STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2
Appeal No. 2007AP001504 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS ZARUBA,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE KATHRYN FOSTER, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is controlled by well-settled law and, therefore, neither oral argument nor publication are recommended.

STATEMENT OF THE ISSUE

Whether the trial court abused its sentencing discretion by starting at the maximum sentence and then working backwards for each mitigating factor and, additionally, by failing to place on the record the reasons why the factors considered by the court required the sentence that was imposed.

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

The trial court sentenced the appellant to eleven years in prison following his conviction for second degree sexual assault. This case involved a situation where Zaruba, who was eighteen years old, had a sexual relationship with his fourteen year-old girlfriend. The girl's own mother pleaded with the court to not impose a lengthy sentence on Zaruba.

The trial court abused its sentencing discretion because: (1) The court plainly started at the maximum penalty and worked backwards in arriving at Zaruba's sentence (this is *plain* because it is what the judge said she was doing); and, (2) The court recited the factors that were being considered but never explained why those factors required an eleven year sentence.

When given a chance to do so on Zaruba's postconviction motion for resentencing the trial court tried to explain the comment

that the starting point was the maximum sentence. But the court's explanation is a distinction without a difference. The court wrote that its reference to the maximum penalty as the "starting point" was merely an "objective starting point for what can be a penalty imposed based on legislative determination and categorization of the offense." The distinction, if there is one, is very difficult to grasp.

Additionally, in denying the postconviction motion the trial court again refused to explain why the sentencing factors required the length of sentence imposed. Instead, the trial court simply held that such an explanation was not required by law.

STATMENT OF THE CASE[1]

The defendant, Thomas Zaruba ("Zaruba"), was charged with six counts of second degree sexual assault of a child and one count of intimidation of a victim. (R:1) Zaruba initially entered not guilty pleas to all charges; however, he eventually reached a plea agreement under which he pleaded guilty to one count of second degree sexual assault and guilty to the count alleging intimidation of a victim. In return, the State dismissed and read-in the remaining five counts of sexual assault. (R:21-3, 4)

The criminal complaint alleged that Zaruba, who was eighteen years-old at the time, had sexual intercourse with his fourteen year-old girlfriend, Heather, on numerous occasions. The complaint further alleged that some of the sexual acts were accomplished through intimidation of Heather and, further, that Zaruba warned Heather not to report any of the activity to the police.

The State recommended nine to ten years confinement

1 Because this case was a guilty plea the factual background and the procedural history will be combined.

followed by seven to eight years extended supervision. (R:22-12) Remarkably, the victim's mother told the court that although Zaruba deserved prison for his crimes, nine to ten years was "too much time for a young man to sit for his stupidity." (R:22-11)

At the sentencing hearing Zaruba, through his attorney, denied that he ever used any physical force on the victim.(R:22-4, 5) Zaruba suggested that probation was appropriate but he recognized that a prison sentence was likely to be imposed.

The presentence investigation report detailed Zaruba's extensive criminal record and history of bad behavior going back as far as the fourth grade. Zaruba explained that his record was the result of numerous emotional problems he had, including ADD, and the fact that he never really went beyond the fifth grade in school.

In sentencing Zaruba, the court said, "The nature of the offense, *my traditional place of starting,* Mr. Zaruba, *is with the maximum penalties that the legislature set up*." (R:23-2; emphasis provided)

The court then summarized in fairly great detail Zaruba's record of bad behavior. The court commented on an incident that occurred when Zaruba was in fourth grade where he was disciplined by his school for repeatedly striking an eighth grade girl on the buttocks in what the school characterized as a sexually demeaning manner. *Id*. p. 9. Additionally, the court noted that Zaruba was fired from a grocery store job for being verbally abusive to a customer. *Id.* p. 11

After summarizing Zaruba's bad behavior the court said:

> I agree with the presentence writer's impression that your negative behavior is escalating. It is getting worse. It has got to stop now.
>
> For all these reasons, the court at time time is going to

> impose the following sentence: I'm going to impose a total sentence of 11 years. I'm going to to-- and that's on count one obviously. I am going to direct that four and a half years be initial confinement followed by six and a half years of extended supervision. . .

Id. p. 18

Zaruba timely filed a postconviction motion asking the trial court for a new sentencing hearing on the grounds that: (1) The court abused its sentencing discretion by starting at the maximum sentence and working backwards for each mitigating factor; and, (2) The court never explained on the record the reasons why the sentencing factors considered by the court required the length of sentence being imposed. (R:14)

By memorandum decision and without a hearing the trial court denied Zaruba's motion. (R:15) The court reasoned:

> This court has reviewed the sentencing transcript. While this Court made reference to the maximum penalties when discussing the first category for consideration at sentencing . . . it was done in th context of recognizing the number established by the legislature. It was simply to give an objective starting point for what can be a penalty imposed based on legislative determination and categorization of the offense. Nothing more, nothing less. This Court is well aware that the starting point, or first consideration, for the sentence imposed is probation.

