COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1436-CR **Cir. Ct. No. 02CF000132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. John L. Jones appeals from a judgment of conviction entered after he pled guilty to child enticement in violation of WIS.

STAT. § 948.07(3) (1999-2000).[1] He also appeals from the order denying his motion for postconviction relief. Jones argues that the sentencing court erroneously exercised discretion when it misstated the subsection of the statute under which he was being sentenced, and when it failed to consider the victim's conduct, which, he claims, was a mitigating factor. He also argues that the court denied him due process by considering the victim's unproven claims that she had been pregnant, had miscarried, and had attempted suicide without having granted his request for an in-camera inspection of her mental health records for purposes of refuting these claims. We affirm.

I. BACKGROUND

¶2 Jones, a City of Milwaukee police detective and youth minister, had an extended sexual relationship with sixteen-year-old Nicole H., a girl from his church youth group. The State originally charged Jones with twenty counts of misdemeanor sexual intercourse with a child, and one felony count of child enticement. Pursuant to a plea agreement, the misdemeanors were dismissed and Jones pled guilty to enticing a child for purposes of exposing a sex organ. The amended complaint, which served as the factual basis for the guilty plea, established that after months of intimate conversation and e-mail correspondence, Jones, then twenty-seven years old, invited Nicole to his home for a sexual encounter on May 11, 2001. Jones removed Nicole's clothes and had mouth-to-vagina sexual contact with her followed by repeated acts of penis-to-vagina sexual intercourse.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 At the September 17, 2002 sentencing hearing, the court heard lengthy arguments from the State and Jones. The court imposed a twelve-year sentence, comprised of seven years of initial incarceration and five years of extended supervision, but mistakenly referred to the subsection of the child enticement statute that refers to enticing the victim for purposes of sexual contact or intercourse. *See* WIS. STAT. § 948.07(1).[2]

¶4 Jones did not object to the court's misstatement; post-sentencing, however, he moved for relief claiming that because Nicole was sixteen on May 11, 2001, he could not have been guilty of the offense. He claimed, therefore, that the court's "sentence rests on a legal impossibility" and that resentencing was required. In addition, Jones argued that the court: (1) failed to consider Nicole's conduct as a mitigating factor; and (2) denied him due process when it sentenced him based on unproven allegations that he had impregnated Nicole. On May 6, 2003, the court denied his motion for sentence modification.

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[2] WISCONSIN STAT. § 948.07, provides in relevant part:

> **Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095[, relating to sexual contact with children who have not attained the age of sixteen].
>
> ….
>
> **(3)** Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10[, exposing genitals or pubic area for sexual arousal or sexual gratification].

II. ANALYSIS

¶5 Jones first argues that the sentencing court erroneously exercised discretion when it misidentified the subsection of the child enticement statute under which he had been charged and had entered his guilty plea. He contends that the error merits resentencing. We disagree.

¶6 The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. ***Larsen***, 141 Wis. 2d at 427. The weight to be given each factor, however, is within the sentencing court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶7 Here, the amended complaint charged Jones with violating WIS. STAT. § 948.07 by enticing Nicole, a child under eighteen, to his residence "with the intent to cause [her] to expose a sex organ in violation of WIS. STAT. § 948.10." During the sentencing hearing, the court described Jones' conduct as child enticement with the purpose of "having sexual contact or sexual intercourse with the child," a violation of § 948.07(1).

¶8 Although Jones correctly argues that he could not have committed the crime of child enticement with the intent described in WIS. STAT. § 948.07(1), due to the victim's age at the time of the charged offense, the impossibility of committing the crime in that way does not require resentencing. As this court has explained:

> [E]nticement of a child is "a social evil in and of itself *regardless of the specific sexual motive which causes the defendant to act*." The gravamen of the crime is not the commission of an enumerated act, but succeeding in getting a child to enter a place with intent to commit such a crime. Enticement of a child to a vehicle, building, room or other secluded place isolates a child from the protections of the public. It also provides the opportunity, with substantially less risk of detection, for the person to exercise force and control over the child for purposes of sexual gratification.
>
> … The crime being addressed is the *luring and secluding of children.* The statute recognizes that multiple motives may exist.

State v. Hanson, 182 Wis. 2d 481, 487, 513 N.W.2d 700 (Ct. App. 1994) (footnote and citations omitted; emphasis added); *see also* ***State v. Derango***, 2000 WI 89, ¶20, 236 Wis. 2d 721, 613 N.W.2d 833 (noting that "child enticement" is one crime with multiple modes of commission). Here, the record establishes that Jones was sentenced for the crime he committed—the luring and secluding of Nicole.

¶9 In its written decision denying Jones' motion for postconviction relief, the circuit court acknowledged its error, but maintained that its misstatement "did not in any way result in its misunderstanding of the penalty that was involved, the defendant's actions which led to his conviction, or the actual felony of which he was convicted." The postconviction court observed:

> There was never any dispute about facts in the complaint that after enticing the victim to his home when his wife was

> not present, the defendant exposed the victim's sex organ and then had sexual intercourse (mouth-to-vagina) with her, followed by several more acts of intercourse … that same night. Moreover, the court's comments associated with the sexual contact and intercourse with the victim were appropriate in considering the entire context of the defendant's crime….
>
> As to the actual offense, the court continuously made reference to the defendant's act of *enticing* the 16-year-old victim, and the court's sentence was based solely on the offense of child enticement. In imposing sentence, the court punished the defendant for the act of enticement, not the resultant acts.

The court then concluded: The "real tenor of [its] sentencing comments was to punish the defendant for the act of enticement. Whatever his specific motive …, it did not affect the basis for the sentence because the act of enticement was done for the purpose of doing something sexually inappropriate with the victim." Clearly, the court's remarks reflect an accurate understanding of the law and a proper exercise of discretion. Consequently, we cannot conclude that the error was anything but harmless.

¶10 Jones also argues that the circuit court erroneously exercised discretion by failing to consider Nicole's contributory role in the relationship and, therefore, failed to adequately mitigate his guilt. Denying the postconviction motion, however, the court noted that it had "repeatedly considered her conduct but concluded [that] it did not mitigate the gravity of the defendant's enticement of her." The sentencing record supports the postconviction court's conclusion.

¶11 Addressing the sentencing statements made on Jones' behalf, many of which focused on Nicole's alleged pursuit of him, the court emphasized that the essential purpose of the child enticement statute is to prosecute adults who fail to refrain from the illegal conduct. In addition, the court explained that, as a matter

of law, the child-victim could not consent to the prohibited conduct. The court was correct; hence, it properly rejected any argument that Nicole's conduct reduced the gravity of the offense.

¶12 Jones also contends that the court may have relied on inaccurate information. He asserts that because he lacked access to purportedly relevant records, he could not challenge the claims that he impregnated Nicole, or that she had attempted suicide. He contends that his inability to contest those claims flowed from the denial of his ***Shiffra*** motion, *see* ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *clarified by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, seeking Nicole's medical records. We reject his contention.

¶13 A defendant has a due process right to be sentenced based on accurate information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing ***United States v. Tucker***, 404 U.S. 443, 447 (1972)). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a "constitutional issue" presenting "a question of law which we review *de novo*." ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993).

¶14 A defendant who asks for resentencing because the court relied on inaccurate information must show both that the information was inaccurate and that the court relied on it. ***Id.*** The defendant carries the burden of proving both prongs—inaccuracy of the information and prejudicial reliance by the sentencing court—by clear and convincing evidence. ***Id.***; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Once a defendant does so, the burden shifts to the State to show that the error was harmless. ***State v. Anderson***,

222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). An error is harmless if there is no reasonable probability that it contributed to the outcome. ***Id.*** at 411.

¶15 Moreover, as we have explained, "the integrity of the sentencing process" depends on certain "safeguards" to assure the opportunity to address and correct any possible inaccuracies. *See* ***State v. Mosley***, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996).

> To protect the integrity of the sentencing process, the court must base its decision on reliable information. Several safeguards have been developed which effectively protect the due process right of a defendant to be sentenced on the basis of true and correct information. The defendant and defense counsel are allowed access to the presentence investigation report and are given the opportunity to refute what they allege to be inaccurate information.

Id. (citations omitted). A defendant's right to be sentenced based on accurate information includes not only the opportunity to challenge information in a presentence investigation report, *see* ***State v. Perez***, 170 Wis. 2d 130, 141-42, 487 N.W.2d 630 (Ct. App. 1992), but also, through the right of allocution, the "opportunity to make a statement with respect to any matter relevant to the sentence," WIS. STAT. § 972.14(2). Where, however, a defendant fails to object to allegedly erroneous information presented at sentencing, and fails to challenge the information when exercising the right of allocution, *see* ***id.***, we determine whether the sentencing court erroneously exercised discretion in considering the information. *See* ***Mosley***, 201 Wis. 2d at 45-46.

¶16 Jones failed to object to the allegedly erroneous information presented at sentencing. Jones nevertheless argues that Nicole's claims of a pregnancy, a miscarriage and a suicide attempt were untrue, and that he should have been given an opportunity to establish that by first having the court review

her medical records for evidence that could confirm his claim. In light of the record, we disagree.

¶17 Denying the postconviction motion, the court correctly stated: "Nowhere in the court's sentencing comments is there a reference to these issues. While the State relied on the victim's assertions about her pregnancy, miscarriage and attempted suicide, the court did not and gave them no weight when it fashioned its sentence." Jones concedes that the court's postconviction comment is literally correct. He argues, however, that given the extent to which references to a pregnancy, a miscarriage and a suicide attempt permeated the sentencing proceeding, the court's postconviction comment is "implausible." Again, we disagree.

¶18 The court's sentencing remarks establish that it was clearly and sharply focusing on other sentencing factors. In particular, the court was concerned with Jones' violation of positions of trust as a youth minister and as a police officer. Thus, the court's postconviction disclaimer of reliance on "assertions about her pregnancy, miscarriage and attempted suicide" is not, as Jones claims, "implausible."

¶19 Moreover, the pregnancy and miscarriage apparently were undisputed; the complaint refers to a pregnancy, an ultrasound, a visit to a Planned Parenthood clinic, and a miscarriage. At the plea hearing, defense counsel confirmed, without qualification, "that the entire complaint is being used [as] a factual basis." Thus, the State maintains that Jones should be estopped from raising this issue on appeal. In response, Jones, citing ***State v. Edmunds***, 229 Wis. 2d 67, 85 n.3, 598 N.W.2d 290 (Ct. App. 1999) (stating that judicial estoppel is applied when a party asserts an inconsistent position on appeal and the difference

is due to a deliberate strategy), argues that, if anything, waiver, not estoppel, applies. We need not decide the issue, however, because Jones has clearly failed to establish that the court relied on the allegedly inaccurate information. *See* ***Coolidge***, 173 Wis. 2d at 789; *see also* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

¶20 Further, we do not conclude that the sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock the 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). Considering Jones' misuse of his position as a youth minister, his occupation as a police officer, his age, and his education, and considering the emotional trauma suffered by Nicole and her family, the sentence is not unduly harsh or excessive.

¶21 Finally, Jones argues that the child enticement statute is unconstitutional; he does so, however, only to preserve the issue, conceding that this argument was rejected by this court in ***Hanson***. 182 Wis. 2d at 485-89. His concession is correct. ***Hanson*** controls the disposition of the issue, and this court cannot overrule that determination. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) ("court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals").

By the Court.—Judgment and order affirmed.

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