COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

No. 94-2885-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. WOOSTER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Richard J. Wooster appeals from a judgment of conviction upon a guilty plea to three counts of first-degree sexual assault of a child, two counts of sexual exploitation of a child, and one count of child enticement, contrary to §§ 948.02(1), 948.05(1), and 948.07(1), STATS. He also appeals from an order denying his postconviction motion seeking sentence modification. He claims that the enactment of Chapter 980, STATS., operates as a new factor that the trial court should consider in imposing sentence, and that the trial court erroneously exercised its discretion in imposing a lengthy sentence. Because Chapter 980, STATS., does not constitute a new factor and

because the trial court did not erroneously exercise its discretion in imposing sentence, we affirm.

I. BACKGROUND

During October 1991 and September 1993, Wooster engaged in unlawful sexual activity with a juvenile, who was a family friend. As a result of this activity, Wooster was charged with three counts of sexual assault, two counts of sexual exploitation, and one count of child enticement. He pleaded guilty. The State recommended a fifteen year term of imprisonment with additional probation provisions. The trial court sentenced him to a total of fifty-five consecutive years imprisonment. Wooster filed a postconviction motion seeking sentence modification on the grounds that a new factor existed and that the fifty-five year sentence was an erroneous exercise of discretion. His motion was denied. He now appeals.

II. DISCUSSION

Wooster raises two issues: (1) whether Chapter 980, STATS., operates as a new factor requiring re-sentencing, and (2) whether the trial court erroneously exercised its discretion in imposing sentence.

A. New Factor.

Wooster claims that the passage of Chapter 980, STATS., also known as the "sexual predator law," constitutes a new factor that justifies sentence modification. We disagree.

Whether a fact or set of facts constitutes a new factor presents a legal issue that we decide *de novo*. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor is a "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the

parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Further, a new factor is "an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Wooster's argument fails on this basis, i.e, the enactment of Chapter 980 does not frustrate the purpose of the trial court's original sentence.

Wooster's argument is that the protections afforded by Chapter 980, STATS., alleviate the need to sentence him to such a lengthy term of imprisonment. He argues that Chapter 980 will protect the public by keeping him confined if he continues to pose a threat and, therefore, a lengthy sentence to echo this same purpose (protecting the public) is unnecessary. We are not persuaded. The sentence imposed by the trial court was based on a variety of factors, including the aggravated nature of the crime and the fact that the activity occurred repeatedly over a long period of time. The trial court also considered the need to punish Wooster for these acts and send a "general deterrent" message to other potential offenders. For these reasons, the trial court decided that a lengthy period of incarceration was required. Accordingly, the existence of Chapter 980, which operates to prevent the release of dangerous "sexual predators" does not frustrate the purpose underlying the sentence imposed. Therefore, we conclude that the enactment of Chapter 980 does not constitute a new factor in this case.

B. Sentencing Discretion.

Wooster next claims that the trial court erroneously exercised its discretion in imposing the lengthy sentence. He argues that this case was not of an aggravated nature to require the long sentence, that the trial court failed to consider the sentencing guidelines, that the trial court relied on other allegations of illegal acts that Wooster was never convicted on, and that the sentence was unduly harsh.

Sentencing is left to the discretion of the trial court and will not be disturbed on appeal unless the trial court erroneously exercised its discretion. ***State v. Borrell***, 167 Wis.2d 749, 781, 482 N.W.2d 883, 895 (1992). Our review of the record in this case reveals that the trial court did not erroneously exercise its discretion in imposing sentence.

1. Aggravated nature of the crimes.

Wooster argues that maximum sentences should be reserved for cases of an aggravated nature and, therefore, the fifty-five year term was inappropriately imposed in this case. We cannot agree for two reasons. First, the trial court did not impose the maximum sentence. Wooster faced a total of ninety years imprisonment if the maximum for each count were imposed. He was sentenced to fifty-five years imprisonment, which is ten years more than half the maximum available. Second, contrary to Wooster's assertion, the fact that these crimes involved only one victim does not mean that the crimes were not of an aggravated nature. This activity occurred over a long period of time; involved a young child; and involved threats, deception and intimidation. The trial court emphasized the gravity of Wooster's crimes in imposing sentence. Accordingly, we reject Wooster's claim that the nature of the crime required a lesser sentence.

2. Sentencing guidelines.

Next, Wooster claims the trial court erroneously exercised its discretion by imposing sentence without considering the sentencing guidelines as mandated by § 973.012, STATS. We summarily reject this contention because this issue was not raised at the time of sentencing and is therefore waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

3. Reference to past illegal activities.

Next, Wooster claims that the trial court erroneously exercised its discretion by considering other conduct committed by Wooster for which he was never convicted. Specifically, Wooster objects to the trial court's consideration of other victims Wooster assaulted in the past. Again, we reject Wooster's contention. A trial court may consider unproven offenses at sentencing, in connection with the defendant's character and need for incarceration and rehabilitation. ***State v. Verstoppen***, 185 Wis.2d 728, 737, 519 N.W.2d 653, 656 (Ct. App. 1994). The trial court must consider whether the crime for which the defendant has been convicted is an isolated act or part of a pattern of conduct, and unproven offenses may be considered for that purpose.

State v. McQuay, 154 Wis.2d 116, 126, 452 N.W.2d 377, 381 (1990). Accordingly, the trial court in the instant case did not erroneously exercise its discretion when it considered Wooster's thirty-year history of assaulting minors when it imposed sentence.

4. Unduly harsh sentence.

Finally, Wooster argues that the sentence imposed was unduly harsh. We do not agree. Sentence length is a matter of trial court discretion. *Cunningham v. State*, 76 Wis.2d 277, 284, 251 N.W.2d 65, 68 (1977). This court first determines whether the trial court properly exercised its sentencing discretion and then whether a challenged sentence is excessive. *State v. Glotz*, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). We will conclude that the trial court erroneously exercised its discretion 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." *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

We consider first whether the trial court properly exercised its sentencing discretion. The trial court in this case properly considered the three required factors in passing sentence: the gravity of the offenses, Wooster's character, and the need to protect the community. The record demonstrates that the trial court clearly considered each factor in imposing sentence. Therefore, we conclude that the trial court properly exercised its sentencing discretion.

Next, we consider whether imposing the fifty-five year prison term was excessive. In reviewing the crimes involved and the potential maximum punishment, we cannot conclude that Wooster's prison term was excessive. The maximum potential terms for the crimes Wooster pleaded guilty to exposed him to a total of ninety years in prison. The trial court imposed a fifty-five year term. This sentence is well within the limits of the maximum and, therefore, is not so disproportionate to the offenses so as to shock the public sentiment or offend reasonable judgment. *See* *State v. Daniels*, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983). Accordingly, we reject Wooster's claim that his sentence was unduly harsh.

By the Court.—Judgment and order affirmed.

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