COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1995-CR **Cir. Ct. No. 2010CF307**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT SMITH, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Robert Smith, Jr. appeals a judgment of conviction for first-degree sexual assault of a child, by sexual contact with a child under the age of thirteen, and an order denying his postconviction motion for resentencing. Smith argues the circuit court erroneously exercised its sentencing discretion by

imposing its personal religious beliefs and by failing to adequately explain its reasons for the sentence imposed. We reject Smith's arguments and affirm.

BACKGROUND

¶2 Smith pled guilty and admitted that the facts alleged in the criminal complaint were "[s]ubstantially correct." A kidnapping charge was dismissed and read-in. Smith was thirty-two years old at the time of the assault.

¶3 The complaint states that Smith arranged to meet three girls: C.D., age twelve; A.D.W., age thirteen; and Z.J.P., age fifteen. Smith drove the girls to an acquaintance's house and led them into the basement. He then asked the youngest, C.D., to accompany him to another room. When she refused, Smith grabbed her by the arms and dragged her into the other room, locking the door behind them. C.D. told police that Smith then pulled down her pants and underwear and threw her down onto the ground, causing her to hit her head and become dizzy. C.D. stated Smith then restrained her arms and forced his penis into her anus as she screamed for him to get off of her. C.D. reported that A.D.W. came to the locked door and pounded on it, but could not get in. A.D.W. told police C.D. was very upset and crying after the incident, and Z.J.P. said that C.D. told her Smith raped her.

¶4 At sentencing, the court observed that the presentence investigator recommended sixteen to twenty years' confinement and five to six years' extended supervision. The State requested a sentence "very close to the high end" of that recommendation. Despite Smith's prior admission to the allegations in the complaint, the State noted that the presentence report concluded Smith had not accepted responsibility for his crime and instead "blame[d] the victim."

¶5 The victim's mother was present at sentencing and directed the following statement to Smith:

> I just want this court and you to understand the pain you have caused this little girl and how you have changed her life forever. She doesn't even like getting hugs from her own family anymore. She's going to even want to take her own life.
>
> I don't know if you're remorseful. I don't even know if you understand what happened was wrong, and I just pray that they'll give you the sentence that you deserve and you can get the help that you need because you're dangerous, you're a predator, and you took something from somebody that you can[] never give back, and there's nobody can fix it, nobody.

Additionally, the court received a letter from the victim, the precise contents of which were not discussed on the record. However, the court referenced the victim's letter in its sentencing remarks.

¶6 Smith's attorney did not make a specific sentencing recommendation or argue for probation. Counsel argued the physical evidence suggested there was no sexual intercourse. In his allocution, Smith denied intercourse, asserting he only "allowed th[e] child to touch" him "intimately."[1] However, he stated he was the adult, at fault, and ashamed.

¶7 In its sentencing remarks, the court made three religious comments. Because the comments must be evaluated in context, we set forth the entirety of the court's sentencing discussion:

> THE COURT: Robert Smith, the law requires that I exten[d] to every defendant I sentence the following

[1] There is also a letter in the record from Smith to the court, date stamped prior to sentencing. In that letter, Smith denies intercourse, but states that the victim masturbated him.

analysis: I have to consider the protection of the public, punishment of the defendant, the defendant's rehabilitative needs, and other factors. So I'm looking right at you today. So we need to talk about this, all right?

THE DEFENDANT: Yes, sir.

THE COURT: Within that I do a subanalysis where I look at the character of the offender, then I look at the gravity of the offense, and as your lawyer indicates, you know, you appear before me as a 32-year-old adult who has certainly a minimal prior criminal record, and that certainly counts in your favor.

Your educational background and your social background and your employment background are really kind of unremarkable. So [Attorney] Fiske is probably correct in characterizing or at least arguing that one would not have expected to find you here in the criminal justice system at this stage in your life without some significant other contacts. So that's—that's in your favor. That's just the way the system has to work.

