COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2874-CR **Cir. Ct. No. 94CF000254**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT C. WAGNON,

DEFENDANT-APPELLANT.

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

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Robert C. Wagnon appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the circuit court erroneously exercised its discretion at the sentencing hearing when it determined that he was

likely to reoffend, and when it considered his use of pornography. Because we conclude that the circuit court did not err when sentencing Wagnon, we affirm.

¶2 Wagnon pled guilty to one count of first-degree sexual assault of a child under the age of thirteen for having committed penis-to-mouth sexual intercourse with a five-year-old child. The court sentenced Wagnon to twenty-five years in prison. Eventually, Wagnon brought a motion for postconviction relief alleging that the court had erred when sentencing him because its rationale was speculative and the court had relied on improper factors. The circuit court denied the motion, and Wagnon appeals.

¶3 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 discretion of the sentencing judge must be exercised in a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). 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). A defendant is entitled to resentencing when the court relied on improper factors when imposing a sentence. ***State v. Leitner***, 2002 WI 77, ¶42, 253 Wis. 2d 449, 646 N.W.2d 341.

¶4 Wagnon first argues that the court erred when sentencing him when it speculated about the likelihood that he would reoffend.[1] Wagnon argues that the court erred when it inferred from its own past experiences what "happens very frequently in these types of cases." Wagnon argues that "a judge's predispositions must never be so specific or rigid so as to ignore the particular circumstances of the individual offender upon whom he or she is passing judgment." ***State v. Ogden***, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996).

¶5 Wagnon asserts that the circuit court demonstrated an improper predisposition by references to certain facts including: his sexual relationships with adults, his recording of telephone conversations with girlfriends or following girlfriends, his uninvited entry into the apartment of a girlfriend, and his impulsive and immature retaliation against a former employer who fired him. The sentencing court, however, considered these various factors as part of a "mosaic" of Wagnon's character that bore directly on the danger he posed to the public. Further, the court noted Wagnon's defensiveness and his willingness to accept responsibility only when he was confronted with irrefutable evidence of his use of pornography, and his bizarre sexual activity. The court considered specifically that Wagnon had asked both his wife and a former girlfriend to shave their pubic hair because it reminded him of a young girl. Given that he had pled guilty to a charge of sexually assaulting a five-year-old child, this information was highly relevant. The court relied on this information to conclude, in essence, that

[1] In its brief, the State suggests that Wagnon is challenging the length of the sentence imposed. It argues that Wagnon must demonstrate that the sentence was so excessive as to shock the public sentiment and violate the judgment of reasonable people about what is right under the circumstances. Wagnon, however, has not challenged the length of his sentence. Rather, he challenges the factual predicate relied on by the circuit court to arrive at that sentence. This is a subtle but important distinction.

Wagnon has no boundaries and is not able to control his sudden impulses. Such a determination is extremely relevant when considering the nature of the crime charged, the character of the defendant, and the need to protect the community. We conclude that the circuit court did not misuse its discretion when considering these facts.

¶6 Wagnon also argues that the court erred at sentencing when it considered his use of pornography and his sexual activity with consenting adults. The court, however, did not consider this information in isolation. Rather, this was part of the "mosaic" the court pieced together to understand Wagnon's character, his lack of boundaries, his impulsiveness, and the need to protect the community. The court considered all of the appropriate sentencing factors: the conduct itself, its effect on the victim and her family, Wagnon's character and rehabilitative needs, his history of bizarre sexual behavior, his use of pornography, and the need to protect the public. We conclude that the court did not err when it sentenced Wagnon. For the reasons stated, 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.