COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP3082-CR
2009AP3083-CR

Cir. Ct. Nos. 2008CF1118
2009CF106

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL E. HARRISON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Darrell E. Harrison faced 135 years' imprisonment after being convicted of first-degree sexual assault of a child and possession of

child pornography. The trial court sentenced him to less than a third of that. He seeks resentencing on grounds that the trial court failed to apply the "least punishment" principle and to explain why it did not order a lesser sentence than the one imposed. We affirm because we are well satisfied that the sentence was reasonable and the product of a demonstrated exercise of discretion.

¶2 Harrison invited a ten-year-old girl and her mother, who lived across the hall, to his apartment to watch a movie. The mother acquiesced when the girl and Harrison both "begged" to let the girl spend the night at his apartment. The girl went home to change into her pajamas and returned with her blanket and teddy bear. After watching another movie, Harrison showed the girl pornographic websites and sexually assaulted her. Computers seized pursuant to a search warrant contained pornographic videos of prepubescent females.

¶3 Harrison pled guilty to one count of first-degree sexual assault of a child and three counts of possession of child pornography. A second count of first-degree sexual assault and one count of exposing a child to harmful materials were dismissed but read in for sentencing. The court sentenced him to eighteen years of initial confinement and seventeen years of extended supervision on the sexual assault count and three years of initial confinement plus four years of extended supervision on each of the child pornography counts, to be served concurrent with each other but consecutive to the sexual assault sentence. In contrast to his 135-year exposure, his aggregate sentence was forty-two years.

¶4 Harrison moved postconviction to vacate his sentence. He contended that the trial court had failed to acknowledge and apply the "least punishment" principle and to explain the necessity of the sentence it imposed. The court denied the motion after a hearing.

¶5 Harrison appeals, again on the basis of the "least punishment" principle: "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." ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971) (citation omitted). He claims the trial court disregarded it by not explaining why a lesser penalty was inappropriate.

¶6 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, our strong and consistent policy is to refrain from interfering with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. Because the trial court is best suited to consider the relevant factors and demeanor of the convicted defendant, we afford a strong presumption of reasonability to that court's sentencing determination. ***Id.***

¶7 The trial court first observed it was sentencing Harrison for "very, very serious and troubling offenses," one a calculated and "horrendous" crime against a trusting ten-year-old neighbor whose mother also trusted him. The court then described the nature of the offenses at length and examined Harrison's age, background and education. It discussed his "very supportive" family and friends who now are "horrified" by a side of him they never saw; his sexual assault thirteen years ago of a fifteen-year-old niece he admittedly "groomed"; the counseling he had during his three years of probation from that assault; his fascination with child pornography and daily alcohol consumption; the "significant and negative impact" on this child victim and Harrison's lack of

insight as demonstrated by his claims that he took advantage of the girl's "curiosity" and that he "never hurt anyone, even the victim." The court explained that "opportunistic and predatory" offenders will be held accountable, part of the sentence was to address his need for alcohol and sex-offender treatment, and that, since this was not his first sexual assault, society must know that his chances to reoffend have "been eliminated for a significant period of time."

¶8 Harrison argues that this explanation falls short. He contends the trial court "must explain why those particular factors require that no lesser punishment would be sufficient to meet the purposes of sentencing." He complains, for instance, that the court "seemingly pulled a number out of the air …. There is no explanation why 21 years, as opposed to the eight to 13 years the PSI writer recommended, or the seven years [defense counsel] recommended, was the least amount of custody necessary." In other words, the trial court should have expressly set forth not only how its analysis of the sentencing factors translated into the term imposed but also why it rejected a lesser amount.

¶9 Harrison's claim does not hold water. A sentencing court properly exercises its discretion when it states on the record its reasons for selecting the particular sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶5 n.1. But the court is not required to provide an explanation for the precise number of years it chooses, ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466, nor is it bound by sentencing recommendations, *see* ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990).

¶10 A court must exercise its sentencing discretion on a "rational and explainable basis" and its discretion "must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based

on a logical rationale founded upon proper legal standards." ***McCleary***, 49 Wis. 2d at 276, 277. The sentencing court may use the recommendations of counsel and presentence reports as "touchstones in [its] reasoning" but it is not obligated to do so. ***State v. Klubertanz***, 2006 WI App 71, ¶19, 291 Wis. 2d 751, 713 N.W.2d 116 (citation omitted). The exercise of discretion does not lend itself to mathematical precision, however. ***Gallion***, 270 Wis. 2d 535, ¶49. We do not expect a court to explain why it selected the precise number of years it did instead of some other number or invoke "magic words" to justify what it thought appropriate. *See* ***id.*** What is necessary is an on-the-record explanation for the general range of the sentence imposed. ***Id.***

¶11 We are satisfied that the trial court provided a rational and explainable basis on the record for why it imposed the sentence it did. That this was not Harrison's first sexual assault; he failed to change his behavior in the thirteen years since the last assault despite probation and counseling; he preyed on young girls who had reason to trust him; the seriousness of the crime, his need for treatment and society's right to be protected from him for a "significant period of time" all demonstrate the reasonableness of this sentence. Given our strong policy against interference with the trial court's discretion in passing sentence, we cannot say, as a matter of law, that the court erroneously exercised its discretion. Harrison is not entitled to the degree of specificity he seeks nor to resentencing.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.(2007-08).