COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP796 **Cir. Ct. No. 1989CF449**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRISON M. MARCUM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

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

¶1 PER CURIAM. Harrison Marcum appeals from the order denying his motion for sentence modification. He argues that the circuit court erred when it sentenced him by referring to him as "a preferential child molester" and "disgusting," that he is entitled to sentence modification because one count was

dismissed, and that his sentence was unduly harsh and excessive. We disagree and affirm.

¶2 In 1990, Marcum was convicted of two counts of first-degree sexual assault for having had sexual contact with his stepdaughter. The jury found him not guilty of four additional counts. The court sentenced him to twenty years on the first count and imposed and stayed a twenty-year sentence on the second count, with twenty years of probation consecutive to the first sentence. On his direct appeal, we ordered that the second count be dismissed, concluding that trial counsel was ineffective for failing to object to unspecific verdict forms, and we affirmed his conviction on the first count. ***State v. Marcum***, No. 1991AP592-CR, unpublished slip op. (Wis. Ct. App. Jan. 22, 1992).

¶3 In the motion that is the subject of this appeal, Marcum argued that the circuit court erroneously exercised its discretion and that he was entitled to sentence modification. Marcum relied on ***Blakely v. Washington***, 542 U.S. 296 (2004), to argue that the circuit court improperly deviated from the sentencing guidelines, that the court misused its discretion when it referred to him as a "preferential child molester" and "disgusting," and that his sentence was too harsh. The circuit court denied the motion without a hearing.

¶4 In this appeal, Marcum raises the same arguments. It is not clear whether Marcum is arguing that there is a new factor and he is entitled to sentence modification or that the circuit court erroneously exercised its discretion when it sentenced him. In either case, we affirm the order of the circuit court.

¶5 In order to establish that he is entitled to sentence modification, Marcum must establish the existence of a new factor or that the sentence it originally imposed was unduly harsh or unconscionable. *See* ***State v.***

Grindemann, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. A new factor is a fact "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶6 Specifically, Marcum argues that the sentencing court's statements that he was a "preferential child molester" and "disgusting" violated ***Blakely*** and ***United States v. Booker***, 543 U.S. 220 (2005). First, the sentencing guidelines were not mandatory. Further, the court sentenced him to less than the maximum: the maximum potential sentence for his crime was thirty years, and the court sentenced him to twenty. Moreover, the court was required to consider Marcum's character when sentencing him. When referring to Marcum by those terms, the court was commenting on his character. This was a proper and required exercise of the court's sentencing discretion.

¶7 Marcum also argues that the court erred when it labeled him a "preferential child molester" since he did not have any prior similar offenses. In this case, the presentence investigation report documented prior sexual assaults committed by Marcum that did not result in convictions. Marcum does not challenge this history. Instead, he appears to be arguing that he had no prior convictions on the record. The court, however, may consider things other than his past record of criminal convictions when sentencing him. *See* ***State v. Von Loh***, 157 Wis. 2d 91, 95, 458 N.W.2d 556 (Ct. App. 1990). It was proper for the circuit court to consider this, and we conclude that the court did not erroneously exercise its discretion.

¶8 Marcum next argues that because this court previously ordered that one count of his conviction be reversed and dismissed, the trial court was required to reduce his sentence on the remaining count when it resentenced him. In making this argument, Marcum relies on ***State v. Martin***, 121 Wis. 2d 670, 360 N.W.2d 43 (1985), and ***State v. Anderson***, 214 Wis. 2d 126, 570 N.W.2d 872 (Ct. App. 1997), *rev'd*, 219 Wis. 2d 739, 580 N.W.2d 239. We conclude, however, that this case is factually distinct from these two cases. In both ***Martin*** and ***Anderson***, the two crimes involved were interrelated because they were based on the same course of conduct. Consequently, if one crime is reversed, the entire course of conduct should be reviewed by the sentencing court. Here, however, Marcum's first count of sexual assault is a different crime than his sixth count of sexual assault. The one charge has nothing to do with the other, and the sentencing court did not need to review the entire course of conduct. The court, therefore, was not required to reduce the sentence on the remaining count.

¶9 Finally, Marcum argues that the sentence imposed was harsh and excessive. The court sentenced Marcum to twenty years out of a possible maximum of thirty years. We conclude that this was neither harsh nor excessive. Consequently, we affirm the order of the circuit court denying Marcum's motion for sentence modification.

By the Court.—Order affirmed.

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