COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2968-CR **Cir. Ct. No. 2005CF988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENALDO N. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Renaldo N. Nelson appeals from a judgment entered after he pled guilty to one count of first-degree sexual assault of a child,

contrary to WIS. STAT. § 948.02(1) (2003-04).[1] He also appeals from an order denying his postconviction motion. Nelson now raises four issues on appeal—the trial court: (1) erroneously exercised its sentencing discretion by not considering Nelson's character; (2) did not explain the length of the sentence; (3) incorrectly utilized the sentencing worksheet; and (4) erroneously exercised its discretion in denying Nelson postconviction relief. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 On February 11, 2005, Nelson was babysitting for an eleven-year-old girl whose family was friendly with the Nelson family. Although Nelson is only twenty-four years old, his family has been acquainted with the victim's family for over thirty years. On the night in question, the girl's father came home unexpectedly and discovered Nelson in the course of having inappropriate sexual contact with his daughter.

¶3 As a result of the incident, Nelson was charged and pled guilty to one count of first-degree sexual assault of a child, a Class B felony that carries a maximum imprisonment of sixty years. Nelson admitted his involvement and, although it appears he was not altogether forthcoming about earlier sexual incidents with the girl, he was generally helpful and apologetic with the authorities. At his sentencing hearing, Nelson asked for an imposed and stayed sentence of three to four years, plus three to five years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Nelson argued that he should be put on probation, conditioned upon one year of incarceration followed by release to the Day Reporting Center.

¶4 The court sentenced Nelson to four years of initial confinement, plus five years of extended supervision, for a total sentence of nine years. Nelson filed a postconviction motion seeking sentence modification on various grounds. This motion for postconviction relief was subsequently denied.

DISCUSSION

¶5 Nelson raises four issues related to the trial court's sentencing discretion. Our standard of review for criminal sentencing appeals is whether or not the trial court erroneously exercised its discretion. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). The presumption is that the trial court acted reasonably during the sentencing, and the appellate court will give the trial court's decision a good degree of deference. ***State v. Thompson***, 146 Wis. 2d 554, 564, 431 N.W.2d 716 (Ct. App. 1988). To properly exercise its discretion, the trial court must consider the three primary factors of the gravity of the offense, the character/rehabilitative needs of the defendant and the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The standard to apply in addressing a defendant's claims that the sentence imposed was unduly harsh or excessive, is whether "the sentence is so excessive and unusual and so 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Based on these standards, we cannot conclude that the trial court erroneously exercised its sentencing discretion.

A. Consideration of Character.

¶6 Nelson's first contention is that the trial court failed to consider his character when it imposed sentence. We disagree. The record shows that the court did consider Nelson's character when making its decision. In fact, the sentencing transcript clearly shows that the court did consider the offender's character at great length, as the character discussion encompassed four pages of the sentencing transcript. The record reflects that the court was deeply concerned with the nature of Nelson's character. At the sentencing, the court mentioned several character-specific issues with Nelson, including his family life, high school record, and Nelson's own words. The court also specifically stated that: "I give you credit for wanting to understand this. I give you credit for wanting to deal with it. I give you credit for wanting to accept help so that you don't injure anyone else." In this case, the court saw a pattern of behavior that led it to believe that Nelson had trouble exercising self-control. Also, the court noted that although there was only one count of sexual assault, both the victim and Nelson had stipulated to numerous other occasions of sexual abuse. Despite Nelson's apologies, the court decided Nelson did present a danger to the public until treatment could be provided. For the best interests of the defendant and the community, the trial court determined that probation would not be appropriate for Nelson. This decision was based on the appropriate factors and the trial court's decision was reasonable. Thus, based on the foregoing, we reject Nelson's contention that the trial court failed to take his character into consideration.

B. Length of Sentence.

¶7 Next, Nelson contends the trial court failed to provide a sufficient explanation for the length of the sentence. We disagree. WISCONSIN STAT.

§§ 973.017(10m)(a) states that a court is required to provide a rational basis for its sentence. It is also required to state the objectives a specific sentence is to impose, including: "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (citations omitted). ***Gallion*** further states that "the exercise of discretion does not lend itself to mathematical precision…. [W]e do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years." ***Id.***, 270 Wis. 2d 535, ¶49. The trial court has the unique opportunity to consider the entirety of the circumstances before it, and has advantages that the court of appeals does not. For this reason, we will affirm the trial court's decision as long as the facts in the record support the trial court's exercise of discretion.

¶8 Although lenient, the sentence imposed of four years' incarceration followed by five years' supervision did not constitute an erroneous exercise of discretion. Nelson's brief addresses the need to explain the court's departure from the pre-sentence investigation report, but the sentence imposed was within the report's boundaries. The pre-sentence investigator recommended a confinement term of three to six years followed by five to six years of extended supervision. The court's sentence was below the maximum recommended imprisonment time. Keeping in mind the trial court's statements on the record regarding the nature of the crime, Nelson's inability to deal with controls, and the danger Nelson presents to himself and the public, the trial court did adequately explain its sentencing under the requirements of WIS. STAT. § 973.017(10m)(a) and ***Gallion***.

C. Sentencing Matrix.

¶9 Nelson also argues that the court misused the sentencing guidelines during its decision. Nelson posits that had the guidelines been properly used, the resulting sentence would have been no harsher than a period of probation or minimal prison. Again, we reject his contention. WISCONSIN STAT. § 973.017(10) deals with the possible uses of the sentencing guidelines on appeal:

> The requirement under sub. (2) (a) that a court consider sentencing guidelines adopted by the sentencing commission or the criminal penalties study committee does not require a court to make a sentencing decision that is within any range or consistent with a recommendation specified in the guidelines, and there is no right to appeal a court's sentencing decision based on the court's decision to depart in any way from any guideline.

There is no right to appeal based upon failure to follow the guidelines. However, that does not totally preclude any use of the guidelines on appeal. In ***State v. Speer***, 176 Wis. 2d 1101, 1125, 501 N.W.2d 429 (1993), our supreme court interpreted a similar version of the statute, indicating that it

> means that the sentencing court must "consider" the guidelines, no more and no less. The court must be aware of the guidelines and consider them when imposing sentence. It does not mean that the sentence imposed must fall within the guidelines. That is within the sound discretion of the sentencing court.

How the court uses the guidelines during sentencing is not an issue for appeal, as long as the court does consider them.

¶10 The record here shows that the court considered the guidelines. That is all that Wisconsin law requires. The implementation of the sentencing guidelines was never meant to increase the possible avenues of appeal. Although they are part of the sentencing process, they are not a barrier to the court's

discretion. The language of WIS. STAT. § 973.017(10) is very clear in emphasizing the fact that the guidelines may be persuasive to a court, but are never mandatory. There is no basis for this issue on appeal. The guidelines are only that—guidelines—and cannot override the sound discretion of an experienced judge. Accordingly, we reject Nelson's argument on this point, and affirm the trial court's action.

D. Denial of Postconviction Relief.

¶11 Nelson filed a postconviction motion alleging that his sentence should be reduced, as it was derived from an erroneous exercise of discretion. We have already found that the trial court did not erroneously exercise its sentencing discretion. It is the job of this court to "review a motion for sentence modification by determining whether the sentencing court erroneously exercised its discretion in sentencing the defendant." ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. The order denying the motion repeats its reasons for the sentence imposed, including that the court complied with ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971) and considered the gravity of the offense, the character of the defendant, and the need to protect the public. The report also explains that it imposed this sentence in hopes it would give Nelson sufficient time to receive treatment. As evidenced earlier in this opinion, the trial court acted completely within the bounds of its discretion. Thus, the trial court did not err in denying Nelson's motion for postconviction relief and we affirm.

By the Court.—Judgment and order affirmed.

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