

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 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. 03-0861-CR

Cir. Ct. No. 01CF000845

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT J. BOGDALA,

DEFENDANT-APPELLANT.

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

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Scott J. Bogdala appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether the circuit court erroneously exercised its discretion when it sentenced Bogdala. Because we conclude that the court did not err, we affirm.

¶2 Bogdala pled guilty to two counts of first-degree sexual assault of a child by a person responsible for their welfare for sexually assaulting his step-daughters. The court sentenced him to eight years of initial confinement and ten years of extended supervision. At the time first set for sentencing, Bogdala's counsel asked for an adjournment because he understood that there might be an error in the presentence investigation report (PSI) and he wanted to talk to the victims. The victims' father objected to this saying that the girls had been through a lot and that he would prefer that they not go through any more questioning. Defense counsel pressed the court to be allowed to interview them but the court determined that a probation and parole officer would interview the one victim who had not been interviewed for the PSI.

¶3 At the next hearing on defense counsel's motion to interview the girls, the court adjourned the hearing because their father had not been notified. The court noted that the father had been "vehemently opposed" to defense counsel's request the last time they were in court.

¶4 When they returned to court, defense counsel again asked to be allowed to personally talk to the girls. The court denied the motion stating: "I think these girls are being used, that everybody is trying to tell them what to do, that enough is enough." The court then stated that it was time to proceed with sentencing. During sentencing, the court stated that the victims had been "permanently scarred" by what Bogdala had done to them, and that they were never going to be the same.

¶5 Bogdala argues that the trial court erroneously exercised its discretion when it sentenced him by making an assumption about the effect the crime had on the victims without support for that assumption in the record. We

disagree. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given the various factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶6 We conclude that the facts of this case permitted the trial court to reasonably conclude that the children had been adversely affected by Bogdala's actions. The court's comments at sentencing must be viewed in the context in which they were made. There was a struggle going on between the victims' mother, who was married to the defendant and who supported the defendant, and their natural father. The defendant had already entered a plea. Defense counsel was nonetheless seeking to interview the victims again. At one of the motion hearings, their father had said that the girls had been through a lot and he was seeking counseling for them. Further, he told the court that they had had a tough time "being pulled back and forth" and that they had to get on with their lives. In his allocution statement, Bogdala stated that his conduct had a "bad impact" on the girls, had been stressful for them, and that he worried about their eating, sleeping, and school performance.

¶7 It was in the context of this ongoing struggle between the girls' parents and the attempt by defense counsel to interview them even after the defendant had entered a plea, that the trial court made this comment at sentencing.

The court wanted the matter to end, to allow the victims to move on. We conclude that Bogdala has not satisfied his burden of showing that the trial court improperly exercised its discretion in its sentencing comments.

¶8 Bogdala also argues that the court should have considered as a new factor warranting a modification in his sentence scholarly articles which discuss the potential psychological resiliency of children, and the lessened likelihood of recidivism on the part of older offenders. A new 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 original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶9 The circuit court denied Bogdala’s postconviction motion. As to the articles which discuss the effect on children, the circuit court stated: “new studies are published on a regular basis. They arrive at different conclusions on a regular basis. My considered opinion is that these children will consciously or subconsciously carry with them the fact that their stepfather assaulted them.” We agree that experts commonly disagree, and that this did not constitute a new factor.

¶10 We also reject Bogdala’s argument that information that older offenders are less likely to reoffend was a new factor. Nowhere in its sentencing remarks did the trial court address Bogdala’s risk to reoffend. Further, as the circuit court noted when it denied the postconviction motion, the court gave Bogdala a relatively lenient sentence compared to the maximum potential sentence. This simply was not a new factor warranting sentence modification. For these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

