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DISTRICT IV

January 28, 2020

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

2019AP662-CR State of Wisconsin v. Jacob M. Swiedarke (L.C. # 2017CF436)
2019AP663-CR State of Wisconsin v. Jacob M. Swiedarke (L.C. # 2017CF483)

Before Kloppenburg, Graham and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jacob Swiedarke appeals judgments of conviction for three counts of first-degree sexual assault of a child under thirteen years of age and one count of incest with a child by a stepparent. Swiedarke also appeals the circuit court's order denying his postconviction motion for resentencing. Based upon our review of the briefs and record, we conclude at conference that

these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

At plea hearings held in February and April 2018, Swiedarke pled guilty to three counts of first-degree sexual assault of a child under thirteen years of age and one count of incest with a child by a stepparent. The court sentenced Swiedarke to a total of 120 years of initial confinement and 60 years of extended supervision. Swiedarke moved for resentencing, contending that the circuit court erred by imposing maximum sentences without considering relevant facts and applying them to the proper sentencing factors. The circuit court determined that it properly sentenced Swiedarke, and denied the motion for resentencing.

Sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A sentencing court properly exercises its discretion when it engages in a reasoning process that "depend[s] on facts that are of record or that are reasonably derived by inference from the record" and imposes a sentence "based on a logical rationale founded upon proper legal standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). In imposing sentence, the court is required to consider three primary factors: "the gravity of the offense, the character of the defendant, and the need to protect 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, however, is within the circuit court's discretion. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Our review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion, and "the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion." ***Harris***, 326 Wis. 2d 685, ¶30. We afford the sentencing court "'a strong presumption of reasonability'" and, if discretion was properly exercised, we follow "'a consistent and strong policy against interference'" with the court's sentencing determination. ***Gallion***, 270 Wis. 2d 535, ¶18 (quoted sources omitted).

Swiedarke argues that the circuit court erroneously exercised its sentencing discretion by relying entirely on the seriousness of the offenses and their impact on the victims, to the exclusion of mitigating factors. *See* ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996) (a circuit court's "employment of a preconceived policy of sentencing that is 'closed to individual mitigating factors'" is "'unreasonable and unjustifiable'" (quoted source omitted)). Swiedarke argues that the court failed to consider his positive characteristics, the lowered risk of sexual reoffense with age, and the possibility of protecting the public through continued supervision after a lengthy prison sentence. Swiedarke argues that the circuit court did not properly explain why the seriousness of the offenses and the risk to the public justified what was in effect a life sentence in light of those mitigating factors. *See* ***Gallion***, 270 Wis. 2d 535, ¶46 ("[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion."). He argues that the circuit court's statement that any risk for reoffense was too great a risk was not particularized to Swiedarke, since any defendant would have at least the possibility to reoffend after a prison sentence. Swidarke also contends that, during postconviction proceedings, the circuit court failed to clarify that the court properly considered

any mitigating factors because the court mentioned them but then stated that they were not a "huge factor" to the court. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has opportunity at postconviction motion hearing to clarify its sentencing remarks).

Finally, Swiedarke contends that the sentence was unduly harsh because it was more severe than the life sentence set by the legislature for first-degree intentional homicide. He argues that the legislature has determined that first-degree sexual assault of a child and incest of a child by a stepparent warrant lesser sentences than first-degree intentional homicide by setting lower maximum sentences for those crimes, and that the circuit court therefore erred by substituting its judgment for that of the legislature. He contends that, by imposing a total sentence for all four offenses that exceeded the individual maximum sentence as to each individual offense, and that exceeded the recommendations of the parties and the presentence investigation report (PSI), the court imposed a sentence that was not fair and just under the circumstances of these cases. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (sentence is unduly harsh only if it is "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").

The State responds that the circuit court properly exercised its sentencing discretion and further clarified its sentencing rationale at the postconviction motion hearing. The State also contends that Swiedarke did not properly preserve his argument that the sentence was unduly harsh, pointing out that a claim that a sentence was unduly harsh is a request for sentence modification, *see* ***State v. Cummings***, 2014 WI 88, ¶71, 357 Wis. 2d 1, 850 N.W.2d 915, and that Swiedarke failed to make this argument in the circuit court, *see* ***State v. Wuensch***, 69 Wis.

