COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2111-CR **Cir. Ct. No. 2003CF2527**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Derrick D. Jones entered a no-contest plea to one count of second-degree sexual assault of a child. The circuit court imposed a twenty-four-year sentence, with Jones to serve a minimum of twelve years in

initial confinement and twelve years of extended supervision. Jones filed a postconviction motion seeking permission to withdraw his plea and, in the event the trial court denied his request, he also requested a new sentencing hearing. In support of plea withdrawal, Jones argued that his plea had not been knowing, intelligent and voluntary because the circuit court had not advised him that it was not bound by the plea agreement or the parties' sentencing recommendations. In support of resentencing, Jones argued that the circuit court failed to consider the appropriate sentencing factors and erroneously exercised discretion in giving excessive weight to Jones's co-defendant's statement that Jones used force during the assault. The circuit court denied Jones's motion, and Jones now appeals. We reject each of Jones's arguments and affirm.

¶2 According to the criminal complaint, a thirteen-year-old girl told police that Jones forced her to have sexual intercourse with him. She told police that when she declined Jones's sexual advances, he took off her shorts and assaulted her. She also told police that after the assault, she got dressed and tried to leave, but could not because the door was locked. According to the victim, approximately two hours later, Jones returned and requested sexual intercourse. She told police that when she refused, Jones retrieved a handgun and started chasing her around the room and calling her a "bitch." When Jones caught the victim, he again forced her to have sexual intercourse. Once he was finished, the victim was allowed to leave. She subsequently identified Jones as her assailant through a police photo array.

¶3 At the plea hearings,[1] Jones admitted having had sexual intercourse with the victim, but he denied using force. He also claimed that he believed the victim was eighteen years old. The State indicated that, in exchange for Jones's no-contest plea, it would not pursue an additional sexual-assault charge and, while recommending a prison sentence, it would leave the length of the sentence "up to the discretion of the Court." In imposing the twenty-four-year sentence on Jones, the circuit court reasoned that sentence was appropriate due to the "serious and aggravated nature" of the crime, Jones's "troublesome" and rather extensive prior criminal record, and the need to protect the community from Jones.

¶4 Jones sought postconviction relief, arguing that he had not entered his plea knowingly, intelligently, and voluntarily because the circuit court had not informed him that it was not bound by any sentence recommendation and he was unaware of this fact. He also argued that the circuit court had not properly exercised sentencing discretion by failing to articulate adequate reasons for the sentence imposed. The circuit court denied the motion, and this appeal on the same two issues follows.

Challenge to the Plea Colloquy

¶5 Jones argues on appeal that the circuit court erred when it denied his postconviction claim that he had not entered his plea knowingly, intelligently, and voluntarily because the circuit court had not informed him that it was not bound by the terms of the plea bargain as to sentence. He claims that if he had understood

[1] The circuit court took Jones's plea over the course of hearings held on two separate days.

that the court was not bound by the terms of the plea agreement, he would not have entered his no-contest plea.

¶6 Postconviction motions to withdraw guilty or no-contest pleas are addressed to the circuit court's discretion. ***State v. Clement***, 153 Wis. 2d 287, 292, 450 N.W.2d 789 (Ct. App. 1989). Plea withdrawal after sentencing is permitted only to correct a "manifest injustice." ***Id.*** A plea not knowingly, intelligently and voluntarily entered is such a manifest injustice and entitles the defendant to withdraw his or her plea. ***State v. Diehl***, 205 Wis. 2d 1, 9, 555 N.W.2d 174 (Ct. App. 1996).

¶7 In ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the supreme court held that, before accepting a plea, the circuit court must advise the defendant personally that it is not bound by the terms of a plea agreement.

> [W]hen the court becomes aware that the guilty or no contest plea is the result of a plea agreement, it must inquire as to the terms of the agreement. If the court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."*

Id., 274 Wis. 2d at ¶32 (citation omitted). "The plea colloquy is defective if it fails to produce an exchange on the record that indicates that the defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing." ***Id.***, 274 Wis. 2d at ¶42. It logically follows that the circuit court need not comply with this requirement if the defendant has not received the promise of a specific recommendation.

