

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP443-CR

Cir. Ct. No. 2006CF1898

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMAL LAWRENCE RUSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKEL, Judge. *Judgment corrected and, as corrected, affirmed; order affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Jamal Lawrence Russ appeals from a judgment of conviction for sexual assault and from a postconviction order denying his motion for sentence modification. The issue is whether the trial court erroneously

exercised its discretion in sentencing and in denying sentence modification. We conclude that the trial court properly exercised its discretion when it sentenced Russ and when it explained why it was denying his sentence modification motion. The fact that it could have exercised its discretion differently does not constitute an erroneous exercise of discretion. Therefore, we affirm.¹

¶2 Russ pled guilty to the second-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(2) (2005-06), for having “consensual” sex with a fourteen-year-old friend of his named Tracie.² Russ was nineteen at the time, and he and his twenty-seven-year-old friend, Eric Phillip Scott, went to see Tracie.³ They were talking and listening to music, and after some time, Scott suggested that he photograph Tracie as she disrobed. Scott and then Russ continued to photograph her in sexually explicit positions. After some time, Scott began having sexual contact and then intercourse with Tracie. Russ then had sexual intercourse with Tracie at least twice during that time. Scott repeatedly had sexual intercourse with Tracie.⁴

¹ To clarify the judgment on an unrelated matter, we also order correction of the judgment to conform to the postconviction order. *See* n.5 *infra*.

² All references to the Wisconsin Statutes are to the 2005-06 version.

Consent (or cooperation) is not a defense to statutory rape; when we use that terminology in this case we mean that the contact was not forcible in the factual sense, we do not mean it was consensual in the legal sense. *See State v. Fisher*, 211 Wis. 2d 665, 674-76, 565 N.W.2d 565 (Ct. App. 1997).

³ This appeal has nothing to do with Scott’s judgment of conviction except that one of Russ’s challenges is that, rather than receiving the same sentence as Scott, he should have received a lesser sentence. Consequently, we only refer to Scott for purposes of that challenge, and for general factual background.

⁴ Although the referenced sexual relations were not forcible in the factual sense, they were initiated by Scott and Russ, not by Tracie. *See also* n.2 *supra*.

¶3 Russ and Scott were initially charged with two counts of second-degree sexual assault of a child. Incident to a plea-bargain, Russ pled guilty to one count and the other count was dismissed but read-in for sentencing purposes, and the State agreed to recommend that Russ be sentenced to prison, without specifying any particular confinement term. The trial court imposed a six-year sentence to run concurrent to a previously imposed sentence, comprised of three-year respective periods of initial confinement and extended supervision. Russ moved for sentence modification, which the trial court denied.⁵

¶4 Russ contends that the trial court erroneously exercised its sentencing discretion because: (1) it failed to explain its reasons for imposing the length of the sentence it did; (2) it exceeded the minimum amount of custody necessary to achieve the sentencing considerations; (3) it considered the victim's age multiple times; (4) it imposed the same sentence for Russ and Scott despite Scott's greater culpability; and (5) it failed to consider certain mitigating circumstances that may have reduced Russ's sentence. Essentially, Russ contends that the trial court erroneously exercised its discretion because it should have imposed a more lenient sentence than it did. Disagreements about how to exercise sentencing discretion should not be confused with erroneous exercises of sentencing discretion; only the latter constitute reversible error.

⁵ The trial court imposed the sentence to run concurrent to a previously imposed sentence, however, the judgment indicated that the sentence was imposed consecutively to that other sentence. In his postconviction motion, Russ also sought to correct the judgment. The trial court ordered correction of the judgment; however, the judgment has not been corrected. To avoid any potential confusion, we direct the trial court, upon remittitur, to supervise the trial court clerk's correction of the judgment to conform to the postconviction order to indicate that the sentence was imposed concurrently.

¶5 Our principal focus is whether the trial court erroneously exercised its sentencing discretion.

When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶6 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court should also explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations (“minimum custody standard”). See *State v. Gallion*, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. See *Larsen*, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶7 The trial court amply explained its reasons for the sentence it imposed. It began by reciting the offense and the applicable forty-year maximum

potential sentence. *See* WIS. STAT. §§ 948.02(2); 939.50(3)(c). It then considered the primary sentencing factors, applying the relevant facts to each.

¶8 The trial court characterized the offense as aggravated because it involved photographing the victim, and more significantly, it involved sexual intercourse rather than sexual contact. It also considered the age difference between Russ and the victim as an aggravating factor. It considered the familiarity between Russ and the victim as mitigating factors, along with the fact that “[t]here were no threats, no abduction, no restraint, no great bodily harm, no pregnancy, [and] no transmission of disease.”

¶9 It considered Russ’s character. It considered, as mitigating factors, his role in the offense in relationship to that of Scott, his lack of alcohol or drug problems, his supportive family, his expressed remorse, his acceptance of responsibility, and his cooperation with the authorities. It also considered his prior record of convictions including his “fleeing conduct [that] occurred just days after this offense,” and characterized him as having “accumulated a poor record of undesirable behavior patterns” in a relatively short time.

¶10 The trial court considered the need to protect the community. It is the trial court’s consideration of this sentencing factor that specifically refutes Russ’s challenges to its alleged failures to meet the minimum custody standard and to explain the length of its sentence.

¶11 The trial court should explain the linkage between the component parts of the bifurcated sentence and the trial court’s sentencing objectives. *See Gallion*, 270 Wis. 2d 535, ¶46. It does not, however, need “to provide an explanation for the precise number of years chosen.” *State v. Taylor*, 2006 WI 22,

¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (citing *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)).

