

FILED
12-09-2021
Clerk of Circuit Court
Brown County, WI
2019CF001581

BY THE COURT:

DATE SIGNED: December 9, 2021

Electronically signed by John P. Zakowski
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BR. 6 BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case Number 2017 CF 1564

CASSANDRA LEIGH NYGREN,

2019 CF 1581

Defendant.

DECISION

The defendant, Cassandra Leigh Nygren, by her attorneys, Assistant State Public Defenders Megan Lyneis and Colleen Marion, moved the court for a sentence modification. At our motion hearing on November 11, 2021, Attorneys Lyneis and Marion appeared on behalf of the defendant and the State was represented by Deputy District Attorney Wendy Lemkuil.

Sentencing is committed to the sound discretion of the trial court; the review is whether the court properly exercised its judicial discretion. There is a presumption the court acted reasonably. McCleary v. State, 49 Wis. 2d 263 (1971).

Did the court erroneously exercise its discretion in this case? Defense counsel referenced certain appellate court cases in support of its position.

Struzik v. State, 90 Wis. 2d 357 was a burglary case. The defendant had fourteen (14) days credit. The trial court sentenced him to five (5) years, fourteen (14) days. The Wisconsin Supreme Court found the procedure in crediting pretrial confinement used by the judge to be an abuse of discretion. In imposing such a particular, i.e. abnormal sentence, it was easily read

between the lines that the court added to the appropriate sentence of five (5) years the time already served.

In Struzik, the trial court acknowledged the credit, determined the sentence and added the time served to the sentence. The Supreme Court stated:

“This technique subverts the constitutional right of a convicted prisoner to have time previously served (in circumstances where the time should be credited) applied toward the reduction of an appropriate sentence.”

The court should have imposed the appropriate sentence and then applied the sentence credit.

In State v. Fenz, 258 Wis. 2d 281 (WI App. 2002), the defendant was convicted of three counts of second-degree sexual assault of a child. After his probation was revoked, the court sentenced the defendant to a total of ten (10) years in prison. At sentencing, the court determined the defendant was entitled to 342 days of sentence credit. The court learned completion of an institutional sex offenders treatment program required at least six years incarceration. The court on the record stated the 342 days credit was one of the factors that would influence the amount of time the defendant would spend in prison. The defendant claimed it was an error to consider the 342 days as a factor in determining the length of one's sentence. The court stated the circuit court is obligated to consider all legally relevant factors and found the trial court properly followed the Struzik rule of articulating a specific time related goal. The length of pretrial detention will affect the time someone actually spends in prison. The length of the defendant's sentence impacted the court's articulated goal that he receive adequate sex offender treatment in prison. The court awarded the defendant 342 days credit. The Fenz court ruled a court may consider presentence credit in certain circumstances as a factor in determining an appropriate sentence.

The court in State v. Armstrong, 354 Wis. 2d 111, recited the line of cases dealing with the impact of jail credit on sentence and reiterated the Klimas' rule, Klimas v. State, 75 Wis. 2d 244 (1977), that it is improper for a court to deprive a defendant of sentence credit by enlarging the sentence.

The court did not do that in this case. Unlike the aforementioned cases, the defendant here was sentenced on two separate files.

The court did not find the amount of sentence credit to be highly relevant at sentencing. What the court found to be relevant was the proper application of the Gallion factors particularly the seriousness of the offense. At our motion hearing, it was confirmed by defense counsel that the court did not fail to utilize the Gallion factors in its decision. The court specifically referenced deterrence, the defendant's character, the seriousness of the offense, protection of the public, and punishment. The court considered her character in referencing the fine letters sent to the court on Cassie's behalf and concluded that "Cassie, you're a good person." (trans. p. 112, line 23). The court also referenced the book Beautiful Mercy in explaining mercy without justice dishonors everyone involved, and that the punishment must fit the crime.

The court addressed the seriousness of the offense in explaining this was the worst "Len Bias" case he had ever seen. The victim was a friend who was pregnant. The court referenced other "Len Bias" sentences from other counties, including a nine year sentence in Jefferson County and a twelve year sentence in Ozaukee County for providing heroin. Unlike those cases, the victim here was also pregnant. The drug here involved fentanyl. The aggravating fact was that the victim almost died from an overdose the first night, and had to be administered Narcan to survive. The defendant had previously told a confidential informant to whom she sold drugs to

“use extreme caution” when using the heroin she and Mr. Gray sold him. She knew the drug was deadly, but yet the very next night she provided more heroin to the victim and this time she died. The court stated.... “You had given her drugs the day before and you and Gray had to administer Narcan to her after she overdosed on drugs a few days earlier. I mean she almost died and you went right back at it. That’s incomprehensible.” (transcript, p. 122, lines 2-6).

