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DISTRICT II

July 5, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Calumet County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1487-CR

State of Wisconsin v. Kevin S. Roth (L.C. #2020CF110)

Before Gundrum, P.J., Grogan and Lazar, 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).

Kevin S. Roth appeals from his judgment of conviction and the circuit court's order denying his postconviction motion. He claims the court erroneously exercised its sentencing discretion "by failing to consider [his] character and the need to protect the public when it sentenced" him. 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 (2021-22).¹ For the following reasons, we affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Following no-contest pleas, Roth was convicted on seven counts of possession of child pornography, with additional child pornography counts dismissed and read in, and on one count of possession of THC.

Roth's entire appeal is founded upon his contended premise that the sentencing court "fail[ed] to consider [his] character and need to protect the public." He claims "[t]he record is void of the court referencing any facts or factors relating to [his] character and need to protect the public in its basis for its sentence." He further complains that the circuit court did not give specific attention to issues he wishes the court would have focused on. He writes:

Had the court referenced the defendant's character, it would have found, based upon the facts on the record, that the defendant had no prior record, accepted responsibility, showed remorse, was open to treatment, and had a solid work history, stable housing and the support of his family. In addition, had the court referenced the need to protect the public, it would have found, based upon the facts on the record, that the defendant is a low risk to re-offend (pre-sentence report), had been out on bond since May, 2020 (16 months), had not actually assaulted any child, had no prior record and did not share any images. The above facts that are on the record were ignored by the Court.

Roth reads the record incorrectly. In addition to addressing the seriousness of Roth's offenses, the circuit court most certainly also addressed Roth's character and the need to protect the public.

The circuit court specifically described in detail many of the child pornography pictures and added that "the fact that the defendant accessed, possessed, and viewed these to his sexual gratification is a problem," referring to him as "a consumer ... who is viewing these images of exploited and abused children ... for his own gratification." Pointing out the specific search terms used by Roth to access the pornography, the court noted that "[t]his wasn't an accidental encounter with child pornography." Contrary to Roth's appellate contention, the court did

acknowledge that Roth did not appear to have shared the photographs with others, stating, “We don’t have sharing.”

While the circuit court also acknowledged there was “no evidence ... that the viewing has become an action, at least not in [Roth’s] adult years,” it expressed concern about Roth’s own reporting to the presentence-investigation-report writer that when he was thirteen years old and would babysit for a neighbor’s five-year-old son, Roth “sexually assaulted the five-year-old by performing oral sex on him, having the five-year-old perform[] oral sex on him and fondl[ing] him sexually.” Roth reported that as a result, he was removed from his home and “sent to Home Home at age 15 to 17-and-a-half.” Roth’s assaults on the young boy caused the court “great concern because it ... involved ... admitted sexual acts with a child.” The court noted that “while it’s old ... it certainly reflects at least at some level, even as a child, an interest in young boys and children ... this wasn’t his first encounter with interest in children.”² Commenting on Roth’s especially poor judgment in accessing child pornography, the court added, “[I]f anyone should have known not to pursue, search, and obtain, and take possession of child pornography, it’s the Defendant.”

Further addressing Roth’s character, the circuit court noted that Roth “admits to having used methamphetamine.” In relation to family “support,” the court was “astound[ed]” that Roth’s wife supported his methamphetamine use and further found it “truly bizarre” that she “knew about the [child pornography] pictures.” As the court expressed it, when she asked Roth “why he would search for these images,” Roth responded that “he thought it was ‘a teen.’”

² The circuit court also noted that “apparently, [Roth] was a victim of sexual abuse himself at the hands of a family member.”

Contrary to Roth’s suggestion in his briefing, numerous times, the court specifically acknowledged that Roth had no prior criminal record. The court also expressed that “[a]side from the child porn, ... methamphetamine use, and possession of THC, [Roth] appear[ed] to have lived, at least on the face of it, a prosocial life as an adult,” and it referenced the many “character letters” it had received on Roth’s behalf. The court provided a word of “caution,” however, “that those who write those letters certainly don’t know about the dark side and what occurred when he accessed and sought out the child pornography.”

The circuit court was concerned about Roth’s noted “sexual interest in children as evidenced by the images that were found”—referring to it as a “dangerous deviance”—and stating, “I don’t think there’s any question” that Roth is “a threat to public safety” and that it would be “folly” to think otherwise. The court further stated, “[T]here’s a risk profile here which makes the ... incidents when [Roth] was 13 relevant.” The court found it incredible that Roth “says he doesn’t know why he was doing it,” noting “the downloads of the images, the [specific] search terms, and so on.” Further concerned about the public-safety aspect signaled by Roth’s conduct, the court stated, “[W]hether it will be a gateway to hands-on child sexual abuse, we don’t know. But certainly, the interest in child pornography ... and the photographs that I’ve detailed, makes him a significant risk not only to continue to access child pornography, but to children, as well.” The court emphasized that the accessing of child pornography “by an individual that at least has some history, even though it’s dated,” made it “very concerned about the public safety element of this.” The court again stated that “the profile here creates a profound risk.”

Also showing its consideration of and concern for the need to protect the public, the circuit court ordered as a condition of extended supervision that Roth “have no contact with any

juveniles.” Specifically addressing Roth’s request that he be allowed to have contact with his grandchildren, the court stated, “I’m not going to just allow ... unsupervised contact. The risk profile is too high here,” but it allowed for “supervised contact with the grandchildren” but only “with the approval of the agent.”

As is readily apparent from the above, contrary to Roth’s contention that the circuit court did not consider his character or the need to protect the public at sentencing, it most certainly did. While Roth wishes the court had focused on factors he believes would be more favorable to him, the court is entitled to give the weight it deems appropriate to the various sentencing considerations. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). On appeal, we are to affirm the court’s imposed sentence unless the court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Bolstad*, 2021 WI App 81, ¶¶11-12, 399 Wis. 2d 815, 967 N.W.2d 164. The appellant bears the burden to show that the circuit court so erred, *Gaethke v. Pozder*, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381, and Roth has not made that showing.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals