COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1443-CR **Cir. Ct. No. 98-CF-345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER S. OGLESBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Christopher S. Oglesby appeals from a judgment of conviction of two counts of second-degree sexual assault of a child and from an order denying his postconviction motion for sentence reduction. He argues that the trial court erroneously exercised its sentencing discretion. We affirm the judgment and order.

¶2 Oglesby was originally charged with eight counts of sexual assault of a fifteen-year-old girl. He entered an ***Alford*** plea[1] to two counts and the remaining six counts were dismissed but read-in at sentencing. The trial court imposed a twenty-year prison term for one count and ten years' probation on the other. Oglesby sought sentence reduction on the grounds that a similarly situated codefendant received a lesser sentence,[2] the trial court relied on inaccurate information that Oglesby had videotaped the sexual assaults, and the trial court's failure to recognize that Oglesby accepted a degree of responsibility for the crimes by entry of his plea.

¶3 Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis. 2d 510, 517, 451 N.W.2d 759 (Ct. App. 1989). This court will honor the strong policy against interfering with the discretion of the sentencing court unless no reasonable basis exists for its determination. ***Id.*** To overturn a sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. ***State v. Petrone***, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991). Inherent in the sentencing court's exercise of discretion is a consideration of numerous factors and the weight to be accorded each factor is within the sentencing court's discretion. ***Scherreiks***, 153 Wis. 2d at 517. It may be a misuse of discretion if the sentencing court places too much weight on any one factor in the face of

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] For sexual conduct with the same victim, Michael Gattie was convicted of one count each of second- and third-degree sexual assault of a child. Gattie was sentenced by a different court to a five-year prison term for the third-degree conviction and sentence was withheld and twelve years' probation imposed for the second-degree conviction.

contravening considerations. ***State v. Spears***, 147 Wis. 2d 429, 446, 433 N.W.2d 595 (Ct. App. 1988).

¶4 Oglesby argues that the trial court imposed too harsh a sentence for crimes that involved no violence and which would have been misdemeanor charges if committed one month later after the victim turned sixteen years old. The trial court recognized that the assaults did not involve force but nonetheless concluded that the victim was seriously affected. Oglesby had sexual intercourse with the victim on eight occasions and supplied the victim with alcohol and drugs. The victim and her mother explained how Oglesby's conduct affected the victim. Further, Oglesby's criminal history included four juvenile adjudications for damage to property, two counts of burglary, and party to the crime of arson. As an adult offender Oglesby was convicted of burglary and for possession of marijuana while incarcerated in jail. The record supports the trial court's conclusion that Oglesby was a dangerous offender who could not be deterred from criminal conduct with a lesser sentence.

¶5 Oglesby contends that the trial court failed to give him credit for taking responsibility for his actions by entry of his ***Alford*** plea. While the plea obviated the need for a trial and spared the victim from testifying, the plea itself was not an admission of responsibility. Indeed, an ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his innocence or does not admit to having committed the crime. ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). Oglesby's plea did not exhibit remorse or responsibility to be factored into the sentence.

¶6 A defendant has the right to be sentenced on the basis of true and correct information. ***Bruneau v. State***, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347

(1977). A defendant who requests resentencing must show that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). The prosecutor's argument that Oglesby had videotaped the sexual assault met with an objection. It was explained that no videotapes were found but that the victim's mother believed that they existed. The trial court was aware that there was no actual proof that videotapes had been made. Although the trial court required Oglesby to turn over any videotape he might have made, it did not rely on the possible existence of the tape as a sentencing factor. There is no merit to a claim that Oglesby was sentenced on inaccurate information about the assaults being videotaped.

¶7 Oglesby argues that he was denied due process because codefendant Michael Gattie received a lesser sentence. The court has held repeatedly that mere disparity in sentences received by persons committing similar crimes does not establish denial of equal protection. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 435, 351 N.W.2d 758 (Ct. App. 1984). A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

¶8 We acknowledge that Gattie also had a criminal history and that his history involved two batteries and a resisting arrest conviction. However, that alone does not demonstrate that Oglesby and Gattie are similarly situated. Oglesby was charged with eight counts and Gattie only two. It was appropriate for the trial court to consider the dismissed but read-in counts. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Further, the reduction of one count against Gattie was pursuant to a plea agreement and Gattie entered a guilty plea

and thereby evinced his remorse for the crimes. The difference is significant enough to justify different sentences for the codefendants as they were not truly similarly situated. The trial court did not erroneously exercise sentencing discretion.

¶9 Finally, Oglesby makes an undeveloped remark that the prosecution breached the plea agreement in its sentencing recommendation. The plea agreement limited the prosecution to requesting probation on the second count. Oglesby suggests that the agreement was breached because the prosecution asked for the maximum on the first count and probation on the second. The prosecution adhered to its agreement to request probation on the second count. The prosecutor's comment that Oglesby was "very violent" was not an "end-run" around the plea agreement because the prosecutor was free to argue for any sentence on the first count. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991) (the prosecutor may not make an "end-run" around the plea agreement and thereby indirectly convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).