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DISTRICT II

September 11, 2024

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Craig M. Kuhary
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Sara Lynn Shaeffer
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1616-CR State of Wisconsin v. John A. Meyer (L.C. #2020CF1754)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John A. Meyer appeals a judgment of conviction and an order denying his motion for postconviction relief. He contends the circuit court "erroneously exercised its discretion when it sentenced [him] under a preconceived policy in violation of ***State v. Ogden***, 199 Wis. 2d 566, 544 N.W.2d 574 (1996)." Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the following reasons, we disagree with Meyer and summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Background

Meyer was charged with ten counts of possession of child pornography, with each count carrying a mandatory period of confinement of at least three years and allowing for imprisonment for up to twenty-five years. He pled to two counts with the other eight being dismissed and read in; another ten uncharged counts were also read in.

At sentencing, the State explained that Meyer was found in possession of thousands of images "of child sexual abuse material" as well as many videos. He was "looking at images and reviewing images of children being sexually assaulted by adults," including "looking at children as young as five years old being sexually assaulted in these videos." The State asserted that Meyer

> said that he had been doing this for years and hadn't been caught, that he would sometimes delete all of those photos and then would begin to be obsessed and would redownload them. I think that shows the defendant does not have control of his behavior, and I do think that makes him a greater risk to the public.
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> ….
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> … [T]he mandatory minimum would unduly depreciate the seriousness of this offense and of this particular defendant's conduct. As the [c]ourt knows, someone that has possessed one image of child pornography could be found guilty of that one image and sentenced to a term of imprisonment of three years of initial confinement. I think the defendant's collection of child pornography, the types of images and videos that he was interested in and that he collected demonstrates that a sentence of more than three years is appropriate ….
>
> … [T]here were a lot of images that also included infants, toddlers, toddler bondage, beastiality [sic], so this is not something where the defendant was just interested, again, in just a simple naked photograph of a 14-year-old girl. His predilections went much, much darker and much deeper.

The State requested a sentence of "five to six years of initial confinement." Meyer and his counsel both spoke to the court, asking for the mandatory minimum amount of confinement of three years.

The circuit court complimented Meyer on sentencing comments he made indicating his "reflection on what happened and what it's done to others" and his "positive attitude … about this," including planning "to come out stronger, better," stating that that "talks about your character." In considering his character, the court also noted that Meyer "had no prior criminal past, you didn't have a criminal past of abusing children or having sexual images, et cetera."

The circuit court spoke of how victims of child pornography "continue to be victims because of something that happened 40 or 50 years ago." Echoing some of the State's comments, the court compared Meyer's case requiring a mandatory minimum sentence of at least three years of confinement with another child pornography case in which the court had sentenced a different defendant. The court pointed out that in that case, the defendant was

> an 18-year-old, he had a single picture, one single picture and he pled to it but he had that same mandatory minimum. He's 18 and he had a picture of I believe it was an 11- or 13-year-old boy … and [the] mandatory minimum was three years and I sentenced that young man to three years in prison….
>
> So when I take … the severity of what you did in comparison to someone else that was charged with the same offense. You could see on the scale how what you did was much more severe than that young man who had a single picture on a cell phone.
>
> So I mention all that as kind of table setting to help you understand what I'm thinking about as I put together a sentence ….

The circuit court recognized Meyer's remorse and talked about his rehabilitative needs and the need for deterrence and punishment. The court again discussed its prior sentencing of the eighteen-year-old man as it compared the severity of that case to the severity of this case.

> [H]e's serving three years for a single image … of a single male on his phone. Yours we have, as highlighted by the [S]tate, we have toddlers obviously up to 14, bondage, rape, things of that nature that just really are quite troubling, quite disturbing, and very concerning to this [c]ourt, so the severity, the volume of images, the type of images, et cetera, certainly make this about as serious and aggravated of a case of possession of child pornography as there can be.

In considering the "risk to the community," the circuit court touched upon comments by the State "about your walking away from it but yet being drawn back in, the fact that you got younger and younger with your choice in images despite you knowing that you shouldn't be doing it, et cetera, those all speak to different risks that … I see to the community." The court also noted the reports of Meyer's experts essentially opining that "there's little chance of recidivism and therefore the risk to the community is very low."

Stating, "[a]gain, as I look at the aggravating nature of what we have here, boys and girls, single digit ages, 25,000 photos, just the volume and the ages, toddlers, beastiality [sic], et cetera, I do believe that more than the minimum is appropriate in this case," the circuit court sentenced Meyer to five years of initial confinement and seven years of extended supervision. Meyers moved for postconviction relief, which the court denied. Meyer appeals.

Discussion

Meyer's criticisms of the circuit court's sentence are as follows:

> [T]he circuit court … applied a "preconceived policy of sentencing" that failed to account the facts of the case independently. The court repeatedly stated that Meyer's case was much more severe than the single image case involving a different defendant it had sentenced previously based almost entirely on the number and type of images he possessed….
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> ….

> … The court tacitly concluded that its consideration of the appropriate length of Meyer's sentence was based on an arbitrarily created benchmark connected to a single image case in a completely different child pornography case involving a completely different defendant.
>
> … The circuit court … employed an[] overly mechanistic formula that predetermined that any term of confinement imposed had to exceed the three-year term of confinement the court imposed on a different defendant in a different case.

Meyer argues that this case bears much similarity to the one before our supreme court in ***State v. Ogden***, 199 Wis. 2d 566, 544 N.W.2d 574 (1996), in which the court reversed a circuit court decision not to grant Huber release to a defendant for child care purposes due to a preconceived policy against granting such release. In truth, the facts of this case bear no similarity to those in ***Ogden***, but much of the ***Ogden*** court's ruling actually supports the circuit court's sentence here.

The ***Ogden*** court stated in relevant part:

> [T]his court has noted that a reviewing court should "start with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of."
>
> It is equally axiomatic, though, that one "unreasonable and unjustifiable basis" for a sentence is a [circuit] judge's employment of a preconceived policy of sentencing that is "closed to individual mitigating factors." Such inflexibility, which "bespeaks a made-up mind," is unacceptable. This court has repeatedly held that the imposition of a criminal sentence must at the very least be based on "the gravity of the offense, the character of the offender and the need for the protection of the public." This methodology does not allow for a sentence which fits the crime, but not the criminal.
>
> The [circuit] court in this case employed the very type of mechanistic sentencing approach disfavored by our case law. At one point the court stated, "[t]here are certain procedures and policies that have to be established as to allow some uniformity. If I make an exception for her, then any person in the jail can also request that same exception." Further, it impliedly disregarded the

> particular facts of Ogden's situation by asserting: "My reason has always been I do not allow [Huber privileges for] normal child care …." In fact, the judge made it clear that he would only grant Huber privileges for child care if it was absolutely essential.
>
> The record indicates that the [circuit] court had decided not to grant Huber release for family care *before* Ogden made her request. Based upon this preconceived sentencing policy, it summarily denied her motion. The [circuit] court clearly did not take into account the specific circumstances of Ogden's situation. This type of approach does not constitute an exercise of discretion, but is instead an abdication of the [circuit] court's responsibility to look at the facts in each case independently before issuing a sentence.
>
> ….
>
> We … hold … that a judge's predispositions must never be so specific or rigid so as to ignore the particular circumstances of the individual offender upon whom he or she is passing judgment.

Ogden, 199 Wis. 2d at 571-73 (fifth and sixth alteration in original; citations omitted).

Meyer appears to suggest that the circuit court here had a preconceived policy that if a defendant being sentenced for possession of child pornography had been in possession of more than one image of child pornography, he or she must necessarily be sentenced to more than the mandatory minimum confinement time of three years. The court's sentencing comments provide no basis for such a conclusion.

The circuit court clearly considered Meyer's individual circumstances and all the relevant sentencing factors. The court considered in his favor that this was his first offense and that he appeared to show insight, remorse and a positive attitude. The court discussed relevant sentencing factors of rehabilitation, deterrence, punishment, protection of the community, and, most relevant to this appeal, the severity of the offense. It was in this latter context that the court contrasted Meyer's case with that of a prior eighteen-year-old defendant who faced and received the mandatory minimum confinement time of three years for possession of just a single photo of

child pornography. Meyer's case, the court correctly noted, was far more severe in that he had been in possession of thousands of pornographic images, including videos, that included children as young as infants and toddlers, a five-year-old being raped by an adult, bestiality, etc. Courts are supposed to consider the severity of the particular offense, aggravating factors before it, and the risk the particular defendant appears to pose to the community. ***State v. Whitaker***, 2022 WI 54, ¶12, 402 Wis. 2d 735, 976 N.W.2d 304. The court here thoughtfully explained to Meyer precisely why he was being sentenced to more confinement time than just the mandatory minimum, using the prior eighteen-year-old defendant's case to illustrate why. The court did not err in any regard with this. We expect sentencing courts to consider all the relevant factors and clearly explain the reason for their sentence, and the court here did precisely that.

Upon review, we will affirm a circuit court's imposition of a sentence unless the court erroneously exercised its discretion. ***Id.***, ¶11. Here, the court appropriately considered all the relevant sentencing factors and fashioned an individual sentence based upon Meyer's individual circumstances. He has failed to demonstrate to us that the circuit court erroneously exercised its discretion in sentencing him.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals