COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1675-CR **Cir. Ct. No. 2010CF3223**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC F. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Eric F. Nelson appeals from a judgment of conviction, entered upon his guilty pleas, for one count of using a computer to facilitate a child sex crime, one count of possession of child pornography, and one count of possession of THC, contrary to WIS. STAT. §§ 948.075(1r), 948.12(1m),

and 961.41(3g)(e) (2009-10).[1] He also appeals from an order denying his postconviction motion, which challenged his sentence. He argues that the trial court erroneously exercised its sentencing discretion in numerous ways. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 According to the criminal complaint, Nelson exchanged online and text messages over a period of one month with a person who identified herself as a thirteen-year-old girl, but who was actually a police detective posing as an underage girl (hereafter, "the girl"). Nelson and the girl discussed having sexual intercourse and using birth control. Nelson asked for the girl's phone number so that he could send her text messages and subsequently texted the girl a photo of his penis.

¶3 About one month after the chatting began, Nelson sent the girl several text messages, arranging to meet her at a restaurant. He asked her, by text, if she was sure she wanted to lose her virginity to him. Nelson showed up at the restaurant at the designated time and was arrested by police officers.

¶4 The criminal complaint alleged that Nelson admitted to the police officers that he spoke sexually with the girl online. He said he believed that she was sixteen years old, but later acknowledged that she may have indicated that she

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

was thirteen. Nelson told the police that he went to the restaurant to meet the girl and said that if they had met, they may have engaged in sexual contact.

¶5 The police subsequently executed a search warrant at Nelson's home and recovered from his computer downloaded images of children engaged in sexually explicit conduct. The police also found some drugs in the home. The amended information charged Nelson with six crimes.[2]

¶6 Nelson and the State entered a plea agreement pursuant to which he pled guilty to one count of using a computer to facilitate a child sex crime (a Class C felony), one count of possession of child pornography (a Class D felony), and one count of possessing THC (an unclassified misdemeanor). Two additional counts of possession of child pornography and one count of possession with intent to deliver psilocin were dismissed and read in. The State agreed to recommend a global sentence of five years of initial confinement and five years of extended supervision, and Nelson was free to argue for a different sentence.

¶7 At the plea hearing, trial counsel noted for the record that the two felonies both had presumptive minimum sentences. Specifically, WIS. STAT. § 939.617(1) provides for a presumptive minimum sentence of five years for violations of WIS. STAT. § 948.075 (using a computer to facilitate a child sex crime) and three years for violations of WIS. STAT. § 948.12 (possession of child

[2] Five of the six alleged crimes took place in Dane County, where Nelson lived. He agreed to have those crimes handled as part of his plea agreement in Milwaukee County.

pornography). *See* § 939.617(1).[3] A sentencing court can impose a lesser sentence "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." *See* § 939.617(2).[4] The trial court reiterated this information when it accepted Nelson's guilty pleas and found him guilty.

¶8 At the sentencing hearing, trial counsel urged the trial court to impose sentences lower than the presumptive minimum sentences, such as a shorter prison sentence or probation. Trial counsel noted the fact that Nelson had no prior record, has a college degree, and has a supportive family. He emphasized the conclusions of a psychologist who examined Nelson and concluded that

[3] WISCONSIN STAT. § 939.617(1) provides:

> **Minimum sentence for certain child sex offenses. (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.

[4] WISCONSIN STAT. § 939.617(2) was amended effective April 24, 2012. *See* 2011 Wis Act 272. The version of § 939.617(2) that was applied to Nelson provided:

> **(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.

Nelson is not over-sexualized and has minor mental health issues that can be addressed in a community-based setting.[5]

¶9 The trial court discussed whether the presumptive mandatory minimum sentences should be applied to Nelson:

> I got a 25 year old who is a college graduate, no record, and in a, for all [intents and] purposes, stable relationship. He has support of his friends and family. The letters remarkably from what they tell me [indicate] that he's never been a problem. Gainfully employed, and yet the legislature has told me that in cases like this I have to sentence him to five years [of] initial confinement unless I can find on this record[,] presumably in good [conscience,] that a lesser sentence is in the best interest of the community and the public will not be harmed.
>
> I thought about this case almost all weekend and I can't do it. I can't make that finding. And this is what's wrong with presumptive minimums, it takes away my discretion. So he's going to go to prison.

The trial court followed the State's recommendation and sentenced Nelson to five years of initial confinement and five years of extended supervision on each of the felonies, to be served concurrently. The trial court imposed a six-month concurrent sentence for the misdemeanor.

¶10 Nelson filed a postconviction motion seeking sentence modification on grounds that the trial court erroneously exercised its sentencing discretion. The trial court denied the motion and this appeal follows.

[5] The psychologist concluded that Nelson did not meet the criteria for pedophilia, but noted: "[I]t appears that his computer use and his behavior with an apparent 13 year old stems from his addictive-like use of computer accessed pornography and chat room sexual behavior in order to avoid directly dealing with uncomfortable personal feelings and relationship problems."

DISCUSSION

¶11 Nelson presents numerous reasons why he believes the trial court erroneously exercised its sentencing discretion. We begin by reviewing the applicable legal standards and applying them to Nelson's sentence, and then we address Nelson's challenges.

¶12 At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶13 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***Id.***, ¶18 (citation omitted). Our analysis includes consideration of postconviction orders denying motions for sentence modification, because a trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶14 In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the nature of the crimes. It called the computer crime "a serious crime." It recognized that the legislature has made clear that it "wants the public to be protected from people like" Nelson, even if Nelson was not determined to be a pedophile. The trial court acknowledged that Nelson did not have a criminal record and that the psychologist found that Nelson expressed "normal sexual desires and interests," but it expressed concern that the psychologist's findings were inconsistent with the fact that Nelson had forty-six pornographic images of children downloaded on his computer and was on his way to a restaurant to meet a thirteen-year-old girl for sex.

¶15 The trial court discussed the needs of the public, ultimately finding that the facts of the case and Nelson's character did not support the findings that would overcome the presumptive minimum sentences. *See* WIS. STAT. § 939.617(2). In its order denying Nelson's postconviction motion, the trial court reiterated that it had concluded that "it was not in the best interest of the community" to impose a sentence less than the presumptive minimum sentences, given Nelson's actions.

¶16 Based on the trial court's remarks at sentencing and the explanation in its postconviction order, we conclude that the trial court's sentencing fit within the dictates of ***Gallion***. We further conclude that Nelson's sentence was not unduly harsh. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (A trial court will be found to have erroneously exercised its sentencing discretion by imposing an unduly harsh sentence 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."). Here, Nelson benefitted from the dismissal of three charges by entering the plea agreement. Even so, he still faced a total of sixty-five-and-one-half years of imprisonment if the maximum sentences had been imposed consecutive to one another. His ten-year sentence is about fifteen percent of what he could have been ordered to serve and is not excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶17 Nelson disagrees with our conclusion that the trial court properly exercised its sentencing discretion, and he offers numerous reasons why his sentence should be modified.[6] First, Nelson argues that the trial court erred by not considering mitigating factors "in a meaningful way." He explains: "The factors had great relevance to his character and rehabilitative needs. He had strong and positive character attributes that were the most notable of his sentencing factors," such as the fact that he was cooperative, accepted responsibility, and "had an excellent employment history." We reject this argument. The trial court acknowledged Nelson's positive attributes, as well as the fact that Nelson had no prior criminal record. The trial court's decision that Nelson's positive attributes did not justify overcoming the presumptive minimum sentences established by the legislature was within its discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41 (weight given to sentencing factors is within trial court's discretion).

[6] Those arguments and sub-arguments that we do not specifically address in this opinion are denied on grounds that they are unpersuasive, undeveloped, or raised for the first time on appeal. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889 ("We generally do not review an issue raised for the first time on appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court "may decline to review issues inadequately briefed").

¶18 In a related argument, Nelson contends that the trial court "did not meaningfully evaluate or consider" Nelson's character. He asserts that the trial court made only "cursory acknowledgement of the contents of the emails and letters" offered in support of Nelson. Nelson argues that the trial court "could have imposed shorter confinement" if it had not "ignored many factors related to his personality, ethic, education, cooperation, remorse and background." He also contends that the trial court should have recognized that Nelson's treatment needs could be met in the community. We are unconvinced that the trial court erred. It considered numerous factors, and it discussed the psychologist's report at length. The trial court's comments span over eight pages of the transcript, demonstrating that the imposition of sentence was not abrupt and unexplained. The fact that the trial court could have imposed a different sentence does not constitute an erroneous exercise of discretion. *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).

¶19 Next, Nelson argues that the trial court "did not appear to understand it had discretion to depart from the presumptive minimums." (Capitalization and bolding omitted.) In support of this argument, Nelson seizes on the trial court's statement that it "can't make" the necessary findings to overcome the presumptive minimum sentences. *See* WIS. STAT. § 939.617(2). The trial court rejected Nelson's argument in its postconviction order, stating: "Nothing is further from the truth. The court indicated several times that it had to determine whether a lesser sentence was in the best interest of the community and whether the public would be harmed by imposing a [lower] sentence." We agree with the trial court. The sentencing transcript, when viewed as a whole, clearly indicates that the trial court was aware that it had the authority to make findings overcoming the

presumptive minimum sentences, but it concluded the facts of this case did not warrant such findings.

¶20 Nelson also asserts that "[t]he record does not reflect that the trial court understood what presumptive minimum sentences applied to the two felony counts before it." The State responds: "Presumably his argument is that the sentencing court relied on an inaccurate understanding of the presumptive minimum and that the court assumed the minimum sentence was the same for both crimes—five years." The State argues that Nelson is not entitled to relief unless he proves "'that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.'" (Quoting ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.) Further, the State notes: "'Proving inaccurate information is a threshold question—you cannot show actual reliance on inaccurate information if the information is accurate.'" (Quoting ***State v. Harris***, 2010 WI 79, ¶33 n.10, 326 Wis. 2d 685, 786 N.W.2d 409.)

¶21 The State contends that Nelson has not met his burden in this case:

> Nelson has failed to prove that the court relied on inaccurate information with respect to the presumptive minimum sentence for possession of child pornography. [The trial court's] statements at the plea hearing indicate that [it] understood that Nelson's crimes carried different presumptive minimum sentences….
>
> ….
>
> Nelson relies solely on the fact that the court imposed the same sentence for both the child pornography offense and the child sex offense—five years initial confinement followed by five years extended supervision. He claims that the court did not set forth a separate rationale for the pornography sentence. However, the court imposed these sentences to run concurrently. Thus, the global sentence was ten years [of] incarceration, which

> included five years [of] initial confinement followed by five years [of] extended supervision. This sentence conformed to the State's recommendation derived from the plea agreement.
>
> Moreover, the court's justification for the length of sentence applied equally to the child pornography and child sex crime offenses….
>
> Thus, Nelson has failed to prove that [the trial court] relied on inaccurate information at sentencing. The fact that the court did not specifically reference the minimum sentence for the pornography offense does not warrant resentencing. This is particularly true in light of the court's comments at the plea hearing demonstrating its knowledge of the correct length of the minimum sentence. Moreover, the sentences were imposed concurrently and were consistent with the State's global recommendation.

(Record citations omitted.) We agree with the State's analysis. The different presumptive minimum sentences were noted several times during the plea hearing, as well as in the amended information and in the signed plea questionnaire. We are unconvinced that the fact the trial court sentenced Nelson to five years of incarceration on both felonies (to be served concurrent with one another and the third count) means that it misunderstood the presumptive minimum sentence on the child pornography count.

¶22 Next, Nelson argues that the trial court had "preconceived notions about the sentence before sentencing which denied Mr. Nelson his constitutional rights to due process and effective assistance of counsel." (Capitalization and bolding omitted.) In support, Nelson points to the following comment the trial court made when discussing whether it could overcome the presumptive minimum sentences: "I thought about this case almost all weekend and I can't do it. I can't make that finding." Nelson contends that it was "impermissible for [the] court to consider the minimum sentences required or consider the sentence it intends to

impose in advance of sentencing." In its postconviction order, the trial court stated that it was "utterly and completely" rejecting that argument.

¶23 On appeal, the State agrees with the trial court that Nelson's argument has no merit, explaining: "The fact that a court prepared for a sentencing hearing, reviewed materials prior to the sentencing, and gave some thought to the case prior to sentencing does not mean that the court predetermined the sentence it would impose." We agree with the trial court and the State that a trial court can review materials prior to the sentencing hearing and, furthermore, that the record does not support Nelson's argument that the trial court prejudged his case. Indeed, the record reveals the opposite: the trial court paused the sentencing so that it would review the psychologist's report and it asked questions to clarify the facts and arguments. We are unconvinced that the trial court prejudged the case.

¶24 Finally, Nelson contends that based on the arguments outlined above, the trial court should have granted his postconviction motion for sentence modification. For the same reasons we reject Nelson's challenge to the original sentencing, we conclude that the trial court did not err when it denied Nelson's postconviction motion.

By the Court.—Judgment and order affirmed.

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