(R:15-1)

Apparently acknowledging that the court failed to set forth any nexus between the factors and the sentence imposed, the court wrote:

> [I]t is this Court's interpretation that *Gallion* makes no such requirement (to set forth a nexus). Instead, the Court highlighted those factors that were both positive and negative regarding Mr. Zaruba, considered the recommendation of the District Attorney, the victim, the defense counsel and the presentence writer in arriving at a decision that incorporates all of those factors. At this juncture this Court is prepared to stand on the record made at the time of the October 16th original sentencing with no need for further hearings.

(R:15-2)

ARGUMENT

I. THE COURT ABUSED ITS DISCRETION IN SENTENCING ZARUBA

Recently, in, ***State v. Taylor***, 2006 WI 22 ¶18 (Wis. 2006) the Court of Appeals reaffirmed the traditional sentencing factors but, in the light of "Truth in Sentencing", emphasized the need for trial courts to do more than to simply recite the facts, to invoke the sentencing factors, and to then decide the sentence. Rather, the trial court must *explain* what factors are being considered and *why* those factors require the sentence being imposed (i.e. to provide the "nexus" between the sentencing factors and the sentence imposed). The court wrote:

> The standards governing appellate review of an imposed sentence are well settled. A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, P17, 270 Wis. 2d 535, 678 N.W.2d 197; see also ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) ("It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed."). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." Id. at 277.
>
> "The sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Borrell***, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992) (citing ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984)). "Therefore, the convicted defendant must show some unreasonable or unjustified basis in the record for the sentence imposed." ***Borrell***, 167 Wis. 2d at 782 (citing ***Harris***, 119 Wis. 2d at 622-23). "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a

different sentence." ***McCleary***, 49 Wis. 2d at 281.

> Furthermore, "[a] trial judge clearly has discretion in determining the length of a sentence within the permissible range set by statute." ***Hanson v. State***, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). "An abuse of this discretion will be found only where 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." (internal citations omitted)

In a concurring opinion in ***Taylor***, Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." ***Taylor,*** 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in ***State v.Gallion,*** 2004 WI 42, (Wis. 2004) "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." ***Gallion***, 2004 WI 42, ¶46 (Wis. 2004)

Additionally, in, ***State v. Gallion***, *supra*, the court made clear that:

> ***McCleary*** further recognized that 'the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.' Id. at 276. This principle has been reiterated in subsequent cases.

A. The trial court's comments make clear that the judge did not impose an individualized sentence that was the minimum necessary under the circumstances; rather, in considering the gravity of the offense the court approached sentencing philosophically.

There are two venerable tenants of sentencing that have been repeatedly reaffirmed by the appellate courts: (1) The court must fashion an individual sentence for each defendant taking into account the personal characteristics of the defendant and the specific facts of the case; and, (2) The sentence imposed must be the minimal amount to accomplish the goals of sentencing. Here, the record demonstrates the that court determined that Zaruba's offense was extremely serious based not on Zaruba's behavior but, rather, based upon the philosophical belief that crimes of this nature are, *ipso facto*, extremely serious because the legislature has created a lengthy maximum sentence. The trial court appeared to start the sentencing analysis at the maximum penalty and then worked backwards.

Here is what the judge said in sentencing Zaruba, "The nature of the offense, my traditional place of starting, Mr. Zaruba, is with the maximum penalties that the legislature set up." (R:23-2)

This is an abuse of sentencing discretion because it is plain that the court's starting point was not the minimum amount of incarceration necessary to punish the defendant. Rather, the court noted that because the maximum amount of prison exposure was in excess of one hundred years that this, and all other such offenses, must be a serious, revolting offense.

Of course, the fact that the maximum prison sentence provided for by the legislature is lengthy does recognize that certain cases of sexual assault of children will demand lengthy prison

sentences. It is not logical, though, to reason that because the maximum possible penalty is very high that *all* violations of the statute are extremely serious offenses demanding nearly the maximum penalty.[2] To approach sentencing in this way is inappropriate because it determines the "seriousness of the offense" based not on the defendant's individual behavior in the present case but, rather, upon some misapprehension on the part of the trial judge that the legislature has declared that *all such* cases are extremely serious.[3] Such an approach invokes the idea of "zero tolerance" in which all violations of a rule, no matter how trivial the violation, result in the same (usually strict) penalty. A "zero tolerance" approach to sentencing is the very opposite of the exercise of discretion- it removes all discretion from the analysis.

The trial judge did make an attempt to individualize the seriousness of the offense here. The judge said:

> Now there are observations here by the presentence writer that you do have anger management issues, and I think that was the observation of Ms. Loose as well that you apparently to this point have no addressed appropriately and that's just one, I think, small indication and it also because of that, frankly, court give more credence than not to the representation that Heather at least at some point was fearful of certain things from you . . .

Id. p. 12

Unfortunately, the judge did not set forth even one example of how Zaruba used physical force, psychological coercion, or verbal threats to accomplish his crime.

In the memorandum decision denying Zaruba's postconviction motion the trial court attempted to explain the comment that the court's

2 Any more than it would be logical to argue that because the legislature did not create a minimum mandatory sentence (i.e. probation is permitted) that sexual assault of a child is not considered to be a very serious offense.

3 This is a misapprehension because, as mentioned above, the fact that some such cases may require forty years in prison does not necessarily mean that all such cases require such a lengthy prison term.

"traditional starting point" was the maximum sentence. The court wrote:

> While this Court made reference to the maximum penalties when discussing the first category for consideration at sentencing . . . it was done in the context of recognizing the number established by the legislature. It was simply to give an objective starting point for what can be a penalty imposed based on legislative determination and categorization of the offense. Nothing more, nothing less.

This appears to be a distinction without a difference. Upon reading the court's memorandum decision one is prompted to ask what is the difference between "starting at the maximum and working downward (as alleged by Zaruba)" and giving "an objective starting point for what can be a penalty imposed based on legislative determination"?

Perhaps the judge was trying to express the idea that *all* sexual assaults are serious offenses because the legislature has provided a serious penalty. Even this idea, though, cannot carry the day. Although the legislature provided for a very long *maximum* penalty, at the time Zaruba was sentenced, the legislature had provided no *minimum* mandatory penalty. Thus, logic permits only the following inferences: The legislature recognized that some sexual assaults may be very serious crimes requiring a very lengthy prison sentence while, at the same time, other sexual assaults may be very mitigated crimes for which no prison time at all may be appropriate.

It is a flaw in logic, then, to infer that *all* sexual assaults are serious crimes because the legislature has provided for a serious maximum penalty. One may not reach this conclusion (i.e. that "all" sexual assaults are serious) because the legislature also recognized that some sexual assaults may be very mitigated.

Bearing this in mind, then, a fair question is whether the maximum sentence provided for by the legislature is a proper

sentencing consideration at all. The maximum sentence is not one of the traditional sentencing factors mentioned by ***McCleary***.

One may convincingly argue that the maximum penalty provided for by law is not a fair sentencing consideration at all except insofar as it sets an outer boundary to the court's sentencing discretion. It simply does not follow that because the maximum sentence is very high that a sentence in the minimum range will rarely be appropriate. To believe otherwise is to trivialize the instructions from the Supreme Court that 'the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***McCleary*** at 276. That is, if a high maximum penalty effectively prohibits the trial courts from considering a minimal amount of time in custody, how could a trial court in a Class B or Class C felony ever follow the ***McCleary*** principle?

B. The trial court merely invoked the sentencing factors without providing the necessary "linkage" between the sentencing factors and the sentence chosen by the court.

In sentencing Zaruba the court took great care to run through Zaruba's lengthy criminal record and history of bad behavior; however, having invoked the sentencing factors, the court never explained *why* the sentence imposed was necessary.

Here, in denying Zaruba's postconviction motion for resentencing the trial court made no effort to point out where, in the record, the court set forth the reasons why the factors considered required the sentence that was imposed. Nor, even, did the court attempt to salvage the record by stating those reasons in the

memorandum decision denying the motion. Rather, the court instead denied the very holding of ***Gallion***. The trial court wrote, "[I]t is this Court's interpretation that ***Gallion*** makes no such requirement."

It is difficult to imagine how the language of ***Gallion*** could be any more explicit. The court wrote, "[W]e require that the court, by reference to the relevant facts and factors, *explain how the sentence's component parts promote the sentencing objectives*. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." ***Gallion***, 2004 WI 42, ¶46 (Wis. 2004)

In Zaruba's case the trial court did not give *any* reasons why the sentencing factors considered by the court required the lengthy sentence that was imposed- a sentence so lengthy that it was contrary, even, to the wishes of the victim's mother. Then, given another chance to do so in the postconviction motion, the court again refused to explain the length of the sentence holding that it simply was not required.

This, of course, makes it very easy for the Court of Appeals to review this case for a "proper exercise of discretion." The only conclusion that may be drawn from this record is that the trial judge *did not have any good reasons* to impose the sentence that was imposed. As such, the sentence represents the trial judge's will rather than any reasoned application of sentencing discretion.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court of Appeals vacate the defendant's sentence and remand the matter for resentencing.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2007.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3677 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2007:

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2
Appeal No. 2007AP001504 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS ZARUBA,

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APPENDIX CERTIFICATION

A. Record on Appeal

B. Excerpts of sentencing transcript

C Memorandum Decision denying motion for resentencing

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so

reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007

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