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March 23, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP632-CR

State of Wisconsin v. Sean E. Wyman (L.C. #2013CF278)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Sean E. Wyman appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erroneously exercised its discretion at sentencing. He further contends that the court relied upon inaccurate information at sentencing. 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 (2013-14).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wyman was convicted following a no contest plea to possession of child pornography. As part of his plea agreement, the State agreed to recommend a withheld sentence with three to four years of probation and nine to twelve months of conditional jail time. Wyman concurred with the State's recommendation.

The circuit court declined to follow the parties' recommendation at sentencing. It also exercised its statutory authority and decided not to impose the presumptive minimum term of initial confinement.² Instead, the court imposed a ten-year term of imprisonment, consisting of two years of initial confinement followed by eight years of extended supervision.

Wyman subsequently filed a motion for postconviction relief. In it, he claimed that the circuit court erroneously exercised its discretion at sentencing. Wyman also asserted that the court relied upon inaccurate information about his character and treatment needs. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. Our analysis includes consideration of the postconviction hearing

² Wyman committed his offense in August 2011. For offenses committed at that time, circuit courts had the authority to impose less than the presumptive minimum term of three years of initial confinement provided that they made the requisite findings on the record. *See* WIS. STAT. § 939.617(2) (2009-10).

because a circuit court has an additional opportunity there to explain its sentence. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. The primary sentencing factors that a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Ziegler*, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. *Id.*

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who seeks relief because the circuit court used inaccurate information must show that the information was inaccurate and that the court actually relied upon the inaccurate information at sentencing. *Id.*, ¶26. Whether a defendant has been denied this due process right is a question of law that we review de novo. *Id.*, ¶9.

On appeal, Wyman first contends that the circuit court erroneously exercised its discretion at sentencing. We disagree.

Here, the record reveals that the circuit court’s sentencing decision had a rational and explainable basis. In discussing the primary sentencing factors, the court acknowledged the seriousness of the offense and Wyman’s history of deviant behavior with children.³ However, it also acknowledged Wyman’s lack of criminal history and positive employment history.

³ The circuit court noted that Wyman acted as photographer for the family he was living with and took pictures of the children in various stages of dress or undress. The court further noted that Wyman had prior allegations of sexual contact with children. The oldest allegation was from 2003.

Ultimately, the court concluded that imprisonment was warranted, as Wyman's "long-term problem" required "a long-term solution." But the court declined to impose the presumptive minimum term of confinement, deeming it "excessive" under the circumstances. Reviewing the court's remarks, we are satisfied that it properly exercised its discretion at sentencing.

Wyman next contends that the circuit court relied upon inaccurate information at sentencing about his character and treatment needs. Specifically, he complains that the court erroneously assumed that (1) he had a lifelong addiction to child pornography and (2) his risk of re-offense was not low and he required long-term treatment. Again, we disagree.

At sentencing, the circuit court observed that Wyman had been watching and observing "this pornography" for a significant period of time, making it a problem. The court later clarified at the postconviction hearing that it was not referring to child pornography with its comment. Rather, it was referring to adult pornography, which Wyman admitted to watching as a young adolescent. In the court's experience, viewing pornography at an early age often leads to other deviant behavior. Given the court's clarification, we are not persuaded that it relied upon inaccurate information about Wyman's character when sentencing him.

Also at sentencing, the circuit court rejected reports from Wyman's treatment provider and the presentence writer that Wyman posed a low risk for reoffending. The court criticized the treatment provider's report as repetitive and lacking in detail. It also found the presentence writer's risk assessment "shocking" in light of Wyman's history and the limited counseling he had received. Although Wyman takes issue with these conclusions, the court was not obligated to accept the reports or give them any weight. Rather, it simply had to review them and make a decision that was appropriate under established sentencing principles. The court did so here. As

a result, we are not persuaded that it relied upon inaccurate information about Wyman's treatment needs when sentencing him.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals