COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1337-CR **Cir. Ct. No. 01-1337-CR**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUINTIN D. L'MINGGIO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Quintin D. L'Minggio appeals an order of the trial court denying his motion to modify his sentence for having sexual intercourse with

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All statutory references are to the 1999-2000 version.

a child over sixteen years of age as a repeater and obstructing justice. We affirm the denial.

¶2 L'Minggio admits in his brief that he had sexual intercourse with a child over the age of sixteen but claims that the trial court misused its discretion in sentencing him to the maximum of three years to be served consecutive to the time remaining after his parole revocation.

¶3 The first argument is a question of law. L'Minggio claims that the trial court improperly sentenced him because he refused to admit his guilt when initially confronted by the investigating police officer. When questioned by the officer, L'Minggio denied that the sexual event ever happened. Only after the DNA results showed his involvement did he change his story and admit to having had intercourse with the young woman. However, he claimed that it was consensual. He cites ***Scales v. State***, 64 Wis. 2d 485, 495-97, 219 N.W.2d 386 (1973), for the proposition that a court may not use a defendant's refusal to admit guilt against him or her in sentencing.

¶4 Actually, that is not the precise holding of ***Scales***. What ***Scales*** really holds is that it is improper to impose a harsher sentence for a defendant's failure to admit guilt *after* a finding of guilty. ***Id***. at 495. So, L'Minggio's reliance on ***Scales*** is misplaced. This is especially so since at sentencing, L'Minggio did, *in fact*, admit his guilt and express remorse for it, which remorse was duly noted by the court. As to L'Minggio's claim that the trial court held his initial denial to the officer against him at sentencing, this court has read the entire sentencing transcript and is unable to find anything showing that the court considered his failure to admit the crime as a factor justifying a three-year sentence. What the trial court *did* consider was his giving conflicting stories to the

investigating officer about what happened. This is more than simply a mere refusal to admit guilt. Rather, it shows he lied. A lie reveals a state of mind that there is something to hide. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶18, 246 Wis. 2d 648, 630 N.W.2d 752, *review denied*, 2001 WI 117, ___ Wis. 2d ___, 635 N.W.2d 783 (Wis. Sept. 19, 2001) (No. 00-2133-CR). Surely, a trial court can consider the fact that a defendant lied to officers. That goes to the character of the defendant. L'Minggio's claim, therefore, is meritless. The trial court did not run afoul of the law announced in ***Scales***.

¶5 All but one of L'Minggio's remaining arguments take issue with the factors that L'Minggio claims the trial court either gave too much weight to or no or little weight to in sentencing him. In no particular order, L'Minggio argues that he should be entitled to some relief because this is the first time that he has been involved in a criminal offense of a sexual nature. Further, he argues that the offense was not a violent one, that it was consensual and that the young lady was the instigator, that he did not know her age at the time, and that he had no intent to commit a crime. He also argues that the trial court placed undue weight on his past criminal record, placed undue weight on the fact that he was on parole at the time of his offense, and never addressed the gravity of his offense. L'Minggio asserts that proper consideration of these factors should have acted to mitigate the sentence.

¶6 Our supreme court has stated that in reviewing a sentence for an erroneous exercise of discretion, it adheres to a strong policy against interference with the trial court's discretion in passing sentence. ***Harris v. State***, 75 Wis. 2d 513, 518, 250 N.W.2d 7 (1977). It is presumed that the trial court acted reasonably and the defendant must show some unreasonable or unjustifiable basis

for the sentence. ***Id***. We will only modify a sentence when a misuse of discretion appears. *See* ***id***.

¶7 In ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1976), our supreme court enunciated the circumstances that might be a misuse of discretion: (1) failure to state on the record the relevant and material factors which influenced the court's decision, (2) reliance on factors that are totally irrelevant or immaterial to the type of decision to be made, and (3) too much weight given to one factor in the face of other contravening considerations.

¶8 Furthermore, in passing senctence, it is within the trial court's discretion to consider factors such as past record of criminal offenses, history of undesirable behavior patterns, the defendant's personality, character and social traits, the vicious and aggravated nature of the crime and the defendant's remorse. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (1992). The weight to be attached to each factor is a determination particularly within the wide discretion of the trial court. ***Id***.

¶9 We hold that the record in this case is devoid of any evidence that the trial court misused its discretion in imposing sentence. Our examination of the record leads this court to the conclusion that the trial court articulated its reasons for imposing sentence, considered proper factors and exercised proper judicial discretion.

¶10 First, as to L'Minggio's claim that the trial court should have given consideration to the fact that the young woman consented to the act and, in fact, instigated the act, the trial court correctly pointed out that in this state, a person under the age of eighteen is legally incapable of consent. Consent is irrelevant to the crime. Moreover, while it is true that the State amended its charge from one

alleging a forced sexual act to one where force is not at issue, that does not mean that force did not occur. What it means is that the State was not convinced that it could prove force beyond a reasonable doubt. As to the issue of consent, the facts were equivocal, a fact which the trial court duly noted. Based on the record, it is obvious that the trial court discounted L'Minggio's assertion of how the act was totally consensual and how the young victim instigated the act. Rather, the trial court chose to leave it as a conviction in which consent was not at issue. The trial court was within its discretion to so decide.

¶11 L'Minggio cites ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975), claiming that the case stands for the proposition that consent of the minor is a mitigating factor which the trial court must take into consideration in passing sentence even when consent is not an element of the crime. ***Rosado*** does not help L'Minggio as that case must be read within the context of its facts. In ***Rosado***, the main focus of the supreme court was the trial court's consideration of a sexual act which had occurred in Puerto Rico. ***Id***. at 288. The main thrust of that opinion was to admonish the trial court for having increased Rosado's sentence based on an act that was not properly before the court. ***Id***. at 290. It is true that in subsequently modifying Rosado's sentence, the supreme court alluded to the voluntary nature of the sexual relationship that Rosado had with the fifteen-year-old, that it was Rosado's first offense, and that he had a good employment record. ***Id***. at 290-91. But, in ***Rosado***, the consensual nature of the act was not disputed. ***Id***. at 291. Here it was. Also, the supreme court gave great consideration to the fact that, in addition to the undisputed consensual nature of the act, Rosado had never been involved in any type of criminal activity before. ***Id***. L'Minggio cannot say that the same goes for him. Third, Rosado had a good employment history,

while L'Minggio's history is dotted with stays in prison settings. L'Minggio is no Rosado.

¶12 We next discuss the fact that the trial court did consider L'Minggio's prior adult criminal record dating from 1978. The trial court noted that the crimes were primarily against property, although the latest charge was a drug charge. The trial court also considered that L'Minggio was on parole at the time of this offense. L'Minggio objects that, while he may have had a prior criminal record, he had no prior record for sexual assault. He also objects to the view that he committed a crime while on parole because he did not mean to commit the crime. But all of L'Minggio's protests are of no consequence. He has repeatedly run afoul of the law. He has repeatedly found himself in criminal court over the years when the vast majority of our citizens have never even seen the inside of a criminal courtroom. Certainly, the trial court can take into consideration the fact that L'Minggio has not shown any ability to conform to social mores. That is within the trial court's discretion to consider and the trial court did properly consider it.

¶13 L'Minggio objects to the characterization of him as a "career criminal." First, the trial court never made that statement, although it does appear in the presentence report. Second, while it may be that the last time L'Minggio was convicted of an offense was in 1993, an inference can be drawn that the reason why he may not have been convicted more often since 1993 was that he was behind bars for a good portion of the time. The record shows that from 1993 on, L'Minggio was repeatedly in prison, then out of prison, then on parole, then revoked, then put back in prison, and then revoked again. The inference to be drawn is that L'Minggio cannot make it on the street. This is a proper factor for the trial court to consider in deciding whether prison is necessary and for what

length of time. There was no misuse of discretion by the trial court in considering L'Minggio's past record.

¶14 We next discuss L'Minggio's claim that the trial court did not consider the gravity of the offense. This again is in keeping with L'Minggio's theme that, since this was a consensual act done without any intent to commit a crime, the trial court should have given great consideration to the lack of gravity of the offense. We have already spoken to the equivocal nature of the record as it relates to whether or not there was consent. The trial court did consider the gravity of the offense, but discounted L'Minggio's version. It gave his version some weight, but not the weight L'Minggio was hoping for. This was all within the trial court's decision to weigh. The trial court said:

> Mr. L'Minggio has expressed some remorse for this incident, but basically in terms of he shouldn't have done it in the first place, that it was consensual, but it was a young victim. The court takes into account the nature of his activity, although I note clearly the frankly conflicting statements that Mr. L'Minggio made, but also the somewhat conflicting statements made by the victim here as well.

By this passage, it is evident that the trial court did consider the gravity of the offense and the claim that the act was consensual. But it was within the trial court's discretion to neither give too much weight to the victim's past statements that the act was nonconsensual nor to L'Minggio's theory that the act was consensual. Rather, the court appears to have given due weight to both claims and moved on to the protection of the public as the deciding factor. This the trial court had discretion to do.

¶15 As to protection of the public, the trial court alluded to L'Minggio's long record, the fact that sexual intercourse with a child over the age of sixteen is a

crime in this state, and the fact that probation and parole have obviously not worked with him because he had been revoked on four separate occasions. The trial court obviously concluded that L'Minggio had to be off the streets for the maximum amount of time in order to protect the public. The trial court also alluded to L'Minggio's character in that he did lie to the officer and therefore did obstruct the investigation. That goes to the issue of trust. Can L'Minggio be trusted to be on the streets? The trial court decided that it could not trust him. That decision is within the trial court's discretion and we will not disturb it.

¶16 Finally, L'Minggio claims that the presentence report was inaccurate and misleading and therefore the trial court should not have considered the presentence report at all. This claim was raised before the trial court and the claim was denied. L'Minggio raises it again on appeal. But he never tells this court what it is about the presentence report that is inaccurate or misleading. We will not further consider it.

¶17 In conclusion, L'Minggio argues that the trial court never considered the gravity of the offense or properly addressed his character. On the contrary, the record shows that the trial court considered both. The sentence is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.