COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1015-CR **Cir. Ct. No. 01 CF 938**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON A. YORK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.[1]

Before Wedemeyer, P.J., Fine and Schudson, JJ.

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[1] We have been informed that Jon A. York died. This does not affect the appeal. *See* ***State v. McDonald***, 144 Wis. 2d 531, 536, 424 N.W.2d 411, 414 (1988) ("when a defendant dies pending appeal, regardless of the cause of death, the defendant's right to an appeal continues").

¶1 PER CURIAM. Jon A. York appeals from an amended judgment entered after he: (1) entered a plea under ***North Carolina v. Alford***, 400 U.S. 25, 37–38 (1970) (defendant may accept conviction while simultaneously proclaiming innocence), to one count of sexual exploitation of a child, as a party to a crime; (2) pled guilty to two counts of possession of an electric weapon and to one count of manufacturing less than 500 grams of marijuana; and (3) pled "no contest" to twenty-five counts of possession of child pornography. *See* WIS. STAT. §§ 948.05(1)(a), 939.05, 941.295(1), 961.41(1)(h)1, and 948.12 (1999–2000).[2] He also appeals from an order denying his: (1) motion to suppress evidence; (2) motion to dismiss the sexual-exploitation count; and (3) motion to dismiss six counts of the information.

¶2 York alleges that the trial court erred when it denied his motion to suppress because he claims that: (1) the affidavit in support of the search warrant did not establish probable cause; and (2) the reliability of how the informant got the information was not established in the affidavit. York also alleges that: (1) the trial court erred when it denied his motion to dismiss the causing-mental-harm-to-a-child, sexual-assault, incest, and sexual-exploitation charges because the criminal complaint and the information did not contain "date-specific" charges; and (2) the trial court erroneously exercised its sentencing discretion. We affirm.

I.

¶3 A cable-data technician found what he considered to be sexually graphic photographs on Jon A. York's computer when he went to York's house to

[2] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

repair the television and cable modem services. The photographs were the basis for an application for a search warrant. According to the affidavit in support of the warrant, the technician saw that three people lived in York's house: a man in his forties, a woman in her early thirties, and a girl "approximately nine years old." The girl was later identified as York's daughter. The technician found many photographs of the residents in the nude, including the girl, while he was working at York's computer. The technician sent some of the photographs to his personal e-mail account. When he returned to his office, he called the Milwaukee Police Department.

¶4 The affidavit further averred that Detective William J. Stawicki interviewed the technician and looked at the photographs. Based upon his experience with the Internet Crimes Against Children Task Force, he believed that the photographs were evidence of sexual assault and sexual exploitation of a child. The affidavit described the photographs as follows:

> [O]ne of the images depicted the adult female nude and leaning forward at the waist. Immediately to the adult woman's left is the white female child, also nude. Affiant states that the child's right arm is under and supporting the adult female's breasts. Affiant states that the child appears to be under the age of ten and has not yet reached puberty. Affiant states that another of the images depicted the adult white female laying on her back on a bed nude from the waist down with her legs spread lewdly exhibiting her genitalia. The white female child is laying on the bed to the adult woman's left, fully clothed. Affiant states that other images also depicted the child in various naked poses.

¶5 A court commissioner found that probable cause existed to search York's house for evidence of first-degree sexual assault of a child and sexual exploitation of a child. The search warrant authorized the police to search for and seize:

> Any and all computers and computer systems, including hardware, software, cables, discs, and any items used to connect any computer systems, along with any related software and computer related magnetic storage devices;
>
> Digital camera; any and all photographic equipment;
>
> Any notes, papers, records of any kind relating to sexual activity with minors[;]
>
> Documentation showing the person or person[s] in control of the premises[.]

When the police executed the search warrant, they found, among other things: a marijuana plant, two stun guns, and 2,796 images they believed to be pornographic. Of the 2,796 images, the police considered 144 to be child pornography.

¶6 York filed several pre-trial motions. First, he sought to suppress all evidence obtained by the police officers. He alleged that the search warrant was not supported by probable cause because what he called the "nondescript" depiction of the photographs did not provide evidence of sexual assault or sexual exploitation. York also claimed that the search warrant was invalid because the affidavit did not "demonstrate the reliability of the *manner* in which the informant obtained the subject photographs." (Emphasis by York.)

¶7 Second, York sought dismissal of the sexual-exploitation charge, contending that the photographs were not evidence of sexual exploitation because they showed mere nudity. Finally, York filed a motion to dismiss the causing-mental-harm-to-a-child, sexual-assault, incest, and sexual-exploitation charges because, he alleged, they lacked "proper specificity as to the date of [the] alleged commission." The trial court denied all of York's motions.

¶8 The case was plea-bargained and the State moved to dismiss three counts of first-degree sexual assault of a child and one count of incest with a child. An additional charge, causing mental harm to a child, was dismissed after sentencing.

¶9 The trial court sentenced York to fifteen years in prison on the sexual-exploitation charge, with ten years of initial confinement and five years of extended supervision; five years in prison on each possession-of-an-electric-weapon charge, with two years of initial confinement and three years of extended supervision; four years in prison on the manufacturing-a-controlled-substance charge, with one year of initial confinement and three years of extended supervision; and four years in prison on each possession-of-child-pornography charge, with one year of initial confinement and three years of extended supervision. The possession-of-an-electric-weapon and the manufacturing-a-controlled-substance sentences were made concurrent to the sentence on the sexual-exploitation charge. The possession-of-child-pornography sentences were made consecutive to each other and to the sexual-exploitation sentence.

II.

A. Motion to Suppress

¶10 York alleges that the trial court erred when it denied his motion to suppress. "When the issuance of a warrant is challenged on appeal, our focus is not on the trial court's decision to grant or deny a suppression motion but on the issuing magistrate's determination that the application for the warrant was sufficient to support its issuance." ***State v. Jackowski***, 2001 WI App 187, ¶9, 247 Wis. 2d 430, 633 N.W.2d 649. The defendant has the burden to show that the evidence before the magistrate was insufficient to support the issuance of the

warrant. ***Ritacca v. Kenosha County Court***, 91 Wis. 2d 72, 78, 280 N.W.2d 751, 754 (1979).

¶11 We independently review a magistrate's decision to issue a search warrant. ***State v. Tompkins***, 144 Wis. 2d 116, 121–122, 423 N.W.2d 823, 825 (1988). Our review is limited, however, to whether the magistrate had a substantial basis for finding that probable cause existed:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for … conclud[ing] that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 236, 238–239 (1983).

1. Probable Cause

¶12 First, York claims that the affidavit in support of the warrant was insufficient to establish probable cause because it did not allege that his daughter was posed in a sexually suggestive manner. Rather, he alleges that the photographs, as described in the affidavit, were "'family pictures' of avowed nudists who were simply goofing around." We disagree.

¶13 In this case, the affidavit alleged that there was probable cause to believe that evidence of sexual exploitation of a child would be found in York's house. The sexual exploitation of a child is a violation of WIS. STAT. § 948.05(1), which provides:

> **(1)** Whoever does any of the following with knowledge of the character and content of the sexually

> explicit conduct involving the child is guilty of a Class C felony:
>
> (a) Employs, uses, persuades, induces, entices or coerces any child to engage in sexually explicit conduct for the purpose of photographing, filming, videotaping, recording the sounds of or displaying in any way the conduct.
>
> (b) Photographs, films, videotapes, records the sounds of or displays in any way a child engaged in sexually explicit conduct.[3]

Sexually explicit conduct includes the "[l]ewd exhibition of intimate parts." WIS. STAT. § 948.01(7)(e). "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19). While no one definition has been established for what is a lewd photograph of a child, the supreme court has stated:

> Three concepts are generally included in defining "lewd" and sexually explicit. First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. Second, the child is posed as a sex object. The statute defines the offense as one against the child because using the child in that way causes harm to the psychological, emotional and mental health of the child. The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's

[3] Effective September 1, 2001, WIS. STAT. § 948.05(1)(a) was amended to provide:

> **(1)** Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child is guilty of a Class C felony:
>
> (a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.
>
> (b) Records or displays in any way a child engaged in sexually explicit conduct.