The court then pivoted to the other file. 19 CF 1581 in which she was convicted of selling drugs while in jail. The court stated, “Then we have what happened in the jail and that is extremely aggravating.” (transcript, p. 120, lines 15-16).

The court accepted the fact that Shawn Gray was a negative influence on the defendant. The court heard that Gray prostituted her and that it was an abusive relationship. He was her accomplice in file 17 CF 1564. However, the court found he had no involvement in her *extremely aggravating* second file:

“I’m going to buy into this theory somehow that Mr. Gray controlled you, but he was not with you in that cell. You were with Ms. Laplant and you went through this, what I could call an elaborate scheme, to get drugs into the jail. We can’t...that is *intolerable*. Nobody is putting a gun to your head, nobody is branding you, nobody is injecting you. You used this other person, Mr. Laundrie. You got your chicken. That’s aggravation and that’s why it’s should be a consecutive sentence because you can’t blame that and I’m not going to find any drug – sex trafficking had anything to do with that offense.” (transcript, p. 120, line 17 – p. 121, line 3).

The court went through her extensive drug history, her poor performance in drug court, and other information contained within the presentence report. Per the plea agreement, there was no recommendation from the presentence investigation report writer.

The court then stated, “Now, the Court has to determine what is an appropriate sentence for something that is so dangerous and how to protect the public. They’re all, they’re very

aggravated, Cassie, (trans. P. 129, lines 22-25). The court specifically stated it found the State and defense recommendations inappropriate for both files. The State recommended a total of eleven years initial confinement and fifteen years extended supervision. The defense recommended eight years initial confinement and eight years extended supervision. The court noted if not for the supportive testimony of Dawn Jones at the hearing, the court would have imposed an even greater sentence. The court noted (as stressed by defense at sentencing) that the defendant and Gray were “joined at the hip.” The court stated Gray got 12 years in his homicide file and the court specifically stated the defendant would get a lesser sentence because of Gray’s influence on her.

The court then asked about jail credit. When told the number was 864, the court immediately stated:

“You know what, those should be erased after what you did. I mean, really, Cassie, that’s how I feel. I’m going to give you 800 days but *you do that kind of behavior in jail you should lose your credit*, but **you’ll get that**. You know, it’s over two years so I consider that too.” (transcript, p. 130, lines 19-24).

The court’s comments about credit were the basis for defense counsel’s narrow postconviction argument. It should be obvious when taken in context with the other preceding comments by the court that the court was referencing her “intolerable behavior” while in jail and the seriousness of that crime. At our post conviction hearing, the court noted that when a jail inmate violates jail rules while on Huber, those privileges can be revoked, i.e. there should be consequences for such behavior while in jail.

The court expressed its frustration with her behavior but immediately stated, “but you’ll get that.” The court recognized the significant amount of credit being over two years. She received her full credit.

The court later stated, “Gray got 12 for the deaths of two people, I’ll give you ten.” (transcript, p. 131, lines 6-7). [At our post conviction motion hearing the defendant stated Gray received a 9 year sentence on the homicide charge and other sentences which totaled twelve (12) years. She was wrong. Gray received 10 years on his homicide charge. Other drug sentences were run consecutively resulting in the twelve year sentence. The court’s mindset was that Gray received 12 years in his homicide file.]

The court sentenced the defendant to 10 years on Count I in her homicide file, 17 CF 1564. However, her other sentences in that file were run concurrent.

The court then sentenced the defendant in file 19 CF 1581 concerning the possession of drugs in jail and imposed a five (5) year sentence, three (3) years initial confinement and two (2) years extended supervision consecutive to the homicide file 17 CF 1564. The defendant could have received up to four (4) years initial confinement. It should be noted even defense counsel’s recommendation had 19 CF 1581 as a consecutive sentence.

CONCLUSION: While in hindsight the court realizes it could have been more articulate to avoid any misinterpretation, what is clear is the court early on stated it was going to impose consecutive sentences for very serious crimes in two separate files. The court referenced the Gray sentence of 12 years for a number of offenses, including the death of the victim. The court noted the defendant and Gray were “joined at the hip” and considered it a mitigating circumstance in imposing a total sentence of 10 years initial confinement in her homicide file. The court then ordered an appropriate sentence for her “intolerable” behavior of selling drugs in jail and imposed a consecutive sentence. While admonishing the defendant that such criminal

behavior while in jail should affect her credit, the court properly awarded her full sentence credit.

The court's sentencing does not mirror Fenz, Armstrong or Struzik.

The defendant's motion is **DENIED**.