COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP104-CR **Cir. Ct. No. 2005CF4991**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHAMSAY VONGPHAKDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Khamsay Vongphakdy appeals from a judgment of conviction and a postconviction order. The only issue on appeal is whether the circuit court properly exercised its sentencing discretion. We conclude that it did. We affirm.

Background

¶2 Vongphakdy pled guilty to one count of sexually assaulting a child in violation of WIS. STAT. § 948.025(1)(b) (2005-06).[1] A person violates this statute by committing three or more sexual assaults of the same child within a specified period of time if fewer than three of the assaults occur while the child is under thirteen. *See* ***id.*** Vongphakdy confessed to repeated assaults of his adolescent daughter over a three-year period. According to the complaint, the conduct involved approximately twenty incidents of penis-to-vagina and penis-to-mouth sexual intercourse. On several occasions, Vongphakdy assaulted his older daughter in the presence of his younger daughter.

¶3 The circuit court ordered a presentence investigation following Vongphakdy's plea. The PSI report recommended imprisonment for fifteen to seventeen years, bifurcated as ten or eleven years of initial incarceration with the balance as extended supervision. The parties urged the court to reject this penalty. They jointly recommended a ten-year term of imprisonment, with only three years of initial confinement. Despite the parties' request for more lenient treatment, the court imposed a seventeen-year term of imprisonment, bifurcated as ten years of initial confinement and seven years of extended supervision.

¶4 Vongphakdy moved for postconviction relief, claiming that the circuit court erroneously exercised its discretion by giving inadequate explanations for the range and length of its sentence, and by failing to explain why a shorter

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

sentence was insufficient to achieve the sentencing goals. The court denied the motion and this appeal followed.[2]

Analysis

¶5 Vongphakdy concedes that the circuit court discussed the primary sentencing factors and relevant secondary sentencing factors. He further acknowledges that the court identified its sentencing objectives. His complaint is that the court "did not sufficiently explain its rationale for the specific sentence imposed …. [It] did not explain why ten years of confinement and seven years of extended supervision were each the correct length of the components of the sentence and how these components were expected to advance the sentencing objectives." He dismisses the court's postconviction decision as "post-sentencing rationalization" that cannot serve as support for the sentence imposed.

¶6 The seminal case in Wisconsin sentencing jurisprudence is ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). ***State v. Gallion***, 2004 WI 42, ¶20, 270 Wis. 2d 535, 678 N.W.2d 197. In ***Gallion***, the supreme court reaffirmed ***McCleary***'s core concepts. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. "While ***Gallion*** revitalizes sentencing jurisprudence, it does not make any momentous changes." ***Stenzel***, 276 Wis. 2d 224, ¶9. Our review remains limited to determining if the circuit court erroneously exercised its discretion. ***Gallion***, 270 Wis. 2d 535, ¶17. We presume that the court acted reasonably and we require the defendant to show that the court relied upon irrelevant or improper factors as the basis for its sentence. ***Id.***, ¶¶18,

[2] Vongphakdy's postconviction motion included a claim that the circuit court relied on an improper factor in imposing sentence. Vongphakdy expressly abandons this issue on appeal.

72. "Moreover, when we review a sentence, we still look to the entire record, including any postconviction proceedings and to the totality of the court's remarks." ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶7 "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. The court must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***, ¶41. Similarly, the court "must [] identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the [sentencing] decision." ***Id.***, ¶43.

¶8 The primary factors for the sentencing court to consider are "the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The court may also consider a wide range of additional factors concerning the defendant, the victim, the offense, and the community. ***Gallion***, 270 Wis. 2d 535, ¶¶40-43 & n.11. The court need discuss only the relevant factors. *See* ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). "The circuit court, in its discretion, decides how much weight to accord each factor." ***State v. Fisher***, 2005 WI App 175, ¶20, 285 Wis. 2d 433, 702 N.W.2d 56.

¶9 Here, the court focused on the gravity of the offense, characterizing the conduct as "outrageous" and the effect on the victim as "devastating." The court viewed the offense as aggravated based on the nature of the sexual conduct, the many assaults involved, and the fact that Vongphakdy victimized his older daughter in the presence of his younger daughter. In discussing character, the

court noted with concern Vongphakdy's lack of insight into his behavior. The court determined that the community required protection from Vongphakdy's conduct.

¶10 Vongphakdy contends that the court failed to explain how its sentence met the requirement of imposing no more than the minimum amount of custody necessary to meet its sentencing goals. *See* ***Gallion***, 270 Wis. 2d 535, ¶44 (reaffirming the requirement that courts impose the minimum amount of custody that is consistent with the primary sentencing factors). We disagree. No party disputed that the case called for prison. The court observed that failure to impose incarceration would unduly depreciate the seriousness of the offense. Additionally, the court found that Vongphakdy required sex offender treatment, as well as treatment for alcohol abuse and depression, and that the "treatment "ha[d] to be in a structured, confined setting." Thus, the court linked the need for incarceration to its conclusion that Vongphakdy had extensive rehabilitative needs. *See* ***Gallion***, 270 Wis. 2d 535, ¶46 (sentencing court should link sentence's component parts to the sentencing objectives).

¶11 The court had an opportunity to explain its sentence further when challenged by Vongphakdy's postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The court clarified that a substantial period of incarceration was necessary for punishment and rehabilitation, particularly in light of Vongphakdy's expressed belief that the victim enjoyed the incestuous sexual conduct. The court further clarified its intention to deter others in the community from engaging in similar conduct by imposing a significant period of confinement. These explanations demonstrate that the sentence met the minimum custody standard. Although Vongphakdy contends otherwise, the court did not have to explain why a seventeen-year prison

term was sufficient to meet its sentencing objectives while a ten-year term was inadequate. *See* ***State v. Russ***, 2006 WI App 9, ¶17, 289 Wis. 2d 65, 709 N.W.2d 483. Moreover, the defendant is not entitled to an explanation of how each factor considered by the court translates into a specific term of confinement. *See* ***Fisher***, 285 Wis. 2d 433, ¶¶21-22.

¶12 Vongphakdy complains that the circuit court did not state why it rejected the parties' joint sentencing recommendation. The court was not required to do so. "[T]he court need not explain why its sentence differs from any particular recommendation." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). Rather, the court must independently exercise its sentencing discretion. *See* ***State v. Trigueros***, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54.

¶13 The court considered Vongphakdy's character and his offense. It identified the relevant factors that it considered in reaching its decision. *See* ***Fisher***, 285 Wis. 2d 433, ¶20. It then fashioned a sentence sufficient to deter others, to exact a fitting punishment, and to address Vongphakdy's extensive rehabilitative needs. The court imposed a more onerous penalty than that urged by the parties, but that does not reflect an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgment and order affirmed.

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