2001 Wis. Act 16, §§ 3969-3970, 9359(1).

> intention to engage in sexual activity or whether the viewer or photographer is actually aroused. Last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph but they may use common sense to distinguish between a pornographic and innocent photograph.

State v. Petrone, 161 Wis. 2d 530, 561, 468 N.W.2d 676, 688 (1991).

¶14 The information in the affidavit provided the court commissioner with probable cause to believe that evidence of sexual exploitation of a child would be found in York's house. First, the affidavit contained information that the cable-data technician had provided to Detective Stawicki. The technician told Stawicki that he had personally "observed numerous images of the … occupants of the residence, including the child, in the nude and in what he considered to be sexually graphic poses."

¶15 The affidavit further alleged that Detective Stawicki interviewed the technician and saw the photographs the technician got from York's computer. As we have seen, Stawicki described the photographs in the affidavit, portions of which are set out above. He concluded that "based upon his training and experience he believes that [the photographs] constitute evidence of … Sexual Exploitation of a Child in violation of Wisconsin State Statutes."

¶16 This was sufficient to establish probable cause. Contrary to York's assertion, the photographs described in the affidavit were not simply photographs of nudity. According to the technician's and Stawicki's description of the photographs, there was an unusual focus on the intimate parts of the subjects. The technician described several of the photographs of the girl as "sexually graphic poses." *See* ***United States v. Layne***, 43 F.3d 127, 133 (5th Cir. 1995) (the term "child pornography" needs no expert training or experience to clarify its meaning).

Moreover, Stawicki described the photographs as: (1) a nude child with her right arm under and supporting an adult woman's breasts; (2) a child lying on a bed next to a woman with her legs spread to exhibit her genitalia; and (3) a child in "various naked poses." It was a fair, "common sense" analysis that some of the photographs were the lewd exhibition of a child's intimate parts. *See* ***Petrone***, 161 Wis. 2d at 561, 468 N.W.2d at 688. Accordingly, there was sufficient information in the affidavit for the court commissioner to conclude that a fair probability existed that evidence of a crime — sexual exploitation of a child — would be found in York's house. The search warrant was valid.[4]

2. Reliability of Informant

¶17 Second, York alleges that the search warrant was invalid because "the manner in which the technician allegedly obtained the subject images" was not verified in the affidavit as reliable. He contends that the information was not reliable because there was no corroboration that the technician e-mailed the photographs to himself. York thus claims that, without verification, the

[4] York alleges that "[n]othing else in the Affidavit demonstrates a fair probability, or a substantial basis, to believe that the Yorks' residence contained additional evidence of illegal activity." This argument is simply a rehash of his probable-cause argument. Moreover, York does not cite any legal authority to support this proposition. Accordingly, we decline to address it. See ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Additionally, York claims that the detective's experience and training "does not save probable cause for the search warrant." (Uppercasing omitted.) In light of our determination that the search warrant was valid, we also decline to address this issue. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). We also do not discuss whether there was probable cause that the police would find evidence of sexual assault of a child, the second crime alleged in the affidavit, in York's house. *Cf.* ***State v. Williams***, 198 Wis. 2d 516, 536–537, 544 N.W.2d 406, 414–415 (1996) ("when counts are transactionally related, the purpose of the preliminary is served once it has been established that there is probable cause to believe the defendant has committed **a** felony") (emphasis in ***Williams***).

photographs could have come from the technician's private collection. Again, we disagree.