¶8 Here, under the plea agreement, the State agreed to recommend a prison sentence, but to leave the duration of the sentence to the discretion of the court. Thus, there was no specific sentencing recommendation agreed to by the State on which Jones could rely. The record shows that at the plea hearing, the circuit court informed Jones that the maximum penalty he faced was forty years, with a maximum of twenty-five years of initial confinement. The circuit court also explained at the plea hearing that it had not:

> made any decision about the appropriate sentence…. The judge at the time of sentencing only decides the sentence after what the State wants to say, what you and your attorney say and within reason, there can be victim input from the victim and family members and from your family members or people who want to appear on your behalf, and at this time the Court makes a decision and no decision has been made about sentencing at this point and that will be done at the time of sentencing.

While it is true that the circuit court did not specifically state that it was not bound by any particular sentencing recommendation, its comments made it clear that it would determine the sentence only after listening to all recommendations.

¶9 Jones also signed and submitted a plea questionnaire that specifically stated that the sentencing judge would not be bound by any specific recommendation. Jones argued in his postconviction motion that his attorney only summarized the form and did not review that particular provision with him, but the circuit court rejected this argument noting that Jones had acknowledged during the plea colloquy that he had reviewed the form with counsel and that he "understood everything that was discussed in the form."

¶10 In his postconviction motion, Jones also suggested that it was his understanding that under the plea bargain, the circuit court was required to follow defense counsel's sentencing recommendation. The circuit court rejected this

argument as "absurd on its face." We agree with this assessment. There is nothing in the record that would support Jones's purported belief that the circuit court was obligated to acquiesce in the defense sentencing recommendation, especially given the terms of the plea agreement itself, which left the length of sentence to be determined by the circuit court, not defense counsel.

Sentencing

¶11 Jones also argues that the circuit court erroneously exercised sentencing discretion in failing to articulate how "the sentence's component parts promote the sentencing objectives." Jones also argues that the circuit court relied upon incomplete information regarding his co-actor's interest in implicating him in the crime.

¶12 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See, e.g.*, ***State v. Wickstrom***, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." *See* ***id.*** at 355 (citations omitted). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's sentencing discretion given the circuit court's advantage in considering the relevant

sentencing factors and the demeanor of the defendant in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶13 On appeal, Jones renews his postconviction arguments that the circuit court failed to articulate adequately the reasons for the sentence imposed and failed to demonstrate how the "component parts" or sentencing factors, when considered together, yielded the sentence imposed. He argues in particular that ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, requires a more detailed and nuanced sentencing analysis than that displayed in the sentencing transcript.[2]

¶14 At sentencing, the circuit court first noted that the maximum penalty facing Jones was forty years, which "applied to this crime without any showing of force, without any showing that the defendant knew the victim's age, without any discussion of how old she said she was, how old the defendant thought she was, whether she had sex with someone before." The court noted that it is an adult responsibility to determine age and "not to have sex with anyone up to the age of 18." The court stated that factors such as the victim's knowledge, appearance and actions might be important at sentencing, but it noted that the legislature considers Jones's crime to be an "extraordinarily serious crime, regardless of knowledge."

[2] Jones was, however, sentenced prior to the release of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The supreme court indicated that ***Gallion*** applied to future cases only. ***Id.***, ¶8.

¶15 The circuit court noted that Jones appeared to be focusing on allegations that he used force, but indicated that it considered the crime "relatively aggravated" even without force having been used.

