COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1996

Nos. 95-0738-CR
95-0739-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER T. NELSON,

Defendant-Appellant.

APPEALS from judgments of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Peter T. Nelson appeals from judgments convicting him of first-degree sexual assault of a child, second-degree sexual assault of a child, misdemeanor entry to a locked building and criminal damage to property pursuant to a plea agreement.[1] The trial court sentenced Nelson to

[1] Nelson was originally charged with two counts of first-degree child sexual assault and two counts of second-degree child sexual assault. Plea negotiations resulted in dismissal of one of each of those counts, a felony bail-jumping charge and a traffic case.

five years in prison for second-degree child sexual assault, imposed and stayed a twenty-year prison sentence for the first-degree sexual assault charge and placed Nelson on probation for twenty years consecutive to his release from prison. Nelson also received three years of probation on the misdemeanor counts to be served concurrently with the twenty-year probation. Nelson challenged the twenty-year probation term and twenty-year imposed and stayed sentence in a postconviction motion. The trial court declined to modify the sentence. Nelson appeals.[2]

The child sexual assault charges against Nelson arose from sexual contact with a female family member who was twelve and thirteen years old at the time of the assaults. Nelson contends that the twenty-year probation term and twenty-year stayed sentence for first-degree sexual assault were unduly harsh and unconscionable because any violation of his probation would result in a twenty-year prison term. We disagree and affirm for two reasons. First, Nelson is estopped from protesting the twenty-year probation term because his trial counsel suggested that very term at sentencing. Second, we affirm the sentence because it was an appropriate exercise of the trial court's discretion.

A party is judicially estopped from maintaining a position on appeal which is inconsistent with a position taken in the trial court. *See* ***State v. Michels***, 141 Wis.2d 81, 98, 414 N.W.2d 311, 317 (Ct. App. 1987). In arguments at sentencing, defense counsel acknowledged that Nelson had committed a serious offense, that the facts were "very egregious" and that a lengthy term of probation might be an appropriate punishment, particularly with "prison being held over [Nelson's] head ...." He then suggested a twenty-year term of probation. Nelson did not object or exercise his right of allocution in response to counsel's statement. Accordingly, he is estopped from challenging the twenty-year probation term on appeal.

(..continued)
The plea agreement provided that the dismissed child sexual assault and bail-jumping charges would be read in for sentencing purposes.

[2] Nelson's March 6, 1995, notice of appeal states that it is taken from the judgments of conviction. Because Nelson challenges his sentence on appeal, the notice of appeal should also have referred to the February 25, 1995, order denying his postconviction sentence modification motion. We will construe the notice of appeal as being taken from both the judgments of conviction and the order.

Even if Nelson were not judicially estopped from challenging the lengthy probation and stayed sentence terms, we would reject his contention that his sentence was unduly harsh and unconscionable.

We presume that the trial court acted reasonably in sentencing, and Nelson must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied,* 503 U.S. 940 (1992). The weight given to each of the sentencing factors is within the sentencing judge's discretion. ***Id.*** at 662, 469 N.W.2d at 195. Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987).

The primary factors to be considered by the trial court at sentencing are the gravity of the offense, the offender's character and the need to protect the public. ***State v. Borrell,*** 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). In sentencing Nelson, the court considered the grave nature of his sex offenses and the harm done to the victim, Nelson's character, including his previous criminal record and a history of alcohol abuse (which was a factor in the assaults), and the need to protect others from his conduct. Nelson has not shown that the trial court relied upon an unreasonable or unjustifiable basis in sentencing him. ***J.E.B.***, 161 Wis.2d at 661, 469 N.W.2d at 195.

By the Court.—Judgments affirmed.

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