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DISTRICT II

November 3, 2021

To:

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

2020AP773-CR

State of Wisconsin v. Nicholas R. Frede (L.C. #2016CF834)

Before Gundrum, P.J., Neubauer and Reilly, 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).

Nicholas R. Frede appeals from a judgment convicting him of child enticement and an order denying his postconviction motion for sentence modification. 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 (2019-20). We affirm.

Frede was charged with two counts of second-degree sexual assault of a child based on allegations that he had sexual contact with thirteen-year-old twin sisters while helping them perform exercises in his home. Frede admitted that he became aroused, put his hand down both girls' pants, and touched their vaginas. As part of a plea agreement, Frede pled no contest to a reduced charge of child enticement, and the second charge was dismissed.

The Department of Corrections prepared a detailed presentence investigation report (PSI). Frede told the PSI writer that he was instantly disgusted after he touched the first girl and felt embarrassed and ashamed. He said he had a momentary lapse of reasoning and did not know why he touched them. Frede told the writer that he had never had sexual contact with anyone except the victims, he did not know how to react to his sexual thoughts, and he was too embarrassed to ask.

Frede's father provided the PSI writer with a mental health counselor's report concluding that Frede did not have personality or mood disorders; he was introverted and shy, with social anxiety; there were no signs that Frede had negative views towards women; and Frede was remorseful and accepted full responsibility for his offenses.

The PSI writer characterized Frede as immature, inexperienced, and socially awkward, and opined that Frede did not know how to handle normal sexual feelings. The writer listed a number of Frede's strengths as identified by a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment attached to the PSI. The COMPAS assessment categorized Frede's recidivism risk as "Low." Noting Frede's lack of insight into his behavior, the PSI writer doubted that Frede grasped the skills needed to avoid another offense and determined that he was

in need of sex offender treatment to address his skill deficits and understand what motivated his offense.

Highlighting Frede's immaturity, trial counsel recommended probation:

I think one of the notes that the PSI writer mentions is that he doesn't have any insight as to why he did this. He doesn't understand what led him to do it in the first place, and I think that came out in the comments he made to the writer. He is young; he is immature. He has been described as socially awkward, very inexperienced. He doesn't have any prior criminal record to speak of, which is why I am asking the Court to consider probation as an alternative here.

The circuit court considered Frede's youth, immaturity, and lack of insight:

As I said, there's a great deal of information that has been made available to me as part of this, and one of the things that appears to be consistent is you don't necessarily know why it occurred. Obviously, that raises all kinds of concerns. The—there are times where we can certainly be fairly certain as to why some particular form of conduct occurred.

As I said, in this case, we don't seem to have a particularly good reason. I would agree that we may have a situation, certainly from your perspective, in terms of lack of—somewhat lack of maturity, the—and naivety on your part. There may be other factors at play.

The bottom line is that, when this occurred, under all circumstances you were 20 years old. The—you were not a child. I agree you may not have been a fully formed adult and, again, we understand that. The development is a process that occurs over time and some of it just simply relates to the development of the brain. The reality is it can be well into one's 20's before the brain is fully developed and tends to develop more quickly in females than males.

The—and for either good or bad the last area that develops, if you will, is the prefrontal area; that's the area where there is—we have rational thought, sometimes referred to as executive functioning, but, essentially, where the thought process is where we make decisions that are ultimately in our interest and may be in our interest long term. It's the last area to develop.

The court stated that while Frede's immaturity might have played a role in the offense, it did not negate his responsibility: "You were the adult and there are certain expectations that go along with that."

After addressing various mitigating and aggravating factors, the circuit court determined that incarceration was necessary and imposed an eight-year bifurcated sentence, with three years of initial confinement followed by five years of extended supervision. The court focused on the impact to Frede's victims and their family as well as the need to protect children from these types of offenses and explained that its term of incarceration would ensure that the girls reached adulthood by the time Frede was released. The court also concluded that a long period of extended supervision was required for treatment and to protect the community.

Postconviction, Frede filed a motion for sentence modification asserting that the findings and conclusions in a post-sentencing psychosexual evaluation prepared by Dr. Charles Lodl at Frede's request constituted a new factor. Lodl diagnosed Frede with generalized anxiety disorder but could not rule out persistent depressive disorder. Lodl determined that Frede had repressed emotions and repressed sexuality and was not surprised that Frede was unable to articulate the reasons that he assaulted the girls. Lodl opined that Frede presented a low risk of reoffense, and the evaluation recommended community supervision and treatment, including sex offender treatment.

Following an evidentiary hearing, the postconviction court denied the motion in a nineteen-page decision, determining that the information and conclusions in Lodl's report did not constitute a new factor: "Here, Defendant Frede's sexual naivety, awkwardness and general immaturity were also addressed, discussed and considered during sentencing. While it is clear that the Lodl Report

really tied everything together with a nice bow, it didn't contain any new revelations. The sentencing Court had all the same underlying information in its hands." Frede appeals.

A circuit court may modify a sentence based on the existence of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a set of facts highly relevant to the imposition of sentence but not known to the judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *Id.*, ¶40. The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *Id.*, ¶36. Whether a new factor exists presents a question of law that this court reviews independently. *Id.*

We conclude that Lodl's psychosexual evaluation does not constitute a new factor. It contained information previously presented at sentencing and newly repackaged for the postconviction court. All of Lodl's background information was in the PSI, and Lodl's conclusions that Frede was immature and suffered from anxiety were not new. The sentencing court explicitly considered Frede's sexual naivety, awkwardness, and general immaturity. Like Lodl's report, the PSI contained information diagnosing Frede with an anxiety disorder but not a personality disorder. Lodl's report did not contain any new revelations. It simply placed a new spin on known information.

Frede argues that the sentencing court did not know that his psychological makeup provided the reason behind his actions. While it is true that the sentencing court expressed concern over Frede's inability to explain why he committed the offenses, it concluded that Frede was immature and naïve. Lodl drew the same conclusions.

To the extent that Lodl's conclusions about Frede's risk to sexually reoffend might be considered "new," they were not highly relevant to Frede's sentence.¹ Here, Frede asserts that the sentencing court improperly concluded that he could be a serial sex offender who would prey on other victims without incarceration. We are not persuaded. The sentencing court never made any such finding, nor did it mention Frede's risk to reoffend.

Similarly, we reject Frede's assertion that Lodl's report is relevant to rebut evidence that he was attracted to prepubescent girls. There was no evidence or argument presented at sentencing that Frede was attracted to prepubescent girls. The sentencing court made no such finding. There is nothing to rebut.

Finally, as he argued postconviction, Frede maintains that the circuit court sentenced him without the benefit of Lodl's report and therefore, on the basis of "incomplete" information. He suggests that this violated his due process right to be sentenced on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶¶26, 31, 291 Wis. 2d 179, 717 N.W.2d 1. We are not remotely persuaded. Frede cannot and does not attempt to show a violation of his "constitutionally protected due process right to be sentenced upon accurate information." *Id.*, ¶9. The nature of the "incomplete" information about which he complains does not rise to the level of "inaccurate" or erroneous facts.

Upon the foregoing reasons,

¹ Frede points to Lodl's conclusion that he presented a low risk to reoffend. The PSI, including the COMPAS assessment, suggested the same thing.

IT IS ORDERED that the judgment and order of the circuit court 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