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DISTRICT II

June 15, 2016

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

2015AP1302-CR State of Wisconsin v. Arlyn R. Dunham (L.C. # 2013CF757)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Arlyn R. Dunham appeals from a judgment convicting him of first-degree sexual assault of a child under the age of twelve. He contends that the imposition of a mandatory minimum penalty constitutes cruel and unusual punishment and violates the separation of powers doctrine and due process. He further contends that he is entitled to discretionary reversal. 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 of the circuit court.

Dunham was convicted following a guilty plea to first-degree sexual assault of a child under the age of twelve, contrary to WIS. STAT. § 948.02(1)(b). The charge stemmed from allegations that he had mouth-to-vagina and mouth-to-penis sexual intercourse with a five-year old girl in June 2013. Under the mandatory minimum penalty provision of WIS. STAT. § 939.616(1r),[2] Dunham faced a bifurcated sentence with at least twenty-five years of initial confinement.

Prior to entering his plea, Dunham moved to dismiss the mandatory minimum penalty. The circuit court denied the motion. After entering his plea, the circuit court imposed a forty-five year sentence, consisting of twenty-five years of initial confinement followed by twenty years of extended supervision. This appeal follows.

On appeal, Dunham first contends that the imposition of the mandatory minimum penalty constitutes cruel and unusual punishment. He cites various mitigating factors in favor of a shorter sentence including his age (he was seventy-two years old when he committed the crime),

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

[2] WISCONSIN STAT. § 939.616(1r) provides:

> If a person is convicted of a violation of s. 948.02(1)(b) or (c) or 948.025(1)(b), 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 25 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

the fact that his wife had been deceased for about a year, and the fact that he had no significant criminal record.

The test for whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment is virtually identical to the test for whether a sentence is excessive. ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823. We consider whether the sentence imposed was "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." ***Id.*** (citations omitted).

Here, we are not persuaded that the imposition of the mandatory minimum penalty constitutes cruel and unusual punishment. The legislature has determined that public policy requires a lengthy sentence for adults who have sexual intercourse with children under the age of twelve. Its classification of the crime as a Class B felony[3] and its requirement of a mandatory minimum penalty for any offender eighteen years of age or older[4] reflect that determination. Given this policy, the victim's young age, and Dunham's admission to sexually assaulting the victim on multiple occasions, we cannot say that a sentence with twenty-five years of initial confinement shocks public sentiment or violates the judgment of reasonable people.

Dunham next contends that the imposition of the mandatory minimum penalty violates the separation of powers doctrine and due process. He asserts that the penalty infringes on the

[3] A Class B felony carries a potential sentence of sixty years of imprisonment, including forty years of initial confinement. WIS. STAT. §§ 939.50(3)(b) and 973.01(2)(b)1.

[4] The mandatory minimum penalty provision of WIS. STAT. § 939.616(1r) does not apply to an offender who was under eighteen years of age when the violation occurred. Section 939.616(3).

judicial function of imposing sentence. Likewise, he complains that the penalty violates due process by providing an exception for offenders who are under the age of eighteen, but not for offenders above a certain age. Dunham suggests that older defendants may not be able to understand the seriousness of their conduct.

Again, we are not persuaded by these arguments. Our supreme court has previously rejected the notion that a mandatory penalty provision violates the separation of powers doctrine. *See* ***State v. Sittig***, 75 Wis. 2d 497, 249 N.W.2d 770 (1977). In doing so, the court explained that while criminal sentencing is an exclusive function of the court, there is no inherent power in the judiciary to determine the nature of the punishment. *See* ***id.*** at 500. As for Dunham's due process argument, he cites no authority for the proposition that the legislature must provide an exception for offenders above a certain age if it provides an exception for offenders below a certain age. He also fails to assert that he did not understand the seriousness of his conduct. Accordingly, we decline to address the argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments which are underdeveloped or unsupported by references to authority).

Finally, Dunham contends that he is entitled to discretionary reversal. He maintains that his sentence presents a miscarriage of justice.

WISCONSIN STAT. § 752.35 confers discretionary authority upon this court to reverse a judgment whenever it is probable that justice has miscarried. We exercise that authority "infrequently and judiciously," only in "exceptional cases." ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

This is not an exceptional case. Rather, this is a case where the circuit court did exactly what it was required to do—impose a mandatory minimum penalty. *See* ***Sittig***, 75 Wis. 2d at 500 ("[A] court's refusal to impose a mandatory sentence or a sentence within limits prescribed by the legislature, constitutes an abuse of discretion by the court and also the usurpation of the legislative field."). We will not exercise our power of discretionary reversal to undermine that result.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals