COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2703-CR **Cir. Ct. No. 2009CF1499**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALOK KUMAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLETT, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Alok Kumar appeals the judgment entered after he pled guilty to using a computer to facilitate a child sex crime, *see* WIS. STAT. § 948.075(lr), and the postconviction order denying his motion asking for sentence modification. Kumar claims that the circuit court erroneously exercised its

sentencing discretion by imposing the presumptive minimum sentence, *see* WIS. STAT. § 939.617(1), when, he asserts, the circuit court should have imposed a sentence less than the presumptive minimum, *see* WIS. STAT. § 939.617(2).[1] We affirm.

I.

¶2 In February to March of 2009, Kumar had online conversations with a person whom Kumar admitted he believed was a 14-year-old boy. In these conversations, Kumar said:

[1] WISCONSIN STAT. § 948.075(1r) provides:

> Whoever uses a computerized communication system to communicate with an individual who [*sic*] the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02(1) or (2) is guilty of a Class C felony.

WISCONSIN STAT. § 939.617 provides:

> **(1)** Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, 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 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.
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> **(2)** If a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court may impose a sentence that is less than the sentence required under sub. (1), or may place the person 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.
>
> **(3)** This section does not apply if the offender was under 18 years of age when the violation occurred.

- "I want to hug u and want to kiss we can kiss we can drink and play wii and if we are naked u can touch me."
- "We can … kiss, touch each other sexually, take shower together."
- They could touch "each others butts."

Kumar also asked to "do oral"; explaining that meant "You suck me." When the "Boy" asked "Like suck your penis?," Kumar responded "You like that?" and said he could suck the boy's penis as well.

¶3 Kumar set up a meeting with the person whom he believed was the boy for a Saturday in March, 2009, at a CVS store, and told him that he, Kumar, would buy wine coolers. Kumar arrived for the meeting at the CVS store and bought the wine coolers. The police then arrested Kumar, explaining that an undercover police officer had posed as the "14-year-old boy." Kumar admitted that he arranged the meeting with "someone he believed to be a 14-year-old boy" whom "he was going to take … to his apartment and have sexual contact with."

¶4 As noted, Kumar pled guilty to one count of use of a computer to facilitate a child sex crime. The circuit court told him that his crime carried a maximum penalty of imprisonment for forty years (twenty-five years of initial confinement, fifteen years of extended supervision) and a fine of $100,000 or both. The presumptive minimum, as set out in WIS. STAT. § 939.617(1), is a "term of confinement in prison … [of] at least 5 years." As we have seen in footnote 1, however, § 939.617(2) permits a lesser sentence or probation if and only if "the court finds that the best interests of the community will be served and the public will not be harmed."

¶5 The State told the circuit court at sentencing that it always recommends the presumptive minimum sentence: "the [S]tate's recommendation in this matter, consistent with our office's firm policy, is that we recommend the mandatory minimum incarceration period of five years which is required by statute as a rebuttable presumptive minimum." Kumar's attorney asked for probation: "The legislature has given you the discretion to impose a sentence below the presumptive minimum or the mandatory minimum with an opportunity for presumptive."

¶6 In sentencing Kumar, the circuit court focused on the crime's seriousness: "So I think the seriousness level is there. It's very clear from the legislature [that] the seriousness level that has been placed on this, and that's in the presumptive mandatory minimum that has been set forth by the legislature and in the class of felony itself." The circuit court also discussed Kumar's character: "giv[ing] you credit for your honesty. … your remorsefulness, which I think is genuine. I give you credit for the treatment that you have undertaken." "I give credit for a lot of things … includ[ing] … no prior record, … family, … marriage, … he is educated, and [that he] has been an upstanding citizen in other ways." Further, the circuit court addressed the "need to protect the public":

> [O]ne of [the purposes of sentencing] is deterrence of the defendant. And I know that Mr. Kumar has suffered in some ways a great deal. Certainly it's a much greater deterrence in terms of the presumptive minimum that is set forth by the legislature. Whatever punishment he has already suffered, I think certainly prison is a very heavy deterrent. And there's also a deterrence of others, which I think is an important factor here, especially with the mandatory presumptive minimum set forth by the legislature.

