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DISTRICT II

October 4, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2022AP1421-CR

State of Wisconsin v. David Schuman (L.C. #2019CF202)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David Schuman appeals from a judgment of conviction, following a guilty plea, for sexual exploitation of a child. He received the minimum sentence. Schuman, who is autistic, argues that, because of his autism diagnosis, the mandatory minimum sentence was unconstitutional as applied. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

According to the criminal complaint, Schuman, a twenty-year-old, engaged in sexual chats and exchanged nude images and videos with a thirteen-year-old child named Veronica.² Schuman and Veronica met online. Veronica wrote in her dairy that “[Schuman] says dating a 13 yr old causes a lot of problems[, and i]f the cops knew about us he would get put in jail But he says that not gonna stop him from be in with me. He is putting his freedom on a line to be with me.” In another entry, she wrote, “But my age really bothers him though. Like really bad I guess. And he says he will go to jail if he got caught.” Veronica believed she was going to marry Schuman when she turned eighteen. An information charged Schuman with sexual exploitation of a child, causing a child over thirteen to view or listen to sexual activity, and exposing a child to harmful material. Schuman has been diagnosed with autism.

In exchange for Schuman’s plea to sexual exploitation of a child, the State agreed to dismiss and read in the remaining charges, not to issue any more charges in connection with its investigation, and recommend an unspecified amount of prison. The sexual-exploitation-of-a-child offense includes a mandatory minimum prison sentence of five years’ initial confinement. *See* WIS. STAT. §§ 948.05, 939.617(1). At the plea hearing, Schuman advised the court he was aware of the five-year mandatory minimum period of initial confinement.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym when referring to the victim in this case.

Also at the plea hearing, Schuman advised the court he had completed a plea questionnaire and waiver of rights form. The form indicated Schuman had completed more than twelve years of schooling and had his high school diploma or equivalent. When discussing the form, Schuman asked the court whether autism counted as a mental illness. The court told Schuman autism was not a mental illness. Schuman then advised the court that his autism did not affect his ability to think and reason clearly at the hearing. Schuman's attorney indicated that before entering the plea, they discussed using autism as a possible defense at trial. Schuman pled guilty to sexual exploitation of a child.

In the presentence report, Schuman acknowledged that he knew Veronica was only thirteen years old at the time and that he knew having a sexual relationship with her was wrong. The report noted that Schuman had no prior criminal record, a supportive family, and a stable job. Schuman believed that he could function independently, but that he suffered from anxiety. Schuman had diagnoses of ADHA, bi-polar disorder, generalized anxiety, Asperger syndrome, and mathematics disorder.

Schuman submitted his own sentencing memorandum and argued that the mandatory minimum period of initial confinement constituted unconstitutional cruel and unusual punishment. The memorandum explained that, because of his autism diagnosis, Schuman's social maturity was impaired and he did not understand that his actions were wrong or illegal.

At sentencing, the State argued the circuit court should sentence Schuman to prison. The State did not dispute Schuman's autism diagnosis, but it argued that the diagnosis did not mitigate his actions. The State argued Schuman knew what he was doing was wrong. The State read entries from Veronica's diary where she stated Schuman knew he would go to jail if their

relationship was discovered. The State highlighted Schuman's recorded interview with investigators, noting Schuman knew his behavior with Veronica would get him in trouble, was evasive about whether he and Veronica had exchanged photographs, and believed that Maryland, where he lived, would only give him a light sentence for his actions. The State argued prison was appropriate to deter both Schuman's future conduct as well as anyone else who engaged in this type of behavior with a child.

Schuman argued the mandatory minimum sentence was unconditional as applied to him because of his autism diagnosis. He asserted his autism impairs his ability to understand social norms and because of his social limitation he did not appreciate there was anything wrong with his interactions with Veronica.

The circuit court recognized that because of Schuman's autism diagnosis, he does not "behave[] like a 20 year old, but is much younger and does not have the guile of most 20 year old men." The court agreed that "in many respects, [Schuman] is not a dangerous person." The court stated that it disagreed with the imposition of a mandatory minimum under the facts of this case. However, the court reasoned it was the legislature's prerogative to determine the penalties for criminal offenses. The court continued:

Now, I know [Schuman's] different, but there have been many people who have come through the criminal court that are very different. Some are not—I mean [Schuman] is relatively intelligent. I mean quite intelligent from what I read.

He does suffer from autism. We have many people who are very limited in their intellectual ability and they are treated equally based on this minimum mandatory.

The court found that in this case the mandatory minimum was not so excessive and unusual and so disproportionate to the offense Schuman committed so as to shock public sentiment. The

court sentenced Schuman to five years' initial confinement and one year and three months' extended supervision.

On appeal, Schuman argues that, because of his autism diagnosis, the imposition of the mandatory minimum penalty for the sexual-exploitation-of-a-child offense amounts to cruel and unusual punishment. His appeal presents an as applied challenge to WIS. STAT. § 939.617.³ A party challenging the constitutionality of a statute, whether facially or as applied, must overcome a presumption of constitutionality and must prove that the statute is unconstitutional beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63.

In Wisconsin, a sentence is cruel and unusual only if “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.” *State v. Pal*, 2017 WI 44, ¶30, 374 Wis. 2d 759, 893 N.W.2d 848 (citation omitted). “A sentence well within the limits of the maximum sentence is not 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.” *State v. Berggren*, 2009 WI App 82, ¶47, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted).

Here, the circuit court evaluated the standard sentencing factors. *See State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. It concluded that the facts of Schuman's case and his personal characteristics, including his autism, required a sentence well below the

³ WISCONSIN STAT. § 939.617 provides in relevant part, “if a person is convicted of a violation of s. 948.05 [sexual exploitation of a child], ... the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 [sexual exploitation of a child].”

maximum available sentence. On the sexual-exploitation-of-a-child offense, Schuman faced a maximum sentence of forty years, comprised of twenty-five years' initial confinement and fifteen years' extended supervision. *See* WIS. STAT. §§ 948.05(2p)(a); 939.50(3)(c), 973.01(2)(b)3., 973.01(2)(d)2. The court sentenced him to five years' initial confinement and one-year and three-months' extended supervision.

Schuman argues that his sentence is cruel and unusual because of his autism diagnosis. He explains he has impaired social skills. However, having impaired social skills is insufficient alone to demonstrate that his punishment in this case was cruel and unusual.

Schuman then argues that his sentence is cruel and unusual because the circuit court indicated that the mandatory minimum sentence was greater than it would have imposed if its discretion were not limited by statute. He also contends that the legislature's statutory scheme has little deterrent effect and there are policy reasons to impose shorter sentences. Schuman's complaints, however, lie with the legislature. We agree with the circuit court that it is within the legislature's power to decide which crimes are serious and to fashion the sentence for that crime. *See State v. Heidke*, 2016 WI App 55, ¶17, 370 Wis. 2d 771, 883 N.W.2d 162.

In short, we conclude that Schuman has not established that his sentence is unconstitutional beyond a reasonable doubt. The circuit court appropriately considered the relevant sentencing objectives and factors and sentenced Schuman to the minimum sentence. Schuman's sentence was not so excessive so as to shock the public's sentiment. *See Pal*, 374 Wis. 2d 759, ¶30.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals