCHEUERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Frederick W. Scheuers appeals from a judgment of conviction entered on his no contest plea for criminal damage to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

property as a party to the crime. Scheuers additionally appeals from a trial court order denying his motion for postconviction relief. He contends on appeal that the trial court erroneously exercised its discretion at sentencing by failing to consider the appropriate sentencing factors. We reject Scheuers' argument. We affirm the judgment and order.[2]

BACKGROUND

¶2 Scheuers was charged with party to the crime of criminal damage to property for conduct occurring on September 5, 2010. The incident report attached to the criminal complaint indicates that Scheuers and another individual entered Stell's Piggly Wiggly in New Holstein and were observed "damaging/tampering with meat packages in the fresh foods section." A total of forty packages of meat ranging from porterhouse steaks to cube steaks were damaged and rendered unusable "by fingers being poked through the packaging and making contact with the fresh meat." The actions of Scheuers and his companion, which were captured on the store's surveillance camera, resulted in losses of $214.44.

¶3 Although the complaint referenced a violation of food tampering, a Class I felony, Scheuers was charged with, and pled no contest to, damage to property, a Class A misdemeanor. The parties' plea agreement indicates that, if Scheuers agreed to plead no contest and paid restitution "up-front," the State's sentencing recommendation would be ten days in the county jail with work

[2] We note that the Honorable Donald Poppy presided over the sentencing hearing and entered the judgment of conviction. The Honorable Fred H. Hazlewood presided over the postconviction motion proceedings and entered the postconviction order.

release. The plea questionnaire signed by Scheuers indicates that the maximum penalty for criminal damage to property is "a fine of not more than $10,000, or imprisonment for not more than nine (9) months, or both."

¶4 Consistent with the parties' plea agreement, the State recommended "a straight jail sentence of ten days." The court then conducted a thorough plea colloquy during which it informed Scheuers of the maximum penalty for the charged offense and that the court is not bound by the recommendation of the attorneys. Scheuers pled no contest. The court then sentenced Scheuers to seven months in jail with work release.

¶5 Scheuers filed a motion for postconviction relief alleging that the trial court's sentence "amount[ed] to an abuse of Judge Poppy's discretion and is so disproportionate to the offense committed that it shocks public sentiment and violates the judgment of reasonable people." Scheuers noted that the State had "no objection to this matter being brought before this court for consideration." The postconviction court, Judge Fred H. Hazlewood presiding, held a hearing on Scheuers' motion. The postconviction court identified those portions of the record where the sentencing court considered the seriousness of the offense and the danger to the community before determining that the sentencing court "clearly stated the reasons for the sentence imposed." Scheuers' motion was denied. He appeals.

DISCUSSION

¶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, and "[t]he trial court has great latitude in passing sentence[,]" ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). Our review is limited to determining

whether there was an erroneous exercise of discretion. ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). There is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶7 The trial court is to consider three primary factors in passing sentence: (1) the gravity of the offense, (2) the defendant's character, and (3) the need for protection of the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The weight to be attributed to each factor "is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, "[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed." ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). As long as the trial judge exercises discretion and arrives at a sentence within the permissible range set by statute, the court need not explain why its sentence differs from any particular recommendation. ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

¶8 Here, the trial court noted that poking holes in food products is "a very serious crime." The court noted that Scheuers' conduct did not only damage the store, but that members of the public could have become seriously ill if they had purchased food contaminated by bacteria. The court found that Scheuers' behavior was mean and vicious and that "contaminating and messing around with the food supply in the community is a serious offense," a crime against public health and safety. The court told Scheuers that if it could send him to prison it

would. In arriving at the sentence, the court explained that it started at the maximum (nine months) and "knock[ed] a month off because [Scheuers was] honest about it, and … another month off because [Scheuers] paid the restitution." The court sentenced Scheuers to seven months in jail with work release, expressly noting both Scheuers' criminal record and the danger he posed to the community.

¶9 Scheuers acknowledges that the trial court "took into account and properly stated on the record what [it] believed was an appropriate response in addressing the needs for protecting the public, the seriousness of the offense, and acknowledged several mitigating factors." However, citing to ***Gallion***, Scheuers contends that the court failed to address his rehabilitative needs or the possibility of probation. He argues that the postconviction court made the same error. We disagree. While the ***Gallion*** court requires the trial court to set forth its sentencing objectives on the record, it recognizes that the objectives in each case vary; rehabilitation of the defendant is just one possible objective. ***Gallion***, 270 Wis. 2d 535, ¶¶40-41. Furthermore, while the trial court did not expressly address rehabilitation and probation, its consideration of these objectives is implicit in its statement that it was ordering jail time due to Scheuers' criminal record, the seriousness of the offense and the danger posed to the community.

¶10 Next, Scheuers complains that the trial court "spent a significant amount of time, during a relatively short sentencing [hearing], focusing on the unrelated felony offense of tampering with food," WIS. STAT. § 941.325, which requires a showing that, in tampering with the food, the offender intended to cause bodily harm to another. While the trial court did reference food tampering, it did so to underscore the seriousness of Scheuers' conduct and its potential impact on his community. We reject Scheuers' contention that the trial court improperly sentenced him on the elements of that more serious offense, rather than the

misdemeanor offense of criminal damage to property. The record reflects that the sentencing court, considering the sentencing range for the charged misdemeanor offense, exercised its discretion and arrived at a sentence within the range set by statute. *See* ***Mallon v. State***, 49 Wis. 2d 185, 192, 181 N.W.2d 364 (1970). A sentence within the statutory maximum is cruel and unusual and, thus, an erroneous exercise of discretion only where it is so excessive and unusual, and so 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. ***Id.*** While this court may not have arrived at the same sentence, we do not view seven months in jail with work release to be so excessive and disproportionate to the offense so as to shock public sentiment.

CONCLUSION

¶11 We conclude that the sentencing court properly exercised its discretion in arriving at Scheuers' sentence for criminal damage to property. We therefore affirm the judgment of conviction and the order denying Scheuers' request for postconviction relief.

By the Court.—Judgment and order affirmed.

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