¶7 The circuit court concluded that:

> What it comes down to [for] me is that the legislature has imposed a presumptive minimum and the court shall impose it … the court may place the person on probation only if the court finds that the best interest of the community will be served and the public will not be harmed….
>
> I cannot say that the best interest of the community will be served by not following the presumptive minimum. I think that the presumptive minimum is there for … deterrence…. [T]he legislature has put forth for a reason the presumptive minimum because of the seriousness of the offense.…
>
> I think there … are times the court can certainly and should not follow the presumptive minimum. … But in this situation … where these conversations took place over time, where … Mr. Kumar shows up at the meeting, buys the wine coolers.… They talked about … sex numerous times … knowing that this was a 14-year-old, I don't think this is the situation envisioned by the legislature [to deviate from the presumptive minimum.] Could there be a situation? Yes, there could. Yes, this is a man who has all these good qualities, but this serious offense has to be weighed against that and along with the mandatory minimum.

¶8 The circuit court sentenced Kumar to a ten-year sentence, with five years' initial confinement, followed by five years' extended supervision. As noted, the circuit court denied Kumar's motion for postconviction relief seeking a lesser sentence.

II.

¶9 Kumar argues that the circuit court erroneously exercised its sentencing discretion: (1) when it did not allow the him to show sentences imposed by other circuit courts in presumptive-minimum cases; (2) because it

allegedly treated the presumptive minimum sentence as a "mandatory minimum"; and (3) when it purportedly over-emphasized the crime's seriousness.[2]

¶10 A circuit court has broad sentencing discretion and may give the various sentencing factors the weight it deems appropriate. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112, 116. The circuit court's sentencing remarks here showed that it relied, as it must, on the three primary factors material to a rational sentence: (1) the seriousness of the crime; (2) the defendant's character; and (3) the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274, 182 N.W.2d 512, 518 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211.

¶11 As we have seen, the circuit court pointed out that the crime was very serious, and was viewed as such by the legislature when it enacted a presumptive minimum sentence. The circuit court also analyzed Kumar's character, and gave him "credit" for the good things in his life. Finally, the circuit court recognized the need to protect the public by deterring not only Kumar but also others from soliciting minors for sex.

¶12 Kumar argues that the circuit court put too much emphasis on the crime's seriousness. We disagree. "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***State v. Spears***, 227 Wis. 2d 495, 507–508, 596 N.W.2d 375, 380

[2] Kumar also contends that the circuit court's "determinations [were not] based on a rational or logical process or [the circuit court did not] state its reasoning or the reasons for its conclusion on the record." As noted from the circuit court's sentencing explanation, this is wholly without merit; as we have seen, the circuit court's sentencing explanation was rational, insightful, and logical.

(1999). The circuit court has the discretion to give more weight to one factor than others and to base the sentence on any or all of the factors. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). That the circuit court put significant weight on the crime's seriousness and the need to protect potential victims of other sexual predators does not make its sentence wrong or mean that it erroneously exercised its discretion.[3] Further, Kumar's contention that the circuit court should have allowed him to show what other judges sentenced other persons convicted of similar crimes is without merit. *See* ***State v. Tappa***, 2002 WI App 303, ¶20, 259 Wis. 2d 402, 412, 655 N.W.2d 223, 228 (circuit court not required to base sentencing decision on "sentences of other defendants"); ***State v. Toliver***, 187 Wis. 2d 346, 362–363, 523 N.W.2d 113, 119 (Ct. App. 1994) (disparity of sentences not improper when individual sentences are based on three main sentencing factors); ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 435–436, 351 N.W.2d 758, 768–769 (Ct. App. 1984) (each defendant should have individualized sentence even though various defendants may have committed the same statutory offense).

¶13 Finally, Kumar argues that the circuit court improperly treated the *presumptive* minimum as a *mandatory* minimum from which it could not depart. As we have seen from the sentencing transcript, however, *all* parties occasionally referred to the presumptive minimum as a "mandatory minimum," including the defense lawyer when he told the circuit court: "The legislature has given you the

[3] Kumar also argues that "Wisconsin law improperly denies meaningful review of the sentencing court's exercise of discretion." (Uppercasing omitted.) Kumar bases this argument on his contention that the circuit court did not adequately explain its reasons. As we have seen, however, the circuit court fully explained why it sentenced Kumar as it did, and this argument is, therefore, without merit.

discretion to impose a sentence below the presumptive minimum or the *mandatory minimum* with an opportunity for presumptive." (Emphasis added.) In fact, both the prosecutor and the defense lawyer used this phrasing before the circuit court imposed sentence. Although the circuit court repeated the lawyers' terminology by referring to the "presumptive mandatory minimum" and "mandatory minimum" once each, as we have seen, it also discussed and recognized its authority to impose a lesser sentence. We caution Kumar's counsel that contentions contradicted by the Record are dishonest.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.