

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 02-2674-CR

Cir. Ct. No. 99-CF-1127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN KONAHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Konaha appeals a judgment, entered upon a jury's verdict, convicting him of repeated sexual assault of the same child contrary

to WIS. STAT. § 948.025(1).¹ Konaha also appeals the order denying his motion for postconviction relief. Konaha argues that the trial court erroneously exercised its sentencing discretion and erred by denying his postconviction motion for a competency evaluation. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In December 1999, the State charged Konaha with one count of repeated sexual assault of the same child. On the morning of the scheduled trial date, Konaha's counsel requested that the court order Konaha to undergo a competency evaluation. In making his request, counsel explained:

I think Mr. Konaha has a good understanding of the role of the Judge, the role of the prosecutor and defense counsel and basically what is going on in terms of our individual functions in the courtroom and court proceedings.

The more difficult question for me is whether Mr. Konaha is actually participating or is able to assist in his defense. We get off on tangential subjects that Mr. Konaha tends to argue with me about and I say tangential, they're things that don't have any relation [sic].

The court questioned whether Konaha was being manipulative, but ultimately found cause to question Konaha's competency and ordered the requested evaluation. Following his evaluation, Konaha was found competent to proceed to trial.

¶3 On March 15, 2001, Konaha was convicted upon the jury's verdict and sentencing was scheduled for May 11, 2001. In April 2001, Konaha moved to

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

discharge counsel, but after Konaha refused to address the court or otherwise argue the merits of his motion, the motion was denied. The court, however, granted counsel's subsequent request to be removed as counsel of record on grounds of irreconcilable differences with his client.

¶4 The court ordered a presentence investigation report; however, Konaha declined to speak with the report's writer and likewise refused to discuss the PSI with his subsequently appointed counsel. The court ultimately sentenced Konaha to thirty-two years' imprisonment. His motion for postconviction relief was denied and this appeal follows.

ANALYSIS

A. Sentencing Discretion

¶5 Konaha argues that the trial court erroneously exercised its sentencing discretion. Sentencing lies within the discretion of the circuit court. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See id.* There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *See id.* at 681-82.

¶6 If the record contains evidence that the circuit court properly exercised its discretion, we must affirm. *See State v. Cooper*, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" *State v. Spears*, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To

overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record.” *Cooper*, 117 Wis. 2d at 40. The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its 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 (1975).

¶7 Konaha argues that while the court referred to the victim as a member of the community and discussed the need to protect her, the court did not assess the need to protect society at large. Konaha also contends that the sentencing court erroneously failed to explain why the sentencing goals could not have been accomplished with less incarceration time. The record belies Konaha’s claims.

¶8 The court considered the appropriate factors in imposing sentence, including the need to protect the public and likewise explained why it was imposing a lengthy sentence. After detailing Konaha’s criminal history, the court stated:

I have selected this time period because I believe that when you take someone's dignity; when you dehumanize someone the way you did, this young lady, depriving her of her childhood, then an extended period of time is necessary to protect the public.

The only way that we know for sure that you won't be involved in this type of criminal activity of preying on young children is to make sure that you are not available to the public for that to happen. I know of no other way under these circumstances to analyze this matter, except to require that you spend an extended period of time in prison.

¶9 The court ultimately sentenced Konaha to thirty-two years' imprisonment out of a maximum possible forty-year term. Under these circumstances, it cannot reasonably be argued that Konaha's sentence is so excessive as to shock public sentiment. *See id.* at 185.

B. Competency Evaluation

¶10 Konaha argues the trial court erred by denying his postconviction motion for a competency evaluation. Specifically, Konaha claims that because he demonstrated reason to doubt his postconviction competency, the trial court was required to appoint an examiner pursuant to WIS. STAT. § 971.14(2). Although postconviction counsel raised the issue of Konaha's competency, counsel did not object to the circuit court's decision not to order an evaluation. Thus, while the issue of Konaha's competency was properly preserved, he failed to preserve his challenge to the circuit court's method of determining that competency. As a general rule, we will not decide issues that have not first been raised in the trial court. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). In any event, we conclude the trial court properly exercised its discretion in finding Konaha competent to continue with postconviction proceedings.

¶11 Based on the tasks that may be required of defendants seeking postconviction relief, a defendant is incompetent to pursue postconviction relief under WIS. STAT. RULE 809.30 “when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding.” *State v. Debra A.E.*, 188 Wis. 2d 111, 126, 523 N.W.2d 727 (1994). After sentencing, if the State or defense counsel has a good faith doubt about a defendant’s competency to seek postconviction relief, counsel should move the appropriate court for a ruling on competency. *Id.* at 131. The court shall honor the request when the court has reason to doubt a defendant’s competency. If the court determines there is a reason to doubt a defendant’s competency, “it shall, in the exercise of its discretion, determine the method for evaluating a defendant’s competency, considering the facts before it and the goals of a competency ruling.” *Id.* The method of evaluation will vary depending on the facts of the case and location of the defendant. “A court may rely on the affidavits of counsel, a stipulation or the court’s observance of the defendant, or may order an examination of the defendant by a person with specialized knowledge.” *Id.* A circuit court may also, in its discretion, hold a hearing before determining a defendant’s competency. Thus, while the court has the option of ordering an examination, it may, in its discretion, opt for a different method of evaluation.

¶12 Here, postconviction counsel raised doubt over Konaha’s competency to proceed, indicating in a letter to the court:

[M]y interaction with Mr. Konaha recently ... compels me to raise the issue of competency and request the judge to appoint a doctor to evaluate him. Although my interaction with Mr. Konaha has long been laborious, it now appears to me that he truly lacks an ability to understand what I am telling him, what we are trying to accomplish, and particularly, he seems unable to discuss methods to

accomplish our goal. He simply obsesses on a series of relatively minor issues, independent of the fact that such issues would not impact the case.

¶13 The circuit court ultimately determined that the issues raised by postconviction counsel were consistent with the opinion of the expert who evaluated Konaha's competency prior to trial and not the result of a mental disorder. Acknowledging that a person's mental status could change over time, thus necessitating additional competency evaluations, the court nevertheless concluded that Konaha's conduct during postconviction proceedings was consistent with what had been predicted by the expert in Konaha's earlier competency evaluation.

¶14 The court quoted the earlier report's prediction that "Konaha will engage in attempts to argue over legal details and this could possibly be perceived as verbally aggressive or intimidating." The report further noted that although Konaha's tendency to provoke arguments over fine details would likely make it challenging for those who work with him through court proceedings, "these challenges are not currently assessed to be due to mental illness or other incapacities." The court additionally noted its own observations of Konaha's demeanor and ability to comprehend what was going on around him. The trial court thus properly exercised its discretion in choosing the method by which it would evaluate Konaha's competency and ultimately determining Konaha was competent to proceed with his claims for postconviction relief.

By the Court.—Judgment and order affirmed.

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

