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DISTRICT II

February 15, 2017

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

2016AP586-CR

State of Wisconsin v. Nemorio J. Atilano (L.C. # 2015CF102)

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

Nemorio Atilano appeals from a judgment of conviction and an order denying his postconviction motion for a sentence modification. Atilano argues that the circuit court erroneously exercised its discretion in considering and weighing the sentencing factors. 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 (2015-16).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Based on charges relating to the sexual assault of a fifteen-year-old female who reported that Atilano forced her to have nonconsensual intercourse on numerous occasions, Atilano pled guilty to two counts of sexual assault of a child under sixteen years of age. Seven additional felonies were dismissed but read in. At sentencing, the circuit court focused on the gravity of the offense, deeming it “a very, very serious case, much more serious than most” cases before the court. Because the assaults were committed with force and without the victim’s consent (rather than with her factual but legally inadequate consent), the court stated its sentence would reflect that Atilano’s conduct was akin to a rape. On the first count, the sentencing court imposed twenty years of initial confinement followed by fifteen years of extended supervision. On the remaining count, the court withheld sentence and ordered a twenty-year consecutive term of probation.

Atilano filed a postconviction motion asserting that the sentencing court placed undue weight on the severity of the offense and improperly speculated that Atilano quit his job to be around children. The postconviction court denied the motion. Atilano appeals.

At sentencing, the circuit court must consider the primary factors of the gravity of the offense, the character of the offender, and the protection of the public. *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight to be given each factor is committed to the circuit court’s discretion. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court is directed to impose the minimum sentence consistent with the gravity of the offense, the rehabilitative needs of the offender and the need to protect the public. *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. *Harris*, 326 Wis. 2d 685, ¶30. Given the strong public policy against interfering with the sentencing

discretion of the circuit court, sentences are afforded a presumption of reasonableness. *Id.* “Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion.” *Id.*

Atilano has not met his heavy burden to show that the circuit court erroneously exercised its sentencing discretion. It is undisputed that in fashioning its sentence, the court’s paramount consideration was the gravity of Atilano’s offenses. Postconviction, the circuit court reiterated that “the enormity of [Atilano’s] crimes cannot be overstated,” noting that the victim was especially vulnerable, lived with Atilano and was often left in his care, and had suffered physical and emotional injuries. The circuit court’s determination that the offense was extremely serious was explained on and is supported by the record. We see no impropriety. The court can permissibly impose a sentence “which considers all relevant factors but which is based primarily on the gravity of the crime or the need to protect society.” *State v. Taylor*, 2006 WI 22, ¶43, 289 Wis. 2d 34, 710 N.W.2d 466 (citation omitted). Here, the sentencing court considered facts relevant to the protection of the public and Atilano’s character, including his lack of a prior criminal record. Postconviction, the circuit court rejected Atilano’s claim that the sentence “did not represent the minimum amount of custody needed to control Atilano’s pernicious behavior.” (Citation omitted.) The circuit court based its decision on the proper law and facts and reasoned its way to a result that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

We also reject Atilano’s contention that the sentencing court relied “on an immaterial and unsupported factor” by suggesting that Atilano quit his job in order to have access to children. Referring to the PSI’s discussion of Atilano’s work history, the sentencing court stated:

I'm not saying this as something I specifically find—but let's just put it as something I can't exclude is that the reason he would go to work for one day and then quit ... was that he didn't want to work, and the reason he would not want to work was because then he could be at home with the children. I'm not saying that I believe that to be the case, but I cannot exclude that possibility and it would fit right in.

Atilano challenged these comments in his postconviction motion. Postconviction, the circuit court explained that its point was to “express ‘concern,’ again, not a sentence factor,” that some of the defendant's behavior may have been motivated by the desire to be around children, and that its concern “did not affect the sentence which was pronounced.”

Atilano has not proven by clear and convincing evidence that the circuit court relied on improper or irrelevant factors in fashioning its sentence. *Harris*, 326 Wis. 2d 685, ¶66. At sentencing, the court observed it could not “exclude [the] possibility” that Atilano avoided work to be home with the children and clearly stated it did not find, consider, or even believe this “possibility” to be true. Postconviction, the circuit court confirmed it did not rely on this “possibility” in fashioning sentence. Atilano points to nothing in the record that would contradict the circuit court's statement of nonreliance.

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