

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2005

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 No. 2004AP0062-CR

Cir. Ct. No. 2002CF6930

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. KLESER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Charles E. Kleser pled guilty to misappropriating personal identifying information, a violation of WIS. STAT. § 943.201(2) (2001-

02).¹ The circuit court imposed a four-year prison sentence, with Kleser to serve a minimum of two years in initial confinement. Kleser filed a postconviction motion in which he argued that the circuit court erroneously exercised its sentencing discretion by relying too heavily on representations made by his son, the victim of the crime, in a letter to the court. The circuit court rejected the contention, reasoning that it had considered the son's letter for insight into why Kleser had victimized his son and also because it "shed light" on Kleser's character. Kleser appeals. Because the record demonstrates the circuit court properly exercised sentencing discretion, we affirm the judgment of conviction and the postconviction order.

¶2 Kleser moved out of his residence, while still owing his utility provider \$800. He then broke his foot and was unable to work to pay off the debt. Consequently, the utility provider was unwilling to provide him service at a new residence. Kleser decided to use his estranged son's identifying information to open the account. His son discovered the ruse when he was in the process of purchasing a house and found he had a poor credit rating, which he traced to his father's actions. When questioned by police, Kleser admitted using his son's social security number to obtain utility service. The account Kleser had opened was approximately \$200 in arrears.

¶3 Kleser was charged and ultimately pled guilty pursuant to a plea bargain. In return for the plea, the State agreed to recommend that Kleser be given

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

two years on probation. The circuit court ordered a presentence report, which also recommended probation for Kleser. In the report, the son revealed that he was “very upset with his father.” He indicated that when he was a child, his father “physically and sexually abused him.” The son, Charles Kleser V, further indicated that when he was twelve years old, his father “gave him to a family friend.” He stated that he was ultimately sent to foster care. Charles V stated that he believed his father “should be penalized to the fullest extent of the law.”

¶4 At sentencing, the State complied with the plea bargain, but noted that Kleser’s son believed Kleser had consistently failed to take responsibility for his actions. The presentence investigation report indicated that Kleser had numerous other offenses, all of them relatively benign, but three of which had resulted in jail time. The State also gave the court a letter from Charles V, which, in the circuit court’s words, “expounded on his victim impact statement and set forth his view of his father’s abusiveness to him as he was growing up.”

¶5 For the defense, Kleser’s attorney noted that Kleser denied sexually abusing his son, although Kleser admitted that he was “not father of the year by any stretch of the imagination.” Kleser acknowledged that he “had a pretty serious drug and alcohol problem” when Charles V and his brother were growing up. Defense counsel stated that he could not “offer a full explanation to everything that [Charles V] says in” his letter, but he noted that “a lot” of the allegations were “very old” and that Charles V and his father “obviously” had a “lot of baggage between the two of them.”

¶6 At sentencing, the circuit court first asked Kleser why he had not sought the utility money from his mother, who had been supportive of him. He answered that he had not sought money from his mother due to his “pride.” The

circuit court then looked to the son's comments to the presentence report writer. Noting that it had been "trying to think ... what kind of father would do this to his son," the circuit court read Charles V's remarks into the record, including the allegations of physical and sexual abuse, and Kleser's apparent abandonment of Charles at age twelve. The court noted that it believed Kleser's crime to be "abominable" and "lower than low," noting specifically that Kleser's "pride" had prevented him from seeking his mother's assistance, but had not "prevent[ed him] from once again taking advantage of [his] son."

¶7 The circuit court also read aloud Charles V's letter to the court. In that letter, he explained his "difficult childhood," noting that he had worked hard to create a better life for himself. He stated, however, that his father's crime "demonstrates the disregard [his] father has for [his] life."

¶8 Charles V's letter went on to describe some of his father's actions toward him when he was a child and suggested that "[i]n 25 years, he has not changed." The letter accused Kleser of drug and alcohol abuse, and "several DWIs [that] show his disregard for other peoples' safety."

¶9 The circuit court commented that the letter was "compelling," and showed that Kleser "cared nothing ... for [his] son's sense of security, only for [his] pride." The circuit court stated, just prior to imposing a prison sentence:

I find this crime so egregious. It's the crime of a low life to betray his own flesh and blood. And there is credence in what your son says because otherwise it does not make sense that a 48- or 49-year-old father would do this to his own son.

But within the context of the history of ... your character and your fatherhood, it then makes sense as described by your son. You have other convictions. They are not the most serious convictions I have ever seen, but certainly the 2001 conviction [for "violating trade orders"] suggests a

depth of dishonesty in the context of this present conviction for which I'm sentencing you, that I think a prison sentence is warranted here.

The interests of this community include the interests of your son who you have violated by this crime. All of us have a right to be protected from this, but surely a son has the – a right to be protected from this kind of criminality by his own father.

You bring your mother to court in support of you after this crime against your son. There's something seriously amiss, sir, and I hope that your time in prison will give you and the prison officials an opportunity to figure out what that is. But it strikes me as a character disorder that clearly is in need of punishment both because of the nature and gravity of the crime itself and as well as the need to protect others from your victimizing them.

¶10 In his postconviction motion, Kleser maintained that the circuit court erroneously exercised sentencing discretion by relying on improper factors and affording too much weight to his son's representations. The circuit court denied the motion, reasoning that it had "used the victim's statement for two purposes: to understand how a father could commit this crime against his own son, and to understand the context of that relationship as it bore on the defendant's character." The circuit court indicated that the son's statement "shed light on the defendant's character," and it noted that Kleser himself admitted most of the victim's allegations, except for the allegations of sexual abuse. It stated that the "longstanding dysfunctional pattern of relating to his son gave the court some insight about why the defendant victimized his son in this crime."

¶11 In regard to Kleser's claim that by relying on the victim's statement, it had relied on inaccurate information, the circuit court stated that it considered the victim's statement about his father's past behavior only to the extent it revealed the son's perceptions about his father, indicating it had not accepted them as true. The court also stated that it had not relied on the victim's statement that

Kleser had “several DWIs.” Kleser now appeals, contending that the circuit court placed inordinate weight on Kleser’s son’s “emotional claims about Kleser’s historical failures as a father, to the exclusion of other relevant factors.” We disagree.

¶12 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See, e.g., State v. Wickstrom*, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court “engaged in a process of reasoning based on legally relevant factors.” *Id.* at 355. The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public’s need for protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). This court will sustain a circuit court’s exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is reluctant to interfere with the circuit court’s sentencing discretion given the circuit court’s advantage in considering the relevant sentencing factors and the demeanor of the defendant in each case. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will “search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶13 In *State v. Gallion*, 2004 WI 42, ¶8, 270 Wis. 2d 535, 678 N.W.2d, the supreme court reaffirmed the *McCleary* sentencing analysis, which cited the importance of the sentencing court’s consideration of “the nature of the offense,

the character of the offender, and the protection of the public interest.” *McCleary*, 49 Wis. 2d at 274 (citation omitted). *McCleary* also emphasized the importance of the sentencing court’s exercise of discretion.

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.

In the first place, there must be evidence that discretion was in fact exercised. 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.... “[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.”

Id. at 277 (citation omitted).

¶14 *Gallion* requires the trial court to explain the “linkage” between the sentence and the sentencing objectives. 270 Wis. 2d 535, ¶46. Although the standard of review did not change, “appellate courts are required to more closely scrutinize the record to ensure that ‘discretion was in fact exercised and the basis of that exercise of discretion [is] set forth.’” *Id.*, ¶76 (quoting *McCleary*, 49 Wis. 2d at 277) (alteration in original).

¶15 We are satisfied that the sentencing record establishes that the circuit court properly exercised discretion in imposing a prison sentence on Kleser. The record demonstrates that the circuit court considered Kleser’s crime to be so serious as to require a more severe sentence than probation. It indicated that it considered the crime “abominable” due to Kleser’s having taken advantage of a son with whom he had had little, if any contact, for many years, simply to save his “pride.” It noted that Kleser’s crime had invaded his son’s “very sense of

security,” and it stated that it considered the crime very egregious due to his willingness to “betray his own flesh and blood.”

¶16 The circuit court commented upon Kleser’s character, noting that it found “something seriously amiss, about his willingness to ‘scam his son,’” and the “depth of [his] dishonesty,” which was demonstrated in his criminal record. The circuit court acknowledged that it had been puzzled by Kleser’s actions, but it noted that his son’s statements had offered insight into Kleser’s character. It indicated that it considered prison time necessary to give Kleser an opportunity to reflect on his actions. The circuit court also noted that it considered prison time necessary to protect the public, stating that “[a]ll of us have a right to be protected” from crimes like Kleser’s.

¶17 The circuit court’s decision to impose a period of imprisonment on Kleser was “rational and explainable.” *Id.*, 270 Wis.2d 535, ¶76 (quoting *McCleary*, 49 Wis. 2d at 276). The court clearly explained the “linkage” between the sentence and its sentencing objectives in this instance. *See id.*, ¶46. Kleser’s contention that the circuit court relied on and gave great weight to improper considerations is without merit.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

