

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 02-2535-CR

Cir. Ct. No. 00-CF-637

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONG T.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Tong T. appeals from a judgment convicting him of second-degree sexual assault of a child and from the trial court's post-conviction order. He claims he is entitled to sentence modification on the basis of a new sentencing factor, the harshness of the sentence, and/or misuse of sentencing discretion. We disagree and affirm for the reasons discussed below.

¶2 Tong entered a no contest plea to one count of second-degree sexual assault of a child in exchange for having two other counts dismissed and read into the record. The charge arose out of allegations that Tong had engaged in intercourse with his daughter over a period of about two years, sometimes by force, from the time she was thirteen to fifteen, ultimately causing her to run away from home.

¶3 At the sentencing hearing, Tong addressed the court through an interpreter. His allocution included a statement that, “[t]he important thing is that I want my daughters to forgive me for if I did something wrong, and I forgive them for what they did wrong and I want to start my life again with them.” The court asked the interpreter for clarification that Tong had said “if” he did something wrong, and the interpreter affirmed that was what Tong had said. The court’s subsequent discussion of the relevant sentencing factors included the following comment:

[Tong’s] statement went well until he finished with if he did anything wrong. He is accepting responsibility to a point and then he’s not and in the end he ultimately did not take responsibility when he says if he did anything wrong and in the Presentence he blames the victim.

¶4 The court proceeded to sentence Tong to twenty-five years in prison under the old sentencing law. Tong moved for sentence modification on the grounds that the word “if” in his allocution had been misinterpreted due to linguistic differences; that the sentence was unduly harsh and disproportionate in severity; that the trial court had placed too much weight on a single factor; and that the maximum available penalty was only twenty years. The court agreed that the initial sentence imposed exceeded the statutory maximum and reduced it to

twenty years, but refused any further downward modification based on Tong's remaining arguments.

New Sentencing Factor

¶5 A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, which operates to frustrate the purpose of the original sentence. Whether a particular set of facts constitutes a new factor is a question of law which we review de novo. However, whether a new factor warrants a modification of sentence is a discretionary determination to which we will defer. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citations omitted).

¶6 In support of his postconviction motion, Tong presented an affidavit explaining that the word “if” does not exist as a separate conjunction in the Hmong language, and that the Hmong understanding of the word “if” is “I did or do something.” Based on this linguistic difference, Tong argued that the trial court had imposed sentence based on an erroneous understanding of Tong's level of remorse.

¶7 The trial court concluded however, that Tong's statement “had nothing to do with the ultimate sentence.” Rather, the court indicated that it was most concerned with the aggravated nature of the offense, given the force that was used, the length of time over which the assaults occurred, and the impact on the victim. Furthermore, to the extent that the trial court was concerned with Tong's lack of remorse, it said it was considering Tong's entire course of conduct, including statements he made to the presentence investigator, and not merely the allocution. We accept the trial court's assertion that its primary intent at the initial

sentencing hearing was to punish a particularly serious offense and conclude that the revised translation of Tong's allocution was of marginal relevance and did not frustrate the purpose of the sentence. Therefore, the revised translation did not constitute a new sentencing factor.

¶8 Tong also maintains that, as a result of the mistranslation of his allocution, he was sentenced based on inaccurate information in violation of his due process rights. However, because the trial court specifically indicated at the postconviction hearing that it would have imposed the same sentence even if it had been given the proper translation, we are satisfied that the harmless error doctrine applies to any due process violation.

Harshness

¶9 A sentence which is 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 may violate the Eighth Amendment prohibition against cruel and unusual punishment. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶10 Tong claims his sentence was unduly harsh and excessive given that he was a first-time offender and had a difficult life in Laos and Thailand before coming to the United States. He also argues that since the initial sentence of twenty-five years was eighty-three percent of the thirty years which the trial court erroneously believed was the maximum available, the reduced sentence should have been no more than eighty-three percent of the actual twenty year maximum. The trial court was entitled to consider, however, that the offense itself was serious enough to warrant twenty years, if it could not impose the twenty-five years that it thought most appropriate. Moreover, the trial court had before it two additional

read-in offenses, showing that the assaults had continued for a period of two years. We are not persuaded that public sentiment would be shocked by the length of the sentence given under the circumstances of this case.

Use of Sentencing Discretion

¶11 In order to properly exercise its discretion, the trial court should take into consideration such factors as the gravity of the offense, the defendant's character and rehabilitative needs and the need to protect the public. *State v. Schreiber*, 2002 WI App 75, ¶¶7-9, 251 Wis. 2d 690, 642 N.W.2d 621.

¶12 Tong claims the trial court misused its discretion by placing excessive emphasis on a single factor—his perceived refusal to take responsibility for his actions. As we have already discussed above, however, the actual focus of the trial court's consideration was the severity of the offense, with additional emphasis on protecting Tong's remaining daughters, rather than on the secondary consideration of Tong's level of remorse or willingness to take responsibility for his actions. The trial court acknowledged several of the mitigating factors which Tong cites, but was not required to give them the weight he believes they should have had. *Id.* In sum, the record shows that the trial court properly exercised its discretion by discussing all of the relevant factors, and reasoning its way to a rational decision.

By the Court.—Judgment and order affirmed.

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

