COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP377-CR **Cir. Ct. No. 2005CF36**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS E. CRANDALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dennis Crandall appeals the sentence pertaining to his conviction for the sexual assault of his stepdaughter. Crandall argues that (1) certain "exculpatory" testimony not provided at the sentencing hearing constitutes a new factor warranting modification of the sentence; (2) the circuit

court erroneously exercised its discretion "by rendering a sentence that lacked the underpinnings of an explained judicial process," and (3) the circuit court failed to exercise discretion "by rendering a sentence that bespoke a 'made up mind'." We reject Crandall's arguments and affirm.

¶2 Crandall pleaded no contest to sexual assault of a child under thirteen years of age, as a person responsible for the welfare of a child, in violation of WIS. STAT. §§ 948.02(1), 939.50(3)(b) and 948.02(3m).[1] The criminal charge involved the repeated sexual assault of his stepdaughter Becki, commencing when she was eleven years old.

¶3 Crandall also admitted to sexually assaulting another stepdaughter, Bridgett,[2] which occurred after the sexual assaults of Becki ended. Crandall was never charged with the incidents relating to Bridgett, nor were they read in for sentencing purposes. Bridgett chose not to testify at Crandall's sentencing hearing. The investigator who prepared Crandall's "alternative presentence investigation" stated: "This investigator attempted to contact Bridgett [S]. It was learned that Ms. [S.] does not want to have anything to do with this investigation, the sentencing of Dennis Crandall or to talk to anybody about it. She has adopted a forget about it attitude and does not want to delve into it deeper."

¶4 Crandall was sentenced to an indeterminate sentence of ten years' imprisonment. Crandall's postconviction motion challenging the sentence was

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

[2] There are various spellings of Becki and Bridgett throughout the record. For purposes of this opinion, we refer to the stepdaughters as Becki and Bridgett.

denied. Crandall makes virtually the same claims on appeal as he raised in his postconviction motion.

¶5 Crandall argues that the uncharged sexual assault of Bridgett, and its assumed effect on her, were "heavily relied on by the sentencing court." Crandall also insists the "mitigating effect of favorable testimony" from Bridgett was "unknowingly overlooked by all parties." Crandall proffers an affidavit from Bridgett that alleges she had not been seriously harmed psychologically by the sexual assault, and further that the assaults did not affect her ability to have meaningful and satisfying relationships with men. Crandall claims Bridgett's willingness to come forward with this testimony is a new factor warranting modification of his sentence. We disagree.

¶6 The definition of new factor is not as broad as Crandall asserts. A new factor must be a highly relevant set of facts unknown to the trial judge or overlooked by all parties which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something that strikes at the very purpose of the sentence selected by the court. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Moreover, the defendant has the burden of establishing the existence of a new factor by clear and convincing evidence. ***Id.*** at 97.

¶7 A court may consider unproven and uncharged offenses in imposing its sentence. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Such conduct is "evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997) (citations omitted).

¶8 It is apparent from the transcript of the sentencing hearing that the newly proffered testimony by Bridgett[3] does not frustrate the purpose of the original sentence. That Bridgett may now allege she suffered less harm from the sexual assaults does not diminish the gravity of the offenses, the public's need for protection, or Crandall's character. In fact, Crandall offers nothing that contradicts or diminishes the effect of his assaults on Becki, which the record confirms was the court's primary concern. At any rate, the proffered testimony was not unknowingly overlooked by the parties since a deliberate decision was apparently made not to testify at the sentencing hearing.

¶9 Crandall insists "the prominent inclusion" of Bridgett in the remarks by the court frustrates the purpose of the sentencing. We are unpersuaded. Crandall exaggerates the weight the court placed on the harm to Bridgett. A review of the transcript of the sentencing hearing does not reveal a record that is "replete with examples of the sentencing court going to great lengths to include mention of Bridget[t]." Nor did the court "flagrantly" use Bridgett as a basis for the sentence imposed. Much more prominent and powerful in the sentencing hearing transcript is Becki's description of the effect of the assaults on her, which was read into the record:

> Please take into consideration when sentencing Dennis, that what he did to me has forever changed my life. Dennis personally took my child innocence away.
>
> He molested me for five years, which I can never have back. The five years that Dennis molested me affects my life every day.

[3] Bridgett's affidavit states at paragraph 9: "This affidavit was drafted by Dennis Crandall's attorney but I have read it thoroughly and completely agree with its contents."

