

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2009

David R. Schanker
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. 2008AP820-CR

Cir. Ct. No. 1999CF290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES A. COLWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

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

¶1 PER CURIAM. James A. Colwell appeals from a judgment of conviction imposing sentence after the revocation of his probation (“revocation sentence”), and from a postconviction order denying his resentencing motion. The issue is whether Colwell is entitled to resentencing because the trial judge who

imposed the revocation sentence (“revocation judge”) failed to read the transcript of the original sentencing. We conclude that resentencing is not warranted because the revocation judge demonstrated familiarity with the original sentencing court’s intent, and properly exercised its discretion in imposing the revocation sentence accordingly. Therefore, we affirm.

¶2 In February of 2000, Colwell pled guilty to two counts of first-degree sexual assault of a child. The trial court imposed and stayed a thirty-year sentence on the first count, and withheld sentence on the second count.¹ It then imposed two thirty-year terms of probation. Several years later, Colwell absconded from probation to Costa Rica from where he was later extradited. His probation was revoked on the second count and he was returned to the trial court for the imposition of the revocation sentence.² The revocation court imposed a thirty-year sentence on the second count on which sentence had previously been withheld. Colwell moved for postconviction relief, namely resentencing. The postconviction court denied the motion and Colwell appeals.

¶3 Colwell contends that the revocation court’s failure to read the transcript of the original sentencing hearing is error pursuant to *State v. Reynolds*, 2002 WI App 15, 249 Wis. 2d 798, 643 N.W.2d 165, and entitles him to resentencing. We disagree.

¹ Colwell was charged with three sexual assaults, the second of which was dismissed and read-in at sentencing. We refer to what was technically the third charged assault as the second because Colwell was only convicted of two assaults.

² We refer to the imposed, stayed and withheld sentences as the original sentence. We refer to the trial court that imposed the sentence after revocation as the revocation court/judge, and the court that denied the postconviction motion for resentencing as the postconviction court/judge.

¶4 In this case, as in *Reynolds*, the trial judge who imposed and later reviewed the revocation sentence was not the same judge who originally withheld sentence.³ Consequently, the trial judge who imposes the revocation sentence does not necessarily have the familiarity with the defendant or the case that the original trial judge had. In *Reynolds*, we were presented with the situation where the trial judge who imposed the revocation sentence did so without reviewing the trial testimony, the presentence investigation report, or the transcript of the original sentencing hearing. See *id.*, ¶1. In *Reynolds*, we reversed and remanded for resentencing “because the sentencing-after-revocation record does not reflect the sentencing judge’s awareness of the information in the presentence investigation report, and of the factors the trial judge found significant in deciding that Reynolds’ case was an exceptional one justifying the withholding of sentence.” *Id.*, ¶2.

¶5 *Reynolds* did not require the revocation judge to read the transcript of the original sentencing proceeding. We held that the revocation judge must be “informed of the trial record and [the original trial judge]’s assessment, based on the evidence, of the severity of [the defendant’s] crime.” *Id.*, ¶14. We consider the original sentencing and the revocation sentencing “on a global basis, treating the latter sentencing as a continuum of the first.” *State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. Reading the transcript of the original sentencing proceeding is one way the trial judge who is imposing the revocation sentence can familiarize him or herself with the defendant and the case; however,

³ The judge who imposed the revocation sentence was the same judge who later reviewed that sentence in postconviction proceedings. We sometimes refer to the particular judge rather than the particular court because Colwell’s challenge relates to the identity of the particular judge as being unfamiliar with the reasoning of a different judge.

it is not the only way to do so. What *Reynolds* requires is a familiarity with the original proceeding before imposing the revocation sentence; in *Reynolds* we suggest several ways to accomplish that objective. See *id.*, 249 Wis. 2d 798, ¶14. Consequently, the current trial judge who imposed the revocation sentence without actually reading the transcript of the original sentencing proceeding did not violate *Reynolds*. See also *State v. Walker*, 2008 WI 34, ¶3, 308 Wis. 2d 666, 747 N.W.2d 673 (in the comparable context of a reconfinement hearing, the trial court is not required to read the transcript of the original sentencing proceeding, but must “be familiar with the particulars of the case[, which] ... can be accomplished in any number of ways, and ... may differ from case to case”).

¶6 Here, the revocation judge began the proceeding by stating that he “was able to go through and read the PSI.” He then recited the charges, and the disposition. He stated that it was “a mystery” why Colwell’s probation had been revoked only on the conviction for which sentence had been withheld. The judge was well acquainted with Colwell’s background, stating his age, his various marital statuses over the years, and the fact that he has grandchildren.

