

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 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. 2005AP311-CR

Cir. Ct. No. 2004CF150

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. JESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN and RALPH M. RAMIREZ, Judges.¹ *Affirmed.*

¹ Judge Michael O. Bohren entered the judgment of conviction. Judge Ralph M. Ramirez entered the order deciding Timothy J. Jeske's postconviction motion.

Before Brown and Nettlesheim, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Timothy J. Jeske appeals from a judgment of conviction for capturing an image of nudity, two counts of sexual exploitation of a child, and five counts of possession of child pornography. He also appeals from an order denying his postconviction motion for sentence modification. He challenges his sentence as being unduly harsh and also argues that the sentencing court erroneously exercised its discretion by not adequately explaining why consecutive terms were imposed. We affirm the judgment and order.

¶2 Jeske was charged in a twenty-six count complaint after it was discovered that he used a spy camera to capture images of the thirteen-year-old daughter of his live-in girlfriend while she used the bathroom and showered, that he printed pictures from the internet of juveniles in sexually explicit poses, and that he possessed computer diskettes and videos that contained sexually explicit images of children. He entered a no contest plea to eight counts and the remaining counts of sexual exploitation of a child and possession of child pornography were dismissed and read-in at sentencing. For the conviction of capturing an image of nudity, count one of the information, Jeske was sentenced to one and one-half years' initial confinement and two years' extended supervision. For the convictions of sexual exploitation of a child, counts two and three of the information, concurrent terms of seven and one-half years' initial confinement and five years' extended supervision were imposed. The two concurrent terms were made consecutive to the sentence on count one. Concurrent terms of one and one-half years' initial confinement and two years' extended supervision were imposed on two counts of possession of child pornography and made consecutive to the sentence on the first three counts. Terms of one and one-half years' initial

confinement and two years' extended supervision were imposed for each of the three remaining possession of child pornography convictions to run concurrently with each other and concurrent to the sentence for the two other possession convictions. The sentence on the five counts of possession of child pornography was stayed in favor of three years' probation. The combined result is nine years' initial confinement, seven years' extended supervision, and three years' probation. If Jeske is not successful in completing his probation, he may have to serve an additional one and one-half years' initial confinement and two years' extended supervision.

¶3 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The three primary factors to be considered are the gravity of the offense, the character of the offender and the need for protecting the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). In addition, the sentencing court may consider: the vicious or aggravated nature of the crime; the record of past criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the rights of the public; and the length of pretrial detention. *Id.* at 623-24. The weight to be given to each of the factors is particularly within the discretion of the sentencing court. *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

¶4 In *Gallion* the supreme court reiterated that under truth-in-sentencing, the sentencing court's exercise of sentencing discretion continues to receive a strong presumption of reasonableness on review. *Gallion*, 270 Wis. 2d 535, ¶¶17-18. An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. In order to properly exercise its discretion, a sentencing court must provide a rational and explainable basis for the sentence. *Id.*, ¶39. It must specify the objectives of the sentence on the record. *Id.*, ¶40. The sentencing court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. *Id.*, ¶42.

¶5 Jeske first asserts that his sentence is unduly harsh in light the relevant sentencing factors set forth in *Harris*, 119 Wis. 2d at 623. He cites as mitigating factors that he had a minimal prior criminal record, that he admitted to having an alcohol problem for which he was undergoing treatment, and that a professional evaluation indicated that if he continued his course of treatment he would not present a future danger to the community. Although he does not specifically argue it, Jeske appears to contend that the sentence is harsh in light of the recommendation of probation by the Waukesha County Sex Offender Supervision Team.²

¶6 We are not persuaded that the sentence is unduly harsh or otherwise an erroneous exercise of discretion. A sentence will be deemed harsh and

² Although the presentence investigation report recommended probation with jail time as a condition of probation, the prosecution recommended a sentence resulting in at least eight years' initial confinement and a lengthy period of extended supervision.

excessive only when the sentence is so excessive, unusual, and 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.” See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Although the maximum sentence was imposed on each count, some terms were made concurrent and stayed such that Jeske will not serve the maximum on all counts. The imposition of the maximum sentence does not render the sentence excessive where the sentencing court’s application of the relevant sentencing factors demonstrates why the maximum sentence is appropriate. See *State v. Schreiber*, 2002 WI App 75, ¶15, 251 Wis. 2d 690, 642 N.W.2d 621.

¶7 The sentencing court explained why it rejected the recommendation of probation and the evaluation concluding that Jeske is not a future danger to society. The court recognized that Jeske exhibits many fine qualities as an employee and family man. However, it found that there is another side to Jeske’s personality that was out-of-control. It specifically found that Jeske’s possession of pornography was not happenstance but resulted from a concentrated effort to collect and retain such materials. Moreover, it found that Jeske had crossed over the line from mere recreational use of pornography to actually creating it by the surreptitious pictures he took of a girl living in his home. Not only did the crime constitute a visual assault, it breached the relationship of trust between Jeske and the girl. The court concluded that the crimes were serious because they were not victimless. The court also rejected Jeske’s alcoholism as an explanation for the offenses.

¶8 The sentencing court touched on the relevant factors of the seriousness of the crimes, Jeske’s character, and the need to protect the public. In making the term on counts two and three consecutive to the term on count one, the

court noted that the total of nine years' initial confinement was so that the seriousness of the crimes would not be depreciated, the community would be protected, and Jeske would receive necessary treatment in a productive environment. This demonstrates a proper exercise of discretion. Under the circumstances cited by the sentencing court, the maximum sentence is not unduly harsh.

¶9 Jeske relies on *State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, to argue that the sentencing court failed to adequately explain why consecutive terms were imposed. In *Hall*, the trial court's sentencing decision was ruled inadequate in part for the failure to give sufficient justification for consecutive terms. *Id.*, ¶¶17-18. This is not a case like *Hall*. As we observed earlier in this opinion, the sentencing court explained why consecutive terms between count one and counts two and three were appropriate. Although the sentencing court did not explain why the imposed but stayed terms for two counts of possession of child pornography were made consecutive, the rationale for doing so can certainly be discerned, based on the highly offensive nature and sheer volume of the materials Jeske possessed.³ *See id.*, ¶19 (even if we conclude that the trial court's sentencing decision is inadequate, we search the record to determine whether the sentence imposed can be sustained). Finally, that the sentencing court deliberately imposed some terms concurrently and some consecutively reflects an overall balanced sentence.

³ Materials presented at sentencing were reviewed at the postconviction motion hearing and the postconviction court confirmed the sentencing court's findings that the materials Jeske possessed were highly offensive because they depicted very young children in sexually explicit circumstances. The decision denying Jeske's postconviction motion provides a careful and thorough analysis of the sentencing rationale and we adopt it as our own as additional support for affirming the judgment of conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