¶18 It is undisputed that the technician was a citizen informant. Citizen informants are considered reliable even though their personal reliability has not previously been proved or tested. ***State v. Paszek***, 50 Wis. 2d 619, 631, 184 N.W.2d 836, 843 (1971). When information is received from a citizen informant the test for reliability shifts from a question of personal reliability to "observational reliability." ***State v. Williams***, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106. Observational reliability is satisfied by "direct personal observation" of the matter in question. ***Sanders v. State***, 69 Wis. 2d 242, 259, 230 N.W.2d 845, 855 (1975).

¶19 Here, the reliability of the information was high. The affidavit indicated that the technician personally saw the photographs on York's computer. Moreover, the technician identified himself to the police—his name and place of employment were included in the affidavit. *See* ***Williams***, 2001 WI 21 at ¶35 (a citizen informant who identifies himself is considered to be reliable because he can be held accountable for providing false information). Finally, the affidavit recited that Stawicki verified the information when he personally looked at the photographs. Accordingly, the information in the affidavit in support of the search warrant, including the manner in which it was obtained, was reliable.

B. Motion to Dismiss

¶20 York also claims that the trial court erred when it did not grant his motion to dismiss the causing-mental-harm-to-a-child, sexual-assault, incest, and sexual-exploitation charges because they were not "date-specific." Five of the counts were dismissed. York entered an ***Alford*** plea to the remaining sexual-

exploitation count. An ***Alford*** plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights. ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332, 334–335 (Ct. App. 1995). Accordingly, York waived his claim that the counts were not date-specific.[5]

C. Sentencing

¶21 Finally, York alleges that the trial court erroneously exercised its sentencing discretion.[6] He claims that his sentence is excessive because it "constitutes a life sentence in all practical respects." We disagree.

¶22 A trial court erroneously exercises its sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances," ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975), or where the trial court does not consider the appropriate sentencing factors, ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). A strong public policy exists against interfering with the trial court's discretion in

[5] York also alleges that the trial court erred when it did not grant his motion to dismiss the sexual-exploitation count because the photographs of the girl were mere nudity. This "argument" is six lines long and is not augmented with any legal authority. Thus, in addition to being a rehash of York's probable-cause argument, this contention is conclusory and undeveloped, and we decline to address it. *See* ***Pettit***, 171 Wis. 2d at 646, 492 N.W.2d at 642 (appellate court may "decline to review issues inadequately briefed").

[6] Although York's postconviction motion before the trial court initially challenged his sentence, he withdrew that challenge, and the trial court did not consider it. We would thus be justified in not addressing his argument that the trial court erroneously exercised its sentencing discretion. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal). Nevertheless, we address it here in the interests of judicial economy.

determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶23 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[7] ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984). An examination of the record shows that the trial court considered the appropriate factors. First, the trial court considered the gravity of the offense, noting:

> You have a responsibility as a parent in order to bring up your child certainly in a right manner. This isn't the right manner, as you know, and as everyone knows. You betrayed a trust, taking away that child's childhood based upon the acts that were done, and it's certainly egregious, pathetic, whatever you want to say, repulsive, and you have to be punished for that not only as a specific deterrent, but also as a general deterrent to others.

The trial court also considered York's character and the need to protect the community, including York's: presentence investigation results, psychological evaluation, age, educational background, and employment record. Moreover, York's sentence was within the maximum limits. He faced a potential

[7] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

imprisonment of 154 years and 6 months. *See* WIS. STAT. §§ 948.05(1), 939.50(3)(c), 941.295(1), 939.50(3)(e), 961.41(1)(h)1, and 948.12(1). The trial court actually sentenced him to imprisonment of 115 years, consisting of 35 years of initial confinement and 80 years of extended supervision. York has not pointed to anything in the record that indicates that the trial court erroneously exercised its sentencing discretion. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411, 417–418 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

By the Court.—Judgment and order affirmed.

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