COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2847-CR **Cir. Ct. No. 01-CF-63**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD W. BENNETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Donald Bennett appeals a judgment convicting him of second-degree sexual assault of a child. He also appeals an order denying postconviction relief. The issues are whether the trial court properly exercised its discretion in sentencing Bennett to twelve years of initial confinement and

eighteen years of extended supervision, and whether new factors require resentencing. We affirm.

¶2 The State charged Bennett with second-degree sexual assault of a child, and third-degree sexual assault, both as a repeater. Bennett entered a guilty plea to the first count and, in exchange for the plea, the State dismissed the second count and the repeater allegation.

¶3 The victim of the assault was the fifteen-year-old daughter of Bennett's girlfriend. She told police that Bennett forced her to submit to sexual intercourse, after which she escaped and went to the police department. Bennett freely admitted sexual contact, but not intercourse with the victim. He denied forcing her. Bennett's prior criminal record included minor offenses, and a felony conviction for sexually assaulting a seven-year-old girl in 1969. Additionally, the presentence investigator discovered evidence that Bennett had sexually abused his daughter and his stepdaughter during the 1980s, although charges were never filed. Bennett was fifty-six years old at the time of the assault, and fifty-seven when sentenced. He was marginally literate and had "significant cognitive limitations," stemming from either mental retardation or learning disabilities and dyslexia.

¶4 The presentence investigator described Bennett as a transient person with no ties to anyone or anything, self-absorbed, remorseless, and manipulative. She concluded that the assault was planned, not impulsive, and she recommended a sentence of ten years of initial confinement plus ten years of extended supervision.

¶5 Sentencing in this case was consolidated with sentencing after revocation on a 1998 drug offense conviction. At the sentencing hearing, the

prosecutor recommended seven years of initial confinement followed by thirteen years of extended supervision, consecutive to a one-year sentence on the 1998 drug conviction. Bennett joined in the State's recommendation. The trial court declined to follow the joint recommendation, and sentenced Bennett to twelve years of initial confinement and eighteen years of extended supervision, and imposed a concurrent two-year term on sentencing after revocation of probation.

¶6 Bennett subsequently moved for a reduced sentence, asserting that his sentence was unduly harsh, that the trial court erroneously exercised its sentencing discretion by failing to explain its reasons for the sentence, and that new factors justified a reduced sentence. The trial court denied relief, resulting in this appeal.

¶7 We have a strong policy against interfering with the trial court's sentencing discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). We presume that the trial court reasonably exercised its discretion, and the appellant has the burden to show some unreasonable or unjustifiable basis for the sentence. ***Id.*** A proper exercise of sentencing discretion requires that the trial court state the relevant and material factors that influenced the sentencing decision. ***Id.*** at 264. The weight given to any particular sentencing factor is discretionary. ***Id.*** We will deem a sentence excessive only when it is so disproportionate to the offense committed that it shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances. ***Id.***

¶8 A new factor is a fact or set of facts highly relevant to the sentence, but unknown at the time of sentencing because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Rosado v. State***,

70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether something constitutes a new factor is a question of law that we review without deference to the trial court. ***Id***. at 97. However, whether that new factor warrants a reduced sentence is left to the trial court's discretion. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

¶9 Bennett contends that his sentence was excessive. Bennett was a repeat sexual offender against children. The trial court fairly described the circumstances of the crime as aggravated. The trial court also reasonably deemed Bennett as a risk to reoffend, given his lifelong maladjustment to society and repeated involvement in the criminal justice system. The sentence he received was not shockingly disproportionate under the circumstances.

¶10 Bennett also contends that the trial court erroneously exercised its discretion by failing to adequately state its reasons for imposing a thirty-year sentence, the maximum term for Bennett's offense. We disagree. The trial court extensively discussed the factors it considered in sentencing Bennett. These included his past criminal record and what it demonstrated about his character, his troubled childhood, his age, and his limited education and spotty work record. They also included his history of "undesirable behavior patterns," including his poor social skills, his history of superficial and detached relationships, his evident sexual desire for young girls, his manipulative behavior, and his lack of remorse. The court further considered the uncharged instances of sexual abuse of children documented in the presentence investigation report.

¶11 In looking at the particular circumstances of the crime, the trial court described it as "vicious and aggravated," involving as it did forcible intercourse with a sexually inexperienced child. The court also considered the effect on the victim, and the need to protect the community from further crimes Bennett might commit.

¶12 In Bennett's view, notwithstanding this detailed recitation of factors, the court's explanation fell short because it failed to specify the significance of each of the factors noted, or whether the court considered them aggravating or mitigating. However, under any reasonable view, it is clear that the trial court considered each of the factors it noted as significant and aggravating. We find no error in the trial court's failure to express what its remarks plainly implied.

¶13 Finally, Bennett contends that he presented new factors at his postconviction hearing. Those new factors were (1) statistics showing that sexual offenders of Bennett's age present a low risk of reoffending, and (2) the argument that Bennett's cognitive limitations caused him to demonstrate less remorse than he felt. Trial counsel argued Bennett's age as a mitigating factor during the sentencing hearing. Statistics about the effect of age on the general population of child sex offenders were largely cumulative to that argument, and tangential as well, because they did not directly concern Bennett's particular circumstances. The absence of those statistics at sentencing does not constitute a new factor that frustrated the purpose of the sentence.

¶14 As for Bennett's disabilities and his level of remorse, the trial court addressed both issues at sentencing. The presentence investigation report addressed both as well, providing extensive information on Bennett's mental and psychological makeup. Trial counsel also noted Bennett's disabilities and his

repeated acknowledgment of responsibility for his offense. Bennett presented no new evidence on this issue at the postconviction hearing. An argument that the trial court should reconsider its interpretation of the information it used in sentencing is not a new factor.

By the Court.—Judgment and order affirmed.

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