

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 14, 2009**

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. 2008AP3150-CR**

Cir. Ct. No. 2007CF6086

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOSHUA MCKINDRA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joshua McKindra pled guilty to one count of second-degree sexual assault of a child. See WIS. STAT. § 948.02(2) (2007-08).<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The court imposed a bifurcated sentence of ten years, comprised of three years of initial confinement and seven years of extended supervision. The only issue on appeal is whether the trial court properly exercised its sentencing discretion. We conclude that it did and, therefore, affirm.

¶2 The Criminal Complaint alleged that McKindra, on four separate occasions between October 1, 2007 and November 17, 2007, “ma[d]e” his then six-year-old stepsister “place his penis in her mouth.” The Complaint further alleged that McKindra told the victim “not to say anything” about the incidents. The Complaint charged McKindra with one count of first-degree sexual assault of a child. In plea negotiations, the State agreed to amend the charge to second-degree sexual assault in exchange for McKindra’s guilty plea and to recommend a twelve-year sentence, comprised of three years of initial confinement and nine years of extended supervision. At sentencing, McKindra argued for probation. As noted, the court imposed a ten-year sentence, comprised of three years of initial confinement and seven years of extended supervision.

¶3 McKindra contends that the trial court erroneously exercised its discretion by not adequately considering various mitigating factors such as his lack of a prior criminal record, his remorse, and his acceptance of responsibility. McKindra emphasizes a psychological evaluation that suggested that McKindra was not a pedophile and that he needed long-term counseling. McKindra contends that the trial court “did not adequately address his upbringing, his education, athletic accomplishments, family ties and intelligence,” which he argues “mitigate the severity of the sentence.” McKindra contends that the court “did not explain the purpose of the sentence or the reason for the length imposed and in some instances drew a conclusion inconsistent with its analysis.” Specifically, McKindra takes issue with the court’s emphasis on protection of children which he

argues is incongruent with his remorse, acceptance of responsibility, and the psychological assessment that he is not a pedophile. We are not persuaded by any of McKindra's contentions.

¶4 Three primary sentencing factors should guide a circuit court's sentencing decision—the nature of the offense, the character of the defendant, and society's interest in punishment, deterrence and rehabilitation. See *State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Appellate review of sentencing is limited to determining if discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.” *Id.* When the exercise of discretion has been demonstrated, we follow “a ‘consistent and strong policy against interference with the discretion of the trial court in passing sentence.’” *Id.*, ¶18 (citation omitted). “Sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *Id.* (citation and brackets omitted). The “sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.” *Id.*, ¶23 (citation omitted).

¶5 “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.” *Id.*, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of

the offense, the rehabilitative needs of the defendant and other aggravating or mitigating factors. *Id.*, ¶40 n.10.

¶6 In this case, the circuit court stated that it had reviewed the presentence investigation report, the psychological evaluation proffered by McKindra, and the victim impact statement. The court stated that the sentencing was “difficult,” particularly because McKindra was nineteen-years old. The court acknowledged that the case originally had been charged as a first-degree sexual assault but the amendment of the charge did not “change certain factors with respect to the case, particularly the young age of the victim.” The court stated that McKindra’s actions had “a tremendous impact” on the victim and the families. The court noted that the “young age of the victim, ... just six years old” was “extremely aggravating.”

¶7 The court also faulted McKindra for not being able to “impose in [him]self some sort of boundary or self-discipline in recognizing how wrong and how terrible it was to engage in this activity” with the “very young and vulnerable victim [who] had so much trust and respect” for her stepbrother. The court considered McKindra’s “position of trust and authority” with respect to the victim who “in essence idolized ... and looked up to” McKindra to be an “aggravating factor.” The court also stated that the number of incidents was “an aggravating factor because it is apparent ... that [McKindra] knew with each act that it was wrong.”

¶8 The court stated that it was considering McKindra’s character. The court noted that McKindra had “accepted responsibility” and that his “statement to the Court [was] very heartfelt and sincere in its expression of remorse.” The court stated, however, that the “need to protect children” and McKindra’s “treatment

needs” called for a prison sentence. The court also rejected McKindra’s recommendation of probation because it would “unduly depreciate the serious nature of the offense.”

¶9 The record shows that the circuit court identified the various factors that it considered in fashioning its sentence. The circuit court identified its sentencing objectives—protection of children and McKindra’s need for treatment. Sexual abuse of children is viewed by our society as one of the most heinous crimes a person can commit. *See Johnson v. Rogers Mem’l Hosp. Inc.*, 2005 WI 114, ¶80, 283 Wis. 2d 384, 700 N.W.2d 27 (Prosser, J., concurring). The court’s emphasis on the nature of the offense, the impact on the victim, and the need to protect similar victims was not improper.

¶10 Numerous factors are potentially relevant at sentencing. *See Gallion*, 270 Wis. 2d 535, ¶43 n.11. The court is not required to discuss every potential factor, however, but “need discuss only the relevant factors in each case.” *Id.*, ¶43 n.11. A defendant is not entitled to an explanation of how each factor considered by the court translates into a specific term of confinement. *See State v. Fisher*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. While the court did not weigh the facts as McKindra hoped, the determination of what is relevant at sentencing lies within the discretion of the circuit court. *See State v. Stenzel*, 2004 WI App 181, ¶17, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court is not obligated to explain why it did not choose a particular sentence; it is only obligated to explain why it chose the sentence imposed. *State v. Hamm*, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988). The trial court provided a sufficient explanation as to why it imposed the sentence that it did. Accordingly, the circuit court did not erroneously exercise its sentencing discretion.

¶11 Finally, McKindra contends that the circuit court erroneously resolved his postconviction motion by rejecting his contention that the sentence was based on an improper consideration of the sentencing factors and that the sentence was excessive. When reviewing the denial of a postconviction motion for sentence modification, this court’s role is to “review [the] motion ... 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. We have already concluded that the circuit court’s sentence was based upon appropriate factors with no improper considerations. Such a sentence, when well within the limits of the maximum, is “unlikely to be unduly harsh or unconscionable.” *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The circuit court did not err.

*By the Court.*—Judgment and order affirmed.

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