2d 467, 478-79, 230 N.W.2d 665 (1975) (claim for sentence modification must be made in the circuit court to be properly preserved for appellate review). The State also contends that, in any event, the sentence is not unduly harsh. In reply, Swiedarke reiterates his argument that the circuit court erroneously exercised its sentencing discretion. Swiedarke does not dispute that he did not properly preserve his unduly harsh claim. He contends, however, that this court should consider the circuit court's disregard of the parties' and the PSI's sentencing recommendations in the context of whether the court properly considered relevant sentencing factors. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11 (sentencing factors include the results of the PSI).

We conclude that the circuit court properly exercised its sentencing discretion. The court explained that it considered the seriousness of the offenses, describing Swiedarke's repeated sexual assaults of multiple young children for five years as "atrocious" and "beyond the pale." The court considered that Swiederke's victims were under ten years of age, "the most vulnerable human beings on the planet," who looked to Swiedarke as "not just their father," but also "a former police officer and paramedic." The court considered that "the harm to these children is overwhelming," noting that Swiedarke paid the victims money and made the assaults a game. The court considered the mitigating factor that Swiedarke pled guilty, but also considered that Swiedarke continued to focus on the harm to himself and insisted that he did not need help controlling his sexual impulses. The court considered Swiedarke's character as demonstrated by his actions as "a repeated child rapist." The court also considered the danger to the public, noting that Swiedarke's psychological examination indicated that he had a 1 to 10% chance of recidivism, which the court considered not "good odds to take" considering the sexual assaults Swiedarke had perpetrated against the children for years. The court then explained that, based on those considerations, it was "very easy" for the court to impose maximum sentences. The

court imposed three sentences for first-degree sexual assault of a child consecutively, explaining that the court intended to ensure that Swiedarke's victims would "never have to be looking around a corner or wondering where you are or what's going on."

At the postconviction motion hearing, the court reiterated that it considered the aggravated nature of the offenses in imposing maximum sentences. The court noted that Swiedarke committed "an ongoing series of events … against these children causing their suffering probably for the rest of their lives." It described the offenses as "beyond serious, beyond reprehensible. They're as serious a crime as this Court has ever seen, period." The court went on to explain that, in these cases, the effects of Swiedarke's crimes "are more significant than a murder because these are living people who are going to suffer for the rest of their lives because of what he did to them as little defenseless children." The court reiterated that it considered Swiedarke's violation of the trust relationship he had with the children as a father figure and law enforcement officer. The court explained that it also weighed heavily the need to protect the public, stating that it believed that "[a]ny risk of his re-offense is far too great a risk … to take any chance with given the things that he was willing to do to children who are [going to] suffer for the rest of their lives. The rest of their lives. Longer than his life." It said that Swiedarke was "way too dangerous for the rest of the community to ever have to put up with." The court also explained that it considered that Swiedarke did not show remorse or concern for the victims. The court clarified that it had reviewed the entire PSI and was aware of the positive comments as to Swiedarke that were set forth in it. It stated that Swiedarke's age, educational background, and employment record were not a "huge factor" for the court. Rather, the court explained, the focus of its sentence was on Swiedarke's victims and any other potential victims

were Swiedarke ever to be released from prison. It described the needs of the public as "overriding."

The court permissibly focused on the aggravated nature of the offenses and the need to protect the public. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Additionally, the court properly considered Swiedarke's lack of remorse and failure to accept full responsibility for his actions. The sentencing court relied on the facts of record and the correct law and reached a reasonable decision, explaining why it believed an effective life sentence was warranted. *See* ***McCleary***, 49 Wis. 2d at 277. Swiedarke has not shown an erroneous exercise of the circuit court's sentencing discretion.[2]

Therefore,

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[2] Although Swiedarke essentially concedes that he did not properly preserve his claim that his sentence was unduly harsh, we also reject that claim on the merits. We are not persuaded that Swiedarke's receiving an effective life sentence rendered the sentence unduly harsh based on the fact that the legislature has set a life sentence for homicide and a lesser sentence for each child sexual assault offense, or that the parties and the PSI recommended lesser sentences. As the circuit court noted, the child sexual assaults in these cases were particularly aggravated because Swiedarke was in a trust relationship with his multiple, very young victims, who he assaulted repeatedly over the course of five years. On these facts, we cannot say that the sentence "is 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." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).