> There are times when I can't stop crying and screaming. There are days that I can't look at certain things because it throws me back in time when he was molesting me.
>
> I try every day not to think about what he did to me because it hurts too much. It is sick to think about it. When that's all I can do, I can't stop myself from vomiting.

¶10 Contrary to Crandall's perception, there is no clear and convincing evidence that the purpose of the original sentence was frustrated. Crandall fails to satisfy his burden of establishing a new factor justifying sentence modification.

¶11 Crandall next argues the court erroneously exercised its sentencing discretion "by rendering a sentence that lacked the underpinnings of an explained judicial process." Crandall is incorrect.

¶12 Appellate review of a sentence is limited. Sentencing is left to the broad discretion of the circuit court, and review is limited to whether the sentencing court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The burden on a defendant to show an erroneous exercise of discretion is heavy; the court's sentence is presumptively reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. This policy exists because "the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Borrell***, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992). We will search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained. ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998).

¶13 Here, the court considered no improper sentencing factors, and considered the appropriate three primary factors including the seriousness of the offense, Crandall's character, and the need to protect the public. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The weight to be given to the various factors is particularly within the wide discretion of the sentencing court. ***Anderson v. State***, 76 Wis. 2d 361, 367, 251 N.W.2d 768 (1977).

¶14 Crandall complains the court did not give adequate consideration to probation. However, both rejection of probation and imposition of a particular sentence can be based on any one or more of the three primary factors. ***Id.*** Implicit in the court's statements that Crandall's crime "needs and cries out for imprisonment" and that "it would unduly depreciate the horrible seriousness of these acts to not have substantial prison time" is that probation was not a reasonable alternative. The record supports the court's tacit conclusion.

¶15 The court's sentence was also not excessive as to shock public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. The ten-year sentence was far less than the maximum penalty of forty-five years, and it was the length of sentence the parties agreed to in the plea bargain that the district attorney would recommend. The sentence was also consistent with the recommendation of the presentence investigation for a sentence of eight to ten years' imprisonment.

¶16 Finally, Crandall argues the court had an "inflexible" and "made up mind." Crandall argues that he was not sentenced based on the facts relevant to his case, but because of the court's general view that "this type" of offense deserved prison, regardless of any mitigating factors. We disagree. Contrary to Crandall's argument, the court did not state or imply there were no possible mitigating factors in a case of child sexual assault. It is not unreasonable for a

court to describe first-degree sexual assault of a stepchild to be one of the most heinous crimes. Moreover, it is clear from the context of statements by the court that it referred particularly to Crandall's crime. For example, when discussing Crandall's claimed religious conversion, the court added "*this* is a heinous crime" and imprisonment is important *here* because not to impose prison time would "unduly depreciate the seriousness of *these* acts." (Emphasis added).

¶17 Crandall complains the court did not consider the testimony of his pastor, the principal of the high school which employed him, or the social worker Crandall retained to prepare his alternative presentence report as evidence that he was no longer a threat to the community. In fact, however, the court considered all of the testimony. The court was entitled to give it appropriate weight based on the witnesses' limited expertise on the subject of whether Crandall was a threat to the community and their narrow experience with Crandall.

¶18 As further evidence of a "made-up mind," Crandall cites "the strong impressions that [the court] left with members of the audience," and the speed of the resolution of the case. Crandall offers no citation to authority that the impression of the audience members is relevant to whether a sentencing court properly exercises its discretion, nor are Crandall's factual claims supported by citations to the record. In addition, there is no indication in the record that the speedy resolution of the case was because the court "had already prejudiced this case" or for any other improper motive.

¶19 Crandall also complains the court refused to hear from all the witnesses he assembled to speak at his sentencing. However, the only statements which a court must permit at sentencing are those of the defendant and his counsel, the victim and the prosecutor. The consideration of any other statements

or evidence at sentencing is within the court's discretion, and is conditioned upon being relevant to the sentence. ***State v. Robinson***, 2001 WI App 127, ¶19, 246 Wis. 2d 180, 629 N.W.2d 810. At sentencing, a defendant is not entitled to present any and all evidence he or she wishes to present. ***Id.***, ¶22.

¶20 We conclude the court did not mechanistically apply a sentence based upon an inflexible policy. The court sentenced Crandall according to the circumstances of his offense, his character, and the need to protect the public. We conclude the court properly exercised its sentencing discretions and correctly denied the motion for a sentence modification.

By the Court.—Judgment and order affirmed.

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