However, what is the most devastating part of the circumstance you find yourself in again is as your lawyer has characterized this, you've decided to enter the criminal justice system at the very highest entry—one of the highest entry points possible. So you're in the state of Wisconsin, and here is how we grade our crimes: We grade them in an alphabetical classification, Mr. Smith, and we have A felonies, and the A felony is first-degree intentional homicide which in the 50 states in this union means the most horrible crime is an A felony. Then for the next most horrendous and horrific actions that a citizen can take, the legislature creates a B felony class, and that's exactly the crime you committed, that is to have sexual contact or sexual intercourse with a child under the age of 13. Mr. Smith, *in the sight of God and in the sight of man, that conduct is an abomination*. It is unacceptable in every—in a civilized society, and it is totally unacceptable in the society in which you are a member.

I say that because much of what the victim writes me and what her mother recites to me is the great lesson that we have learned, and that is this begins a cycle of destruction, the end of which we do not know where it will lead, that a young innocent life has now been transformed, and hopefully *through prayer* and healing, that life can be redirected and made whole, but the great tragedy is, and we all have to recognize that, that now that's a struggle, and

> we can hope for triumph, but the fact that that life has been changed is laid wholly and solely at your doorstep.
>
> The fact that there was such an age differential in this case is an aggravating factor. The fact that the conduct, even the conduct you acknowledge[,] occurs in an isolated setting where the victim is behind a locked door and is denied the ability to get help or assistance, and those are the allegations, are aggravating factors.
>
> Clearly the parties ... in this case argue to me that a prison sentence is appropriate, and clearly probation would not be a consideration though the law says I'm supposed to take a moment to look at that. Then the question is what is the sentence to be imposed.
>
> I'm looking at the protection of the public and the punishment of the defendant because while this conduct may be the defendant's first activity of this type, it is of such an egregious and dangerous nature and it has all the attributes of predatory behavior. So ... the risk that the court has, the community has, is that he will repeat this behavior, and, again, what I'm most mindful about, *every life in this court's opinion is a life created and a gift from God, and when man interferes with that life either to kill that person or in this case to alter that person's life in a dramatic and substantial way, then that must be addressed*, and so it's protection of the public and punishment of the defendant.
>
> For all the reasons set forth upon the record, it's the sentence of the court and judgment of law the defendant be confined in the Wisconsin State Prison System for 20 years. I'm recommending 15 years of initial confinement and five years of extended supervision.

(Emphasis added.)

¶8 Smith filed a postconviction motion seeking modification of the sentence or an order for a new sentencing hearing. Smith argued the court misused its discretion by basing the sentence on the court's own religious views, and by failing to adequately explain its reasons for the sentence imposed.

¶9 The court denied the motion after a hearing. Addressing its remark that Smith's conduct was an "abomination" "in the sight of God and in the sight of man," the court observed that the comment was not a statement of its personal religious beliefs, but a "neutral" statement in that Smith's conduct would be an abomination "whether you're a person of faith" or not. Regarding its comment that "every life in this court's opinion is a life created and a gift from God," the court explained that it meant that the "basic instinct that we should have is that we would want to guard and protect our children." The court concluded that, viewing the sentencing transcript as a whole, its brief comments referencing God or religion did not indicate the court erroneously exercised its discretion by relying on an improper factor at sentencing. Smith now appeals.

DISCUSSION

¶10 Smith first argues the circuit court erroneously relied on its personal religious beliefs when determining Smith's sentence. Our review of a sentencing decision is a limited one, meant to determine whether the court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). In exercising its sentencing discretion, a court must consider three primary factors: the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The court may consider a wide range of additional factors like the defendant's criminal record, the result of the presentence investigation, the vicious or aggravated nature of the crime, read-in offenses, and the defendant's remorse, among others. ***Id.*** ¶¶40, 43 n.11.

¶11 A court erroneously exercises its discretion when it imposes its sentence based on clearly irrelevant or improper factors. ***Id.***, ¶17. The defendant

bears the burden of demonstrating by clear and convincing evidence that the court actually relied upon an irrelevant or improper factor when imposing the defendant's sentence. ***Id.***, ¶72. When determining whether the court erroneously exercised its discretion, our "obligation is to review the sentencing transcript as a whole, and to review potentially inappropriate comments in context." ***State v. Harris***, 2010 WI 79, ¶45, 326 Wis. 2d 685, 786 N.W.2d 409.

¶12 A circuit court may not base its sentencing decision upon the defendant's or the victim's religion. ***State v. Ninham***, 2011 WI 33, ¶96, 333 Wis. 2d 335, 797 N.W.2d 451; ***State v. Fuerst***, 181 Wis. 2d 903, 909-15, 512 N.W.2d 243 (Ct. App. 1994) (improper to consider the defendant's lack of religious convictions and church attendance). Smith argues, "Similarly, a court may not base its sentencing decision on its own personal religious principles. ***United States v. Bakker***, 925 F.2d 728, 740-41 (4th Cir. 1991)."

¶13 Bakker was a high profile televangelist charged with fraud for misappropriating millions of dollars from his followers. ***Id.*** at 731. In sentencing Bakker, the judge commented that Bakker "had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests*." ***Id.*** at 740. The reviewing court vacated Bakker's sentence, holding that sentencing procedures cannot create "the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." ***Id.*** The court observed, "Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed." ***Id.*** at 740-41. The court concluded Bakker's due process rights had been compromised

because of "the explicit intrusion of personal religious principles as *the* basis of a sentencing decision." ***Id.*** at 741 (emphasis added).

¶14 As the State emphasizes, ***Bakker*** has been repeatedly distinguished and rarely applied to reverse a sentencing decision. Indeed, Smith does not cite any cases applying ***Bakker*** to vacate a sentence.[2] We find persuasive the various decisions that have taken a narrow view of ***Bakker***, particularly ***State v. Arnett***, 724 N.E.2d 793 (Ohio 2000). There, the reviewing court held that a judge's references to a biblical verse about "little ones" assisted the court in its consideration of the weight to apply to a permissible sentencing factor, the age of the victim. ***Id.*** at 799. The court observed that the "biblical verse contain[ed] the same general message explicitly recognized" in the Ohio sentencing statutes, "that offenses against children are especially serious." ***Id.*** at 800. Further, the court distinguished ***Bakker***, regarding it as "the *exceptional* case where a judge's religious comments implicate the fundamental fairness of a sentencing proceeding by revealing that the judge's personal religious views were the *primary* basis for the sentencing decision." ***Id.*** at 803 (emphasis added).

¶15 ***Arnett*** was upheld on federal habeas review. *See* ***Arnett v. Jackson***, 393 F.3d 681, 686-87 (6th Cir. 2005). That court also distinguished ***Bakker***, observing that the sentencing judge's "'personal religious principles'" in ***Bakker*** and his sense that he and other pious persons had been "'ridiculed as saps'" by the television evangelist's conduct had led to the sentence in that case. ***Id.*** at 687.

[2] The State acknowledges one case that relied in part on ***Bakker*** to vacate a sentence. ***United States v. Bakker***, 925 F.2d 728 (4th Cir. 1991). The State contends the case is plainly distinguishable. In ***State v. Pattno***, 579 N.W.2d 503, 505-09 (Neb. 1998), the court overturned a sentence where the judge cited a biblical passage to disparage the defendant's sexual orientation. Smith does not address ***Pattno*** in his reply brief. We therefore do not consider it further.

¶16 In ***Gordon v. State***, 639 A.2d 56, 56 (R.I. 1994) (per curiam), the defendant challenged his sentence based on the court's reference to a biblical passage indicating "'that no man takes more than he's willing to give,'" and the court's further statement that "'[t]his young man took an awful lot. He's going to give an awful lot.'" The reviewing court summarily held: "We believe that this statement in no way suggests any religious bias on the part of the trial justice. It is in no way analogous to the situation in [***Bakker***]. In this case the biblical adversion was minimal and not prejudicial in any way to applicant." ***Id.*** at 57-58.[3]

¶17 Similarly, in ***United States v. Traxler***, 477 F.3d 1243, 1248 (10th Cir. 2007), the sentencing court made a religious reference after the defendant expressed hope that he would get something out of imprisonment. Because the court preceded its statement by noting that "[t]he fact is, good things can come from jail," it was evident the reference was meant to illustrate that something positive can come from difficult circumstances. ***Id.*** Thus, the reference did not demonstrate that the judge's personal religious principles influenced any aspect of the sentence. ***Id.*** at 1248-49.

¶18 In ***United States v. Hoffman***, 626 F.3d 993, 998 (8th Cir. 2010), the sentencing judge told the defendant that "one day you will face a higher and greater judge than me. May he have mercy on your soul." Reviewing the comments in context of the entire sentencing transcript and the facts of the case, which involved a pastor who sexually assaulted young church members, the

[3] The State also cites the federal habeas review of ***Gordon v. State***, 639 A.2d 56 (R.I. 1994) (per curiam), as an example of a case distinguishing ***Bakker***. *See* ***Gordon v. Vose***, 879 F. Supp. 179 (D.R.I. 1995). That court, however, concluded the sentencing judge "was not expressing his personal religious beliefs." ***Id.*** at 185. That is not a basis for distinguishing ***Bakker*** here. There is no disputing that the court here expressed its personal religious beliefs.

reviewing court held the statement did not "appear to have been an inappropriate driving force or improper consideration during the court's sentencing." ***Id.*** at 999. The court further concluded that given its review of the sentencing judge's analysis of required sentencing factors, the defendant went "too far in characterizing the[] comments as proof that the sentencing court's own sense of religious propriety might have clouded its imposition of sentence[.]" ***Id.***

¶19 Finally, a court upheld a sentence where, before imposing sentence, the judge stated he still "believe[d] in good old-fashioned law and order, the Bible, and a lot of things that people say I shouldn't believe anymore. .... Maybe one day they will say [to me] you should not sit here anymore because you ... believe too much in the Bible and law and order." ***Poe v. State***, 671 A.2d 501, 505-06 (Md. App. 1996). The court explained, "We do not believe the remarks made in the instant case were as extreme as those made in ***Bakker***, nor do we believe that [the judge's] comments reflected that his personal religious beliefs had been betrayed." ***Id.*** at 506. The court also noted that the ***Bakker*** court "recognized 'that a trial judge on occasion will misspeak during sentencing and that every ill-advised word will not be the basis for reversible error.'" ***Id.*** (quoting ***Bakker***, 925 F.2d at 741). Thus, the court held:

> In recognizing a trial judge's very broad discretion in sentencing, we by no means express approval of the [judge's] remarks ... pertaining to his own personal religious and moral beliefs. Nonetheless, we find that the sentence imposed upon the defendant was not motivated by ill-will, prejudice, or other impermissible considerations.

Id.

¶20 We share the ***Poe*** court's sentiments. While the circuit court's religious comments here were ill-advised, they do not rise to the level of the

"exceptional" ***Bakker*** case. *See* ***Arnett***, 724 N.E.2d at 803. Reviewed in the context of the entire sentencing transcript, we are not convinced that the court's religious beliefs were "the basis," *see* ***Bakker***, 925 F.2d at 741, or the "primary basis," *see* ***Arnett***, 724 N.E.2d at 803, much less *a* basis, for Smith's sentence. Significantly, each of the court's religious statements was made in the context of one or more proper sentencing factors.

¶21 As to the comment that Smith's conduct was an "abomination" "in the sight of God and in the sight of man," Smith's conduct was appropriately labeled an abomination. Smith, a thirty-two year old man, sexually assaulted a twelve-year-old girl after dragging her into a room and locking the door. The court's religious comment merely reflected accepted societal values. As the State observes, the comment was "a bit of old-fashioned if somewhat overheated rhetoric used by the judge to express society's condemnation of child rape." Moreover, the court's comment arose in the midst of considering proper sentencing factors: the gravity of the offense, as viewed by both society and the legislature's sentencing structure, and the crime's effect on the victim.

