COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1996

NOTICE

No. 95-0757-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY L. THOM,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Eich, C.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Ricky L. Thom appeals from a judgment of conviction and a postconviction order. The issues are whether the trial court erred in limiting the admissibility of Thom's post-polygraph statements ("statements") to use as impeachment during rebuttal, and whether the trial court erroneously exercised its sentencing discretion. We conclude that limiting

the admissibility of these voluntary statements to use as impeachment during rebuttal did not deprive Thom of his right to a fair trial, and that the trial court did not erroneously exercise its sentencing discretion. Therefore, we affirm.

A jury found Thom guilty of first-degree sexual assault of his three-year-old daughter, contrary to § 948.02(1), STATS. Before Thom was charged, he retained counsel who notified the Sheriff's Department of that representation.[1] Thom's daughter was reluctant to see him, so to "clear [things] up," Thom telephoned the prosecutor to discuss the current status of the investigation. The prosecutor, having no recollection that Thom was represented, asked Thom to consent to a polygraph. Thom agreed, but never mentioned that he was represented by counsel. After the mechanical part of the polygraph, Thom "confessed" to a single incident of sexual contact with his daughter which allegedly occurred three months before the charged offense.[2]

The State moved to admit these statements as evidence of a prior act. Section 904.04(2), STATS. Thom urged suppression because these statements were not voluntary and were made outside the presence of counsel. After an evidentiary hearing, the trial court found that the statements were voluntary because Thom initiated the contact, agreed to the polygraph, felt comfortable talking with the detective, and had not requested counsel. The trial court ruled that ***State v. Schlise,*** 86 Wis.2d 26, 42, 271 N.W.2d 619, 626 (1978), required suppression of post-polygraph statements during the State's case-in-chief because there was no pre-examination stipulation as required by ***State v. Stanislawski,*** 62 Wis.2d 730, 216 N.W.2d 8 (1974). However, it ruled that it would allow the use of these statements in rebuttal for impeachment purposes. *E.g.,* ***Harris v. New York,*** 401 U.S. 222, 225-26 (1971); ***State v. Pickett,*** 150 Wis.2d 720, 442 N.W.2d 509 (Ct. App. 1989). Thom claims that this ruling prevented him from testifying in his own defense. *See* U.S. CONST. amend. VI.

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[1] The Sheriff's Department then notified the District Attorney's Office.

[2] The verbatim "confession" (hereinafter referred to as "statement") was: "[i]n my heart I know I did it, but I don't remember doing it. Drank enough. Only one time, that could have done it, and not remember that much about it.... On May 15, drinking after work, came home drunk, got [my daughter] ready for bed. She crawled in bed with me, [describes specific sexual contact] . . . The only time it can happen, could have happened, can happen."

Thom challenges that part of the trial court's order which admits the statements, albeit for a limited purpose. He claims that this ruling violates his attorney-client privilege, his right against self-incrimination and his right to present a defense under the Sixth Amendment to the United States Constitution. We disagree.

Thom has not shown that these factual findings are clearly erroneous. Section 805.17(2), STATS. *See* ***State v. Michels,*** 141 Wis.2d 81, 90, 414 N.W.2d 311, 314 (Ct. App. 1987). Although the ultimate issue of voluntariness is one of constitutional fact which we review independently, we cannot quarrel with the trial court's finding that these post-polygraph statements were voluntarily disclosed. *See* ***id.*** Thom contacted the prosecutor and agreed to the polygraph. After the mechanical part of the polygraph examination was completed and Thom was told that he had failed, he asked to talk with Detective Anthony Z. Soblewski.[3] He cannot now complain that these statements were coerced. He also cannot complain that his attorney-client privilege was violated when he initiated contact with the prosecutor, agreed to the polygraph, asked to talk with the detective thereafter, and never requested counsel. *E.g.,* ***Patterson v. Illinois,*** 487 U.S. 285, 291 (1988) (citing ***Edwards v. Arizona,*** 451 U.S. 477, 484-85 (1981)) ("[once the accused requests] to deal with the police only through counsel he should not be subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication.*") (emphasis supplied) (quotations omitted).

Thom also contends that the trial court's ruling prevented him from testifying in his own defense. His fear was that by testifying, he could open the door to use of the statements. However, the opportunity for impeachment would only arise if Thom's testimony was inconsistent with these statements. Thom does not have a constitutional right to testify without risking confrontation with his prior inconsistent statements. *See* ***Harris,*** 401 U.S. at 225-26; ***Pickett,*** 150 Wis.2d at 726-27, 442 N.W.2d at 512-13. Because the trial court's ruling was legally sound, it did not improperly affect Thom's decision not to testify. *See* ***id.***

[3] Thom testified that he told the polygrapher that "I wanted to talk to Tony [Detective Anthony Z. Soblewski] about it."

Thom also claims that the trial court erroneously exercised its sentencing discretion. The trial court imposed and stayed a fifteen-year sentence and imposed a ten-year term of probation with conditions, including a one-year jail term. Thom contends that the trial court's sentence was excessive insofar as it imposed and stayed the fifteen-year sentence. We disagree.

Our review of the sentence is limited to whether the sentencing court erroneously exercised its discretion. ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors are the gravity of the offense, the character of the offender and the need for public protection. ***Id.*** at 427, 415 N.W.2d at 541. The weight given to each factor is within the sentencing court's discretion. ***Cunningham v. State,*** 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Thom does not argue that the sentencing court failed to consider these factors. Instead he claims that the sentencing court should impose the minimum term of custody consistent with these factors. ***State v. Krueger,*** 119 Wis.2d 327, 336, 351 N.W.2d 738, 743 (Ct. App. 1984) (citing ***McCleary v. State,*** 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971)). Thom claims that the fifteen-year imposed and stayed sentence exceeds the minimum term necessary to conform to the sentencing factors.

Thom was convicted of a Class B felony which carries a potential maximum sentence of twenty years. Section 939.50(3)(b), STATS., 1991-92. The Presentence Investigator recommended a five-year prison term and the State concurred. Thom suggested probation with conditions rather than prison, to avoid further emotional and financial hardship for his family.

The trial court was persuaded by the reasons supporting Thom's sentencing recommendation and, upon consideration of the primary sentencing factors, it tailored a sentence designed to control Thom for a lengthy period of time. The trial court sought to maintain Thom's family unit through participation in counseling and allowing Thom to work. However, it was concerned that Thom could "mess this up." To accomplish these objectives, the trial court imposed a lengthy term of probation, followed by a lengthy, stayed sentence. Thom has not persuaded us that the sentence imposed and stayed by

the trial court is excessive, inconsistent with the sentencing factors, or an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

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