¶7 The judge explained that Colwell had no prior criminal record and had not committed any new offenses subsequent to his two sexual assault convictions. The judge described Colwell’s personality as strange, commenting on Colwell’s many personal and professional successes, while “at the same time he has molested a child.” The judge extensively considered the primary sentencing factors, and quoted from both a letter presented at the original sentencing hearing from one of the victim’s grandparents and from the revocation summary. It commented on the presentence investigator’s recommendation, emphasizing that that recommendation preceded the revocation of Colwell’s probation.

¶8 The judge reasoned that

[w]e are past the issue of correctional treatment.... He has had ample opportunities to engage in counseling and he continues apparently to groom young girls his target age, continues to – he refused to really comply. I guess after he eloped from his probation and went to Costa Rica that was the final step.

I believe confinement is necessary. There would be undue depreciation of the seriousness of the offense unless a lengthy sentence was ordered here. I have no other choice but to adopt the recommendation of the state and the agent and order that the defendant serve those full – those thirty years that have been recommended....

¶9 Colwell sought postconviction relief, claiming that he was entitled to resentencing because the revocation judge had not read the transcript of the original sentencing. In denying the motion, the postconviction judge demonstrated his familiarity with Colwell and this offense, explaining:

I used all the sentencing material that the Court must use. I looked at the PSI. I looked at the sentencing revocation material. I listened to the argument of the attorneys. I picked up on the underlying facts. I picked up on the defendant's family history, learned – I picked up on the fact that he is a college graduate – all the good things about him. And then we turn to all the bad things, and the bad thing is this little girl that was molested and there is where the balancing must come.

Obviously, the defendant has done a lot of good things in his life, but the effect on this child has been significant. She was in court again then, she was age fourteen, and remembered the issues clearly. I made findings that his rehabilitative needs were significant and I also note that he continued to groom young girls and he refused to comply with the sentencing correctional treatment, and then he eloped to Costa Rica making the only sentence possible a lengthy prison term.

I think that the preparation that I engaged in is significant. Obviously I had my sentencing notes with me when I made my remarks. I read all the material. I quote Kelly Bochat, the corrections worker. I don't know what else there is left to do. The argument is ... what is a

lengthy sentence, and Judge Carlson [the original trial judge who withheld sentence] said what a lengthy sentence is. He said thirty years. I don't think there is any mystery there. Thirty years is thirty years. Of course the question is always what is a lengthy period of time.

.... And I don't believe that there has been any contradiction on any of the findings I made. Now being told now that the administrative law judge wanted to have a s[w]or[d] of [D]amocles hanging over Mr. Colwell, could well be. I make that remark. If you look at paragraph – page seven, I make the remarks at page six beginning that I suppose that he had a double sword [D]amocles hanging over him. Maybe that was what the administrative law judge wanted to find and have continue. So I don't see that the Court missed that significant issue ... entitling the defendant to a new sentence, and I don't believe that the Court sentenced the defendant improperly and I deny your motions.

¶10 The postconviction judge reiterated that he was mystified that Colwell's probation was revoked for the second sexual assault, for which sentence had been withheld, but not for the first, for which a thirty-year sentence had been imposed and stayed in favor of a thirty-year probationary term. That mystery however, would not have been solved by reading the transcript of the original sentencing proceeding.

¶11 The revocation judge imposed a thirty-year sentence. The trial court originally imposed and stayed a thirty-year sentence for the identical offense and thirty-year probationary terms for that offense and this. The trial court also stated during the original sentencing proceeding that it believed that, contrary to the presentence investigator's recommendation of prison, Colwell "can be controlled without incarceration.... [W]ith the lengthy sentence over [Colwell's] head at his stage of the game, even small stepping away from the rehabilitation program, would certainly result in a lengthy incarceration." A thirty-year revocation sentence was consistent with the trial court's reasoning at sentencing. Colwell

does not claim that the revocation court erroneously exercised its discretion when it imposed the revocation sentence, only that it did not read the transcript of the original sentencing proceeding.

¶12 We conclude that the revocation judge complied with *Reynolds*. Although it had not read the transcript of the original sentencing proceeding, it had read the presentence investigation report and, from its remarks, it was clear that it was familiar with Colwell, the original offenses, their disposition, and the reasons for his revocation. The one question the revocation court had was why Colwell’s probation was revoked only on the second count; however, reading the transcript of the original sentencing proceeding would not have answered that question. We therefore conclude that the revocation judge, who imposed the thirty-year sentence, complied with *Reynolds* because he was “aware[] of the information in the presentence investigation report” that he had in fact read, and of the factors the original trial court had found significant. *Id.*, 249 Wis. 2d 798, ¶2.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

