COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1609-CR **Cir. Ct. No. 2008CF3487**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY MCLEAN,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Cory McLean appeals from a judgment of conviction and an order denying postconviction relief. He challenges the circuit court's decision to impose an eight-year term of imprisonment upon his conviction for using a computer to facilitate a child sex crime. Because we conclude that the

circuit court neither erroneously exercised its sentencing discretion nor relied on inaccurate information at sentencing, we affirm.

BACKGROUND

¶2 During June and July of 2008, McLean participated in three online conversations with a police detective who was posing as a fifteen-year old girl named Maria. Although the detective told McLean several times that she was fifteen years old, McLean said that he would like to have mouth-to-vagina sexual contact with her, he sent her a video recording that showed McLean masturbating, and he arranged to meet her at a mall to have sexual contact with her. When McLean arrived at the mall, police arrested him.

¶3 McLean pled guilty to one count of using a computer to facilitate a child sex crime pursuant to WIS. STAT. § 948.075(1r) (2007-08).[1] A second charge of attempting to cause a child to view or listen to sexual activity was dismissed and read in for sentencing purposes. At sentencing, McLean requested probation, telling the circuit court during his personal allocution: "that behavior just isn't me. It doesn't fit me characteristically." He noted that the author of the presentence investigation report believed that he could be safely supervised in the community. He also relied on a psychosexual evaluation prepared at his request by a psychologist, Dr. Melissa Westendorf. In her report, Dr. Westendorf discussed McLean's scores on several actuarial tests that she administered to assess his risk of sexually reoffending. Dr. Westendorf characterized those scores as "low" and "low-moderate." Additionally, she discussed McLean's

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

acknowledgment that he had used internet chat rooms on approximately eight occasions to arrange or to try to arrange meetings with young women for sexual purposes. Noting McLean's belief that all of these young women "were over eighteen years old," Dr. Westendorf concluded that McLean presented a low risk to reoffend.

¶4 The circuit court, however, rejected McLean's plea for probation, emphasizing the aggravated nature of McLean's conduct. The circuit court also observed that "[t]his was not a one-time computer type situation.... [T]here was a pattern of behavior going on here." The circuit court therefore imposed an eight-year term of imprisonment, bifurcated as five years of initial confinement and three years of extended supervision.

¶5 McLean challenged the sentence in postconviction proceedings, arguing that the circuit court erroneously exercised its discretion and relied on inaccurate information. His challenges failed, and this appeal followed.

DISCUSSION

¶6 "When reviewing a sentence imposed by the circuit court, we start with the presumption that the circuit court acted reasonably. We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citation omitted). A proper exercise of sentencing discretion includes "specify[ing] the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. Further, the circuit court "must consider three primary sentencing factors in determining an

appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The circuit court may also consider additional factors, including:

> (1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. (citation and quotation marks omitted). The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶7 When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). On appeal, a reviewing court will search the record for reasons to sustain a circuit court's exercise of sentencing discretion. ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶8 In this case, McLean pled guilty to a violation of WIS. STAT. § 948.075(1r), and therefore he faced a presumptive minimum sentence of five years in initial confinement. *See* WIS. STAT. § 939.617(1). When a defendant is convicted of an offense under WIS. STAT. § 948.075, the sentencing court has discretion to impose less than five years of initial confinement "only if the court

finds that the best interests of the community will be served and the public will not be harmed." *See* § 939.617(2). Here, the circuit court concluded that it could not make those findings.

¶9 McLean asserts that the circuit court erred by overemphasizing negative factors and by giving insufficient weight to his good character and to the opinions of Dr. Westendorf and the author of the presentence investigation report. Decisions about the relative weight to assign to the applicable sentencing factors, however, lie in the circuit court's broad discretion. *See* ***State v. Iglesias***, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994).

¶10 The circuit court in this case placed the greatest weight on the gravity of the offense. The circuit court observed that "this isn't just one chat ... it's not spur of the moment." The circuit court identified numerous aggravating factors, including the seventeen-year age difference between McLean and "Maria," McLean's knowledge that "Maria" was fifteen years old, the extended period of time over which McLean interacted with "Maria," the agreement McLean made to meet with "Maria," his arrangement to have oral sex during that meeting, and his actions in driving to the meeting place. The circuit court also took into account McLean's related conduct charged in the count that was dismissed and read in, namely, sending a video recording to "Maria" that showed him masturbating to the point of ejaculation. *See* ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835 (circuit court may consider read-in charge at sentencing).

¶11 The circuit court acknowledged the mitigating factors in the case, noting that "there are good qualities in McLean's character," and the circuit court highlighted his work history, supportive family, and absence of any prior criminal

record. The circuit court concluded, however, that these factors did not outweigh the need to punish McLean, to protect the public from the dangers posed by his conduct, and to deter McLean and others from engaging in the same behavior in the future. The circuit court was not required to balance the factors in the way that McLean had hoped. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶12 McLean also alleges that the circuit court erroneously exercised its discretion by failing to consider the presentence investigation report and the report prepared by Dr. Westendorf. A circuit court is not required to consider either presentence investigation reports or reports from defense experts. *See* ***Harris***, 326 Wis. 2d 685, ¶28. Nonetheless, the circuit court assured McLean in the postconviction order that the sentence followed the court's consideration of the two reports. Further, the circuit court explained that Dr. Westendorf's report "led directly to the court's comments about [McLean's] 'pattern of behavior.'"

¶13 McLean next complains that the circuit court "did not attempt to refute the opinions or conclusions" of the author of the presentence investigation report, and he objects that the circuit court did not offer any "articulated interpretation of the accuracy, inaccuracy, or relevance" of Dr. Westendorf's evaluation. These complaints do not describe any error. A circuit court has no obligation to explain why its sentence deviates from the recommendations of defense experts or parole agents. *See* ***State v. Hamm***, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988). Rather, the court must independently exercise its sentencing discretion. *See* ***State v. Trigueros***, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54.

¶14 Last, McLean complains that the circuit court considered inaccurate information when imposing sentence. He alleges that the circuit court based the

sentence on an erroneous conclusion that he repeatedly "engag[ed] in sexual liaisons with minors, after meeting them in internet chat rooms."

¶15 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To earn resentencing based on a violation of this right, a defendant has the burden to show both that the information was inaccurate and that the circuit court actually relied on the information in making its sentencing decision. ***Id.***, ¶26. On appeal, our review is *de novo*. ***Id.***, ¶9.

¶16 In support of the claim that the circuit court relied on inaccurate information here, McLean points to a portion of the circuit court's sentencing remarks:

> [t]his was not a one-time computer type situation. The other individuals that Mr. McLean did meet with he believed were in their 20s. I guess we won't know what they were, but I have no knowledge of other underage girls. But clearly there was a pattern of behavior going on here at the time as well[,] of being in these chat rooms and then meeting up with these individuals, the criminal conduct here obviously being the age of the individuals that he was going to meet.

¶17 According to McLean, these remarks "reflected the [circuit] court's belief that [] McLean is a repeat offender and that the charged offense was simply one act in a continuum of child sexual offenses." We disagree. The remarks reflect that the circuit court took into account McLean's admissions to Dr. Westendorf, including his acknowledgments that he previously engaged in online conversations with people and arranged to meet some of those people for sexual encounters. The circuit court expressly recognized the absence of any information that the people involved were "underage girls" but, as the circuit court explained in its postconviction order, McLean's conduct constituted a pattern of

risky behavior that "led to [McLean's] attempt to meet up with the 15-year-old in this case."

¶18 Moreover, McLean himself recognized that his past history of seeking out strangers for sexual encounters created uncertainty about the lawfulness of his prior sexual conduct. Dr. Westendorf reported to the circuit court: "although [McLean] believed all of these individuals to be over 18 years old, he acknowledged that he is not absolutely sure they were because individuals alter their information." McLean fails to demonstrate that the circuit court relied on inaccurate information here.

¶19 In sum, McLean shows no error in the sentencing proceedings. He shows only that the circuit court considered the information presented and then exercised discretion differently than he would have preferred. That showing earns him no relief. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (Our inquiry is whether discretion was exercised, not whether it could have been exercised differently.).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).