

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1705-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**BRADFORD F. LESCHER,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER and KITTY K. BRENNAN, Judges. *Affirmed.*

WEDEMEYER, P.J.<sup>1</sup> Bradford F. Lescher appeals from a judgment entered after a jury convicted him of one count of bail jumping, contrary to § 946.49(1)(a), STATS. He also appeals from the order denying his postconviction motion seeking sentence modification. Lescher claims the trial court erred in imposing a sixty-day electronic surveillance sentence. Because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

## I. BACKGROUND

On January 30, 1993, Lescher was out on bond for charges of the misdemeanor offense of intimidation of a witness, contrary to § 940.42, STATS. One of the conditions of his release was a no contact order, which prohibited him from having any contact with Michael Salick. In defiance of this order, Lescher made a derogatory remark to Salick about Salick's weight gain. As a result, Lescher was charged with one count of bail jumping.

The intimidation of a witness charge and the bail jumping charge were consolidated for trial. A jury acquitted Lescher of the intimidation of a witness charge, but convicted him of bail jumping. He was sentenced to sixty days of electronic surveillance. He filed a postconviction motion seeking sentence modification, which was denied. He now appeals.

## II. DISCUSSION

Lescher claims the trial court erroneously exercised its sentencing discretion in three ways: (1) that it relied on discussions with the jurors which took place after the verdict; (2) that the sentence imposed denied Lescher his First Amendment rights; and (3) that the sentence imposed was excessive and unduly harsh. This court addresses each claim *seriatim*.

In addressing each claim, this court notes that it is bound by the following standard of review. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Echols*, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41 (1993). When sentencing, the trial court must consider the following three factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The significance of each factor, however, in the total sentencing process lies solely within the sentencing court's discretion as demonstrated by the record. *State v. Patino*, 177 Wis.2d 348, 385, 502 N.W.2d 601, 616 (Ct. App. 1993). Moreover, this court will not find that the sentence imposed by the trial court was excessive unless "the sentence 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.” *State v. Dietzen*, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991).

When considering the three primary factors, the sentencing court may also take into account: the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention. *State v. Borrell*, 167 Wis.2d 749, 773-74, 482 N.W.2d 883, 891 (1992).

#### A. *Juror Comments.*

Lescher first complains that the trial court used information from conversations with the jurors in deciding what sentence should be imposed. This court is not persuaded by Lescher's claim. Although the sentencing transcript does demonstrate that the trial court made several references to conversations with the jurors, this court concludes that the sentencing transcript does not support Lescher's claim.

The trial court's initial reference to juror conversations was simply an acknowledgement that it was familiar with the case. The next reference, although more extensive, focused only upon the jurors' comments regarding the evidence relating to the intimidation of witness charge, on which Lescher was acquitted. The trial court's comments observed that the jurors were not persuaded by the evidence supporting the intimidation of witness charge, which led to the acquittal on that charge. Accordingly, even if the juror conversations revealed the nature of the jury's deliberations contrary to § 906.06(2), STATS., and even if the trial court used this information in formulating the sentence, the error was harmless, *State v. Dyess*, 124 Wis.2d 525, 541-42, 370 N.W.2d 222, 231 (1985), because Lescher was not sentenced on the intimidation of a witness charge. He was sentenced only on the bail jumping conviction.

Further, it is within the trial court's discretion to allow jurors to express their feelings regarding sentencing. *State v. Marhal*, 172 Wis.2d 491, 501 n.7, 493 N.W.2d 758, 763 n.7 (Ct. App. 1992). This court again cautions, however, that there are serious concerns with allowing jurors to express their feelings regarding sentencing. See *id.* Based on the foregoing, this court cannot conclude that the trial court's references to juror comments constituted an erroneous exercise of sentencing discretion.<sup>2</sup>

*B. First Amendment.*

Lescher next claims that the sentence imposed violated his First Amendment rights because the sentence would prevent him from protesting at abortion clinics. This court is not persuaded.

In imposing the sentence, the trial court ruled:

[The sentence is] going to prevent you from going to these protests for a period of time. I think you need the time to sit down and think about how you may protest in a way that was envisioned by the constitution and the laws that define First Amendment rights. I think you really need some time to look at your behavior in the context of exercising your freedom.

In addition, the sentencing transcript demonstrates that the limitation on Lescher's First Amendment rights was imposed because of an identifiable link between the protected right and the criminal conduct. *State v. J.E.B.*, 161 Wis.2d 655, 469 N.W.2d 192 (Ct. App. 1991). Accordingly, the trial court was within its discretion in limiting Lescher's First Amendment rights. The identifiable link was the fact that Lescher's criminal conduct occurred while he was protesting at an abortion clinic. If Lescher cannot refrain from committing criminal conduct at such protests, then the trial court is within its discretion to limit his First Amendment rights.

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<sup>2</sup> In addition, this court's review of the sentencing transcripts confirms that the trial court considered the three primary factors in imposing sentence.

*C. Excessive Sentence.*

Finally, Lescher claims the sentence imposed was excessive and unduly harsh. He claims that the comment, which was the basis for the bail jumping charge was brief, that he apologized for making the comment, and that the comment was non-threatening. As a result, he claims that a sixty-day electronic surveillance sentence was excessive. This court does not agree.

This court will not find that a sentence imposed is unduly harsh unless “the sentence 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.” *Dietzen*, 164 Wis.2d at 213, 474 N.W.2d at 756. The sentence imposed in the instant case does not meet this standard. Although this court agrees with Lescher's contention that his criminal conduct was not as serious as other criminal activity that occurs, it nonetheless was a crime. Lescher violated an order of the court. Such conduct cannot and should not be taken lightly. In order to preserve the sanctity of the justice system, citizens must obey orders of the court and those who do not abide by the orders must be punished.

Given this consideration, this court cannot say that a sixty-day electronic surveillance sentence is so excessive and disproportionate to Lescher's violation of the court's order that it shocks public sentiment. Accordingly, this court concludes that the trial court's sentence was not excessive or unduly harsh.

*By the Court.* – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.