COURT OF APPEALS DECISION DATED AND FILED

February 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0644-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE T. NICOLL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. George T. Nicoll appeals from a judgment sentencing him after probation revocation and from an order denying his sentence modification motion. Because we conclude that the circuit court properly exercised its sentencing discretion, we affirm.

Nicoll was convicted in 1990 of two counts of first-degree sexual assault involving a young boy. As to one count, Nicoll was sentenced to a two-year term; as to the other count, Nicoll received a consecutive ten-year term of probation. In May 1997, Nicoll masturbated on a bus and was charged with misdemeanor lewd and lascivious behavior as a repeater. Nicoll's probation on the 1990 case was revoked, and he appeared for sentencing after revocation.

At the sentencing hearing, the court noted the gravity of the offense for which Nicoll was to be sentenced—the 1990 sexual assault of a boy who was then six years old. The court noted Nicoll's history of sexual misconduct, including other incidents of sexual misconduct in 1994. The court acknowledged that Nicoll suffers from cerebral palsy and borderline mental retardation. However, the court found that Nicoll had not accepted or sought sex offender treatment and that any treatment he had been provided was not effective. Nicoll argued that he had participated in therapy and had had no response to his offer to take medication to control his sexual urges. The court found that Nicoll was a danger to the community and a high risk of reoffending. The court found that previous attempts at rehabilitation were ineffective and that a previous short-term period of incarceration had not had a deterrent effect on Nicoll's conduct. The court then sentenced Nicoll to sixteen years in prison.

In his sentence modification motion, Nicoll argued that the court did not consider his rehabilitative needs or other, more appropriate treatment options in light of his disabilities. At the hearing on the motion, the trial court stated that it was aware at sentencing of Nicoll's disabilities but that these disabilities weighed more heavily at the first sentencing (when Nicoll received probation) than they did at sentencing after revocation. At sentencing after revocation, the court placed greater weight on protecting the community. Nicoll appeals.

There is a strong public policy against interfering with the trial court's sentencing discretion. *See* ***State v. Mosley,*** 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The record must show that the trial court exercised its discretion and stated its reasons for the sentence it imposed. *See* ***id.*** The record indicates that the sentence in this case was based on appropriate factors. *See* ***State v. Larsen***, 141 Wis.2d 412, 426-27, 415 N.W.2d 535, 541 (Ct. App. 1987). These factors included the gravity of the offense, the defendant's character and the need to protect the public. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991)

While Nicoll contends that the trial court did not give sufficient weight to his need for rehabilitation and treatment, the weight to be accorded to particular factors in sentencing is for the sentencing court, not the appellate court, to determine. *See* ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). As long as the sentencing court considered the proper factors and the sentence was within statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. *See* ***State v. Owen,*** 202 Wis.2d 620, 645, 551 N.W.2d 50, 60 (Ct. App. 1996). We do not conclude that the sentence is excessive.

Nicoll's appellate arguments do not manifest an understanding that he was sentenced based upon the 1990 sexual assault. While his intervening sexual misconduct could be characterized as less alarming than the sexual assault for which he was placed on probation, Nicoll has lost sight of the fact that he was being sentenced after revocation of probation on a serious offense.

Nicoll's offer to participate in therapy and take medication to suppress his sexual urges does not negate the trial court's exercise of its

sentencing discretion. This information was before the court at sentencing, and the weight given this information was within the court's discretion. Furthermore, the record does not support Nicoll's assertion that he was cooperative in his prior treatment programs or that previous programs were inappropriate. The court found that based upon the reports of his probation officer, Nicoll had been uncooperative and reluctant in treatment.

Nicoll claims that the trial court should have considered that his therapist's direction to use masturbation to address his sexual urges contributed to the public masturbation incident. However, Nicoll's parole agent had previously warned Nicoll not to engage in public masturbation.

Finally, Nicoll argues that the legislature has intended that offenders like him should be treated rather than punished. He cites ch. 980, STATS., Wisconsin's sexually violent persons commitment statute. However, Nicoll has not been charged or committed under this legislative scheme and the argument is irrelevant to this appeal from sentencing after revocation. Rather, our focus is on the factors which govern sentencing. We conclude that the court properly exercised its discretion in balancing those factors and imposing a lengthy sentence.

By the Court.—Judgment and order affirmed.

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