¶12 The trial court was mindful that Russ

already had an opportunity for probation that ha[d] not been successful. He's re-offended.

[The trial court] think[s] that ... the time ... for probation is over. In terms of the need to protect the public, [the trial court] think[s] that confinement is necessary to protect the public from this defendant's pattern of conduct that again is being established at a very early age.

The defendant is at a young enough age that he can certainly determine to change his conduct. Every day he has the same decision every other citizen has; that is, whether to be a law abiding citizen or whether to break the law. He apparently is having some difficulty in conforming his conduct to what is expected of law abiding citizens. He certainly can change that conduct.

[The trial court] think[s] that if [Russ] sees there are some serious consequences for not changing that conduct that should be a further incentive to him to change the conduct while at the same time the public can be protected from the on-going pattern of criminal conduct that is again being established here.

The trial court continued to explain that

because of the mitigating factor[s] that [the trial court has] indicated [the trial court] do[es]n't think that he need[s] a very extensive period of confinement. This is a very serious charge, and [he] could be looking at up to 25 years of confinement.⁶ [The trial court] do[es]n't think that's

⁶ This footnote was not part of the trial court's explanation, but addresses any confusion about the trial court's references to a forty-year maximum potential sentence and a twenty-five-year period of initial confinement for this Class C felony. See WIS. STAT. §§ 948.02(2); 939.50(3)(c); 973.01(2)(d)2.

necessary or called for in this situation, but [the trial court] think[s] that a period of confinement is called for and a shorter period would certainly protect the public and give [Russ] an opportunity to adjust [his] conduct so when [he] come[s] out [he] would be a law abiding citizen.

[The trial court] think[s] ... an equal amount of time on extended supervision will ensure that [he is] properly conforming [his] conduct to that of a law abiding citizen. If not, the public would be able to be further adequately ... protected by revocation of that.

¶13 The trial court explained why it rejected probation as a sentencing alternative, and why it imposed a prison sentence comprised of a period of extended supervision that equaled that of initial confinement. It structured a sentence to allow Russ to demonstrate that after serving his initial period of confinement he would obey the law. The trial court further imposed an equal period of extended supervision to serve the dual objectives of acting as “a further incentive” to obey the law and ensuring protection of the public from what had been Russ’s “on-going pattern of criminal conduct.” This explanation demonstrates the trial court’s consideration of the minimum custody standard, and explains the linkage between the component parts of the bifurcated sentence and the trial court’s sentencing objectives. See *Gallion*, 270 Wis. 2d 535, ¶46.

¶14 Russ also complains that the trial court unfairly considered the victim’s age multiple times. He contends that because the victim’s age is an element of the offense, it should not also have been considered an aggravating factor by the guidelines or by the trial court in its reasoning apart from its having considered the guidelines. Russ contends that the trial court considered the vulnerability of the victim by again considering her youth. Incident to its exercise of discretion, the trial court is entitled to assign to the primary sentencing factors whatever weight it concludes the facts warrant. See *Ocanas*, 70 Wis. 2d at 185. The trial court did not overemphasize the victim’s age, or unfairly exclude

consideration of other factors. The trial court's consideration of the victim's age, particularly in a case of sexual assault of a child, is proper.⁷ Moreover, in its postconviction order, the trial court explained that even if it had only considered the victim's age once, it would not have made any difference in the length of the sentence it imposed. *See Fuerst*, 181 Wis. 2d at 915. We reject Russ's challenge that the victim's age was repeatedly and unfairly considered.

¶15 Russ also complains that he should have received a more lenient sentence than that of his older, more culpable co-defendant.

Disparity alone does not amount to a denial of equal protection. The sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court. The sentence was not excessive. "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

Ocanas, 70 Wis. 2d at 189 (footnote omitted). The trial court is not obliged to consider the sentence imposed on an accomplice. *See id.* at 188-89. Nevertheless, in its postconviction order, the trial court explained that Scott's "slightly more culpab[le]" status was offset by Russ's prior criminal record. We reject Russ's challenge to what he alleged was disparate sentencing.

¶16 Russ also contends that the trial court did not consider certain mitigating circumstances that should have resulted in a more lenient sentence,

⁷ While the victim's age may relate to her vulnerability, these two factors are not necessarily identical. The trial court considered the victim vulnerable because she was "only 14"; however, it also considered her familiarity with Russ and the fact that "[t]here were no threats, no abduction, no restraint, no great bodily harm," as mitigating factors. We do not view the trial court's consideration of the victim's age several times in its explanation, and its relationship to her vulnerability, as unfairly emphasizing her age.

such as his allegedly “minimal” criminal record, the fact that this was an isolated incident, that “[h]e did not force the victim but was instead understanding,” that he did not intend to harm or embarrass the victim, that he was remorseful and accepted responsibility, and that he lacked a work history because he had recently graduated from high school. The trial court addressed many of these incidental factors.

¶17 The trial court exercised its discretion differently than Russ had hoped it would. That difference does not constitute an erroneous exercise of sentencing 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). The trial court extensively considered the primary sentencing factors and applied the relevant facts to those factors. It provided a reasonable explanation for the sentence structure and the sentence it imposed. We reject Russ’s sentencing challenges because there was no erroneous exercise of sentencing discretion.

By the Court.—Judgment corrected and, as corrected, affirmed; order affirmed.⁸

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

⁸ See n.5 *supra*.