¶22 Next, the court's passing reference to prayer and healing was similarly uttered in context of the court's consideration of the assault's psychological effect on the young victim, which the court observed was evidenced in part by the victim's and her mother's letters to the court.

¶23 Regarding the court's third comment, that life is created by and a gift from God that man should not interfere with, the court again addressed the crime's continuing effect on the victim. The court did so while expressly indicating it was considering the primary sentencing objectives of protecting the public and punishing the defendant because, while Smith did not have a criminal record (a

mitigating factor), Smith's actions were aggravated and demonstrated predatory behavior carrying a risk of recidivism. Again, the court's superfluous religious reference merely reflected the accepted societal beliefs that human life, particularly a child's life, is extraordinarily valuable, and that life altering harm should be treated accordingly.

¶24 In addition to arising in the context of considering proper sentencing factors, the court's religious comments are distinguished from the situation in ***Bakker*** because, here, the court did not align itself with the victims. *See* ***Bakker***, 925 F.2d at 740-41. Further, we note that the sentence Smith received was less harsh than that recommended by the presentence investigator and the State, and substantially shy of the maximum. If the court increased Smith's sentence based on a view that Smith violated the court's personal religious beliefs, we might expect that sentence to exceed recommendations that were based solely on proper considerations. Viewed as a whole, we are satisfied that the sentencing transcript does not demonstrate that Smith's sentence was the result of improper considerations.[4]

¶25 Smith next argues the circuit court failed to adequately set forth its rationale for the sentence. A sentencing judge must detail his or her reasons for selecting the particular sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶39. This

[4] Smith alternatively argues that even if the court's sentencing comments did not demonstrate the sentence was improperly based on the court's personal religious beliefs, they create such an appearance. This argument conflates the appearance of bias case law with the proper standard of review, which requires that Smith prove by clear and convincing evidence that the court actually relied on an improper factor. *See* ***State v. Gallion***, 2004 WI 42, ¶72, 270 Wis. 2d 535, 678 N.W.2d 197. Smith does not develop a bias argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not decide issues that are not, or inadequately, briefed.).

requires that the court indicate the general sentencing objectives it considers to be of the greatest importance in the case and state why, in light of the facts of the case, the particular component parts of the sentence imposed advance those objectives. ***Id.***, ¶¶41-42. If the court rejects probation and imposes a sentence of confinement, it must explain why the duration of that confinement advances the sentencing objectives it has identified. ***Id.***, ¶45.

¶26 Smith concedes that the court properly rejected probation as a sentencing option. However, he argues the court failed to adequately explain its basis for the length of the sentence or link the sentencing objectives to the facts of the case.

¶27 At the outset of the sentencing hearing, the court observed that Smith faced a maximum of sixty years' imprisonment, that the court could consider the read-in kidnapping charge at sentencing, and that a presentence investigation report recommended twenty-one to twenty-six years' imprisonment, including sixteen to twenty years' initial confinement. The court subsequently addressed mitigating and aggravating factors in the case, the crime's effect on the victim, and the potential for recidivism. The court also identified its primary sentencing objectives, in the context of the various factors. We therefore fail to see how the court's sentencing remarks fall short of the requirements set forth in ***Gallion***.

¶28 Moreover, the transcript provides a further basis for the court's sentence. While the sentence imposed was more lenient than the recommended sentences, the presentence investigation report indicated Smith blamed the victim, and in his allocution Smith denied committing acts he had previously admitted. These factors suggest Smith lacked remorse and failed to accept responsibility,

providing support for a harsher sentence. *See* ***McCleary***, 49 Wis. 2d at 282 (We are "obliged to search the record" for support of a sentence if a sentencing judge's explanation is lacking.).

By the Court.—Judgment and order affirmed.

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