> This is a 13-year-old child who is in the early year of that felony range. There's also the age difference. This is not a prom date. This is not someone dating a child…. This is not one of these cases where the parents seem to condone the relationship…. This is nothing like that. This is a significant age difference. There's no prior relationship.
>
> The child is a runaway. She's vulnerable. Whether the defendant chooses to open his eyes to her vulnerability or not is one thing. Whether she appears to be vulnerable is another…. [T]he law is designed to protect those children regardless of how they act, regardless of how they present themselves, regardless of whether they want to sit back, smoke a cigarette and look old and run to the store and buy cigarettes. That's who this law is designed to protect.
>
> This is a case where there's no prior relationship and there is a 31-year-old and a 13-year-old. And once wasn't enough for this 31-year-old. It happened twice. Another aggravating factor. So I have got lots of aggravating issues here without the issue of force, and I'm going to continue to try to put that aside.
>
> When I look at the defendant's background and circumstances and character, there is nothing that seems to be upheld [sic] here. I have got a brother who says something nice about him, but I have got some nine, 10, prior convictions. And because he hasn't been convicted of sexual assault before, I gather Mr. Jones thinks that somehow prior felony and misdemeanor convictions should simply be washed away because, after all, this is about a runaway kid who looked like she wanted sex. Those 10 prior convictions, or whatever the exact numbers are, do matter. Even misdemeanor convictions, when they reach this number, indicate someone who cannot stay out of trouble, who cannot conform his behavior to the dictates of the law, who continues to be a burden on the system year after year.
>
> And while we do not have any felony offenses of violence, we have two prior battery convictions. We have felony convictions here, [in]cluding an officer [sic],

> burglary. We have an extremely troublesome record. And to take that kind of record and this kind of felony and talk about probation just isn't going to happen. This is not a probation case unless there are some truly extraordinary circumstances, either with respect to the crime or the defendant's background, none of which have emerged here.
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> I don't see any real mitigating factors in terms of the seriousness of the offense, just aggravating factors. And there are no material mitigating factors or compelling reasons for leniency or mercy here, rather someone who won't even obey our traffic laws and get a license before he drives and who continues to violate the law year after year and be punished with jail time, prison time, and more probation.
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> In addition to the defendant's background and circumstances and seriousness of the offense, I have to consider the risk to the community and the community's need for protection. Clearly there's a need for protection [from] Mr. Jones for all sorts of violations of the law and most particularly, and of greatest concern here, the risk that he will prey on some 13-year-old runaway because she talks tough and acts old and has sex with other people as far as he understands it.
>
> There's also the need the community has to attempt to deter others and in trying to get a message across. It's apparently, at least partly, [lost] on Mr. Jones that adults have an absolute responsibility not to have sex with 13-year-olds. Whether we can deter others or not, it's hard to say. But runaway children deserve this protection. All children deserve this protection, and it's certainly worth the community's efforts to try. So it's my judgment that considering those factors, there must be a substantial prison sentence in this case. Anything less would not sufficiently account for the seriousness of what Mr. Jones did and for his prior record. And the community needs to be protected from Mr. Jones and others like him.

¶16 The circuit court then commented on the factual dispute between the victim and Jones regarding Jones's alleged use of force in the assaults, but it noted that it was "not prepared … to determine whether there was a forcible rape beyond a reasonable doubt…." Noting the dispute, however, and Jones's arguments as to why the victim should not be believed and regarding his belief that the victim was

older, the circuit court noted that "there are answers to all, if not virtually all, of his questions."

> Sometimes very obvious answers. 13-year-old runaways don't act in some particular logical way. They don't necessarily tell the truth. They don't necessarily tell the truth about their age. Sexual assault victims don't want to talk about what happened. They don't want to admit what happened. That's true of adult sexual assault victims and appears even more true of child sexual assault victims.

The circuit court noted, however, that it considered the allegations of forcible assault to have been credible, and it concluded that even "the fact that he might have forcibly raped" the victim "certainly increases the risks that he presents to the community." The circuit court then indicated that it had initially considered nine years of initial confinement for Jones, but modified that to twelve years due primarily to the credible claim that Jones used force.

¶17 It is clear from the sentencing transcript that the circuit court discussed the main ***McCleary*** factors and applied them to the facts of this case. Specifically, the court considered the seriousness of Jones's crime, the danger to the community his offense represented, and the need to deter Jones from future similar criminal acts, especially given his character evidenced by his lengthy criminal record.

By the Court.—Judgment and order affirmed.

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