COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP217-CR **Cir. Ct. No. 2009CF216**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. KAPPUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Scott Kappus appeals a judgment of conviction for three counts of possessing child pornography and an order denying his motion for postconviction relief. Kappus argues the circuit court considered an irrelevant and immaterial factor when determining his sentence. We disagree and affirm.

BACKGROUND

¶2 Kappus pled guilty to three charges of possessing child pornography, which carries a presumptive minimum sentence of three years' confinement per count. As part of the plea agreement, nine additional counts were dismissed and read in. The circuit court sentenced Kappus to a total of ten years' confinement and ten years' extended supervision on two counts. On the third, the court imposed and stayed the maximum of twenty-five years' imprisonment, consecutive to the other charges, and placed Kappus on probation for ten years.

¶3 Kappus moved for resentencing, arguing that, among other things, the court considered an irrelevant and immaterial factor when determining his sentence. Specifically, Kappus asserted the court improperly considered that there were no pleas for leniency from the families of any of the victims depicted in the videos Kappus had downloaded from the internet. Kappus stressed that there was no indication in the record that any of the victims or their families had received notice of Kappus's charges or convictions.

¶4 The circuit denied Kappus's motion, indicating that it had not actually considered the factor when determining Kappus's sentence. Kappus renews his argument on appeal, seeking a remand for resentencing.

DISCUSSION

¶5 Review of a sentencing decision is limited to determining whether discretion was erroneously exercised.[1] ***State v. Harris***, 2010 WI 79, ¶30, 326

[1] Kappus's counsel incorrectly refers to an "abuse of discretion" standard. That terminology was jettisoned by the Wisconsin courts long ago. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

Wis. 2d 685, 786 N.W.2d 409. "Discretion is erroneously exercised when a sentencing court imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." ***Id.*** A defendant must show by clear and convincing evidence that the sentencing court actually relied on an improper factor. ***Id.***, ¶34. When determining whether the sentencing court erroneously exercised its discretion, we must "review the sentencing transcript as a whole, and ... review potentially inappropriate comments in context." ***Id.***, ¶45.

¶6 We reject Kappus's argument that the circuit court relied on the lack of any pleas for leniency from the victims' families when determining the sentence. Rather, the court's single comment in that respect was simply an observation that such pleas were typically present in other sexual assault cases resulting in probation sentences. The court's comment was in response to Kappus's counsel's argument that the court should order a sentence less than the presumptive minimum sentence of three years' confinement.

¶7 Regarding the presumptive minimum, a court may impose a lesser sentence or place the defendant on probation "only if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record." WIS. STAT. § 939.617(2).[2] In support of her argument for deviating from the presumptive minimum, Kappus's counsel stated she had reviewed the records of other persons in the county who had been convicted of the same offense and placing Kappus on probation would be consistent with how those cases had been handled.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 At the outset of its sentencing comments, the court properly recited the WIS. STAT. § 939.617(2) standard for deviating from the presumptive minimum and then continued as follows:

> Now, those are subjective concepts, subjective in that I have to look at the seriousness of the crime, I have to look at the protection of the community, and I have to look at the character and rehabilitation potential for the defendant.
>
> I think [defense counsel] has very wisely done some research regarding sentencings in other crimes that are similar to this. I would say rarely, based upon her statistics, have individuals been sentenced to prison. *My personal experience in sex crimes is that it depends a lot upon the family of the victim. Many times they come forward and plead for the defendant usually because it's a very close friend of the family or relative*. Other redeeming factors would be an otherwise pristine life, good job, taxpayer, pillar of the community, or at least not having no redeeming attributes.
>
> But I have really struggled with this case considering this standard, and that is for me to try to list reasons why it is in the best interests of the community and why the public will not be harmed because of the character and rehabilitative potential of Mr. Kappus is difficult, if not impossible.
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> ....
>
> Things that I would look at to try to be in his favor would be his family history, his educational history, his employment history, meeting his legal and moral obligations and those kind[s] of things. I find in all those areas he comes up very, very short.

(Emphasis added.)

¶9 While the court's sentencing comments comprise approximately nine pages of transcript, the italicized language above was the only reference made to pleas for leniency. The court repeatedly referred to the three primary sentencing factors and applied those factors in detail. In doing so, the court never discussed whether there were pleas for leniency in Kappus's case or indicated that

had any bearing on its determination whether to deviate from the presumptive minimum sentence.

¶10 Further, at the postconviction hearing, the court observed it had not in fact relied on the lack of victim pleas for leniency when sentencing Kappus. The court explained:

> And my intent was only to make an observation. I never considered that because I knew what the facts were.
>
> ....
>
> And I was just making the observation based upon a lot of reasons, but mainly because I wouldn't expect any relatives to come forward and ask for probation and not that I was considering the fact. *I never considered it for a moment as a mitigating or aggravating factor*. I just made it as an observation when it was brought up thinking that the minimum sentence was three years in prison.

¶11 Kappus falls far short of meeting his burden to demonstrate the court actually relied on the lack of victim pleas for leniency when sentencing him. As there was only a single passing remark on the issue, the sentencing transcript as a whole fails to support Kappus's contention. It is also evident from the court's discussion of the primary sentencing factors and the lengthy prison sentence handed down that, in any event, the court did not feel a downward departure from the presumptive minimum sentence was even a realistic consideration. And finally, as already discussed, the circuit court expressly disavowed any reliance on the challenged factor.

By the Court.—Judgment and order affirmed.

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