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**DISTRICT II**

May 17, 2017

To:

Hon. Kathryn W. Foster  
Circuit Court Judge  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Hon. Ralph M. Ramirez  
Circuit Court Judge  
Waukesha County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2016AP1485-CR                      State of Wisconsin v. Nicole A. Wagester (L.C. #2014CF1176)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Nicole A. Wagester appeals from a judgment of conviction and an order denying her postconviction motion.<sup>1</sup> She contends that the circuit court erroneously exercised its discretion at sentencing. Based upon our review of the briefs and record, we conclude at conference that

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<sup>1</sup> The Honorable Kathryn W. Foster entered the judgment of conviction. The Honorable Ralph M. Ramirez entered the order denying the postconviction motion.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).<sup>2</sup> We affirm the judgment and order of the circuit court.

Wagester was convicted following a guilty plea to first-degree reckless homicide. The charge stemmed from the death of a two-year old child who had been left in her care. According to the complaint, Wagester initially told police that the child had fallen off of a bed and stopped breathing. However, Wagester later admitted to losing her temper and kicking the child in the midsection. The child sustained a severely lacerated liver and died from massive internal bleeding.

For her actions, the circuit court sentenced Wagester to thirty-five years of initial confinement followed by ten years of extended supervision. It also ordered Wagester to “attempt to maintain full-time employment” as a condition of extended supervision. Wagester filed a postconviction motion challenging both the length of her initial confinement and the condition of extended supervision. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court’s sentencing decision because that court is best suited to consider the relevant factors and demeanor of the defendant. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence imposed. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. The primary sentencing factors that a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Ziegler*, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. *Id.*

WISCONSIN STAT. § 973.01(5) permits a circuit court to impose conditions on a defendant's term of extended supervision. "It is within the broad discretion of the [circuit] court to impose conditions as long as the conditions are reasonable and appropriate." *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499. We review such conditions under an erroneous exercise of discretion standard. *State v. Stewart*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165.

On appeal, Wagester contends that the circuit court erroneously exercised its discretion at sentencing. She complains that the court failed to explain its reasoning for sentencing her to thirty-five years of initial confinement. She also accuses the court of using the maximum penalty<sup>3</sup> as a starting point in its analysis and ignoring the recommendations of counsel and the presentence report, which called for a lesser sentence. Finally, Wagester notes that she will be sixty-seven years old when released on extended supervision and submits that it is unreasonable to compel her to work at that age.

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<sup>3</sup> First-degree reckless homicide is a Class B felony with a maximum term of forty years of initial confinement. See WIS. STAT. §§ 940.02(1) and 973.01(2)(b)1.

Upon review of the record, we are satisfied that the circuit court properly exercised its discretion in determining the length of Wagester's initial confinement. Contrary to Wagester's assertion, the court did not use the maximum penalty as a starting point in its analysis. Rather, it recognized that probation was the minimum possible disposition and then explained why, in light of the primary sentencing factors, something near the maximum penalty was necessary. Of particular importance was the gravity of offense. The court emphasized the helplessness of the victim, who could not defend herself against Wagester.<sup>4</sup> This caused the court to exceed the recommendations of both counsel and the presentence report, which it was free to do.

We are also satisfied that the circuit court properly exercised its discretion in determining Wagester's condition of extended supervision. As noted by the State, full-time employment will facilitate Wagester's reintegration into society and ensure that she can pay any restitution or costs that are still outstanding when she is released. Accordingly, the condition is both reasonable and appropriate. Moreover, the court simply required Wagester to "attempt to maintain full-time employment." It was not an absolute order. Thus, if intervening events such as poor health make full-time employment impossible, Wagester will not be required to maintain it.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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<sup>4</sup> The child was suffering from other injuries at the time of her death including a casted broken arm and an untreated broken leg.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*