COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0017-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRACE J. MCKAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

NETTESHEIM, J. Trace J. McKay appeals from the sentencing provisions of a judgment of conviction for resisting or obstructing an officer pursuant to § 946.41(1), STATS., and misdemeanor bail jumping pursuant to § 946.49(1)(a), STATS. McKay was convicted and sentenced as a habitual criminal on both counts. McKay also appeals from an order denying his motion for modification of the sentences. McKay contends that the trial court erred in the

exercise of its sentencing discretion when it referred to the seriousness of accompanying sexual assault and child enticement charges which had been dismissed as part of a plea agreement. McKay otherwise contends that the sentences are unduly excessive. We reject McKay's arguments.

The facts are not disputed. On May 12, 1997, the State filed a criminal complaint against McKay alleging four counts: (1) second-degree sexual assault by use of force pursuant to § 940.225(2)(a), STATS.; (2) second-degree sexual assault of a child pursuant to § 948.02(2), STATS.; (3) child enticement with intent to have sexual contact or sexual intercourse pursuant to § 948.07(1), STATS.; and (4) resisting an officer pursuant to § 946.41(1), STATS. McKay was charged as a habitual offender on all counts. On May 19, the State filed an information that alleged the same counts but also added a felony bail jumping charge pursuant to § 946.49(1)(b), STATS.

On September 22, 1997, the parties appeared before the trial court and proposed a plea agreement. The State offered to dismiss the two sexual assault charges and the child enticement charge. In addition, the State offered to reduce the bail jumping charge from a felony to a misdemeanor. The State also recited that it reserved the right to seek appropriate sentences, including maximum sentences, consecutive to a sentence McKay was then serving. In exchange, McKay would plead no contest to the reduced charge of misdemeanor bail jumping and the existing charge of resisting an officer.

` The prosecutor explained that the State was offering to dismiss the sexual assault and child enticement charges because McKay was already serving a sentence resulting from the revocation of probation based on the sexual assault episode. In addition, the prosecutor stated that although it was "pretty clear in my

own mind that this event took place," the victim presented credibility problems because she had lied in the past regarding accusations against other persons. The trial court approved the proposed plea agreement, and on September 23, 1997, the plea agreement was executed.[1] The trial court accepted McKay's no contest pleas and the matter was adjourned pending receipt of a presentence investigation report.

After a number of delays, the sentencing was conducted on December 15, 1997. The State requested the maximum sentences totaling six years. During his sentencing statement, the prosecutor referred to certain circumstances related to the dismissed charges. McKay's attorney objected to these references.

In its sentencing remarks, the trial court correctly noted that the offenses on which McKay was to be sentenced arose out of the alleged sexual assault episode. After reciting McKay's extensive criminal record, the court observed, "This is a vicious and aggravated crime by its nature." It is this remark which forms the basis for one of McKay's challenges to the sentences. The court sentenced McKay to maximum consecutive sentences (three years) on each charge. In addition, the court ordered that the sentences be served consecutive to the sentence which McKay was then serving.

Postconviction, McKay moved for sentence modification. He complained that the trial court, by its allusion to the "vicious and aggravated

[1] At this plea hearing, McKay also entered a plea of no contest to an amended charge of entry into a locked building on an unrelated matter. This charge was not part of the parties' original plea agreement. However, the State did agree that its sentencing recommendation under the original plea agreement would also apply to this charge.

crime," had improperly based the sentences, in part, on the sexual assault and child enticement charges which had been dismissed.[2] Defending its remark, the trial court noted that "conduct short of criminal conviction is … something that can be looked at by the Court as it relates to such issue as character." The court denied McKay's modification motion. McKay appeals.

Sentencing lies within the sound discretion of the trial court and we will not reverse absent an erroneous exercise of that discretion. *See* ***State v. C.V.C.***, 153 Wis.2d 145, 163, 450 N.W.2d 463, 470 (Ct. App. 1989). A misuse of discretion will be found only where the sentence is 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* ***id***.

We first address McKay's challenge to the trial court's "vicious and aggravated crime" comment. This comment consists of a mere ten words out of seven pages of the trial court's sentencing remarks. One full page of the transcript is devoted entirely to the trial court's summary, without editorial comment, of McKay's criminal record and his repeated failures on probation and parole. The court concluded that confinement was necessary to protect the public and that probation would unduly depreciate the seriousness of the offenses.

The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender and the need for protection of the public. *See* ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980).

[2] McKay also argued that if the trial court's remark was directed at the offenses of which he had been convicted, those crimes were not "vicious and aggravated."

The weight to be given to any particular factor is within the sentencing court's discretion. *See* ***State v. Evers***, 139 Wis.2d 424, 452, 407 N.W.2d 256, 268 (1987). Viewing the trial court's sentencing remarks in toto, we are not persuaded that the trial court's isolated comment represents the driving force behind the court's ultimate sentencing decision. The trial court clearly focused on the three primary factors recited in ***Elias***. And, the court clearly chose to place primary emphasis on McKay's character and the danger which McKay represented to the public, as it was entitled to do under ***Evers***. Given the isolated nature of the challenged comment, we do not see it as materially bearing on the court's sentences.

Regardless, we conclude that the trial court did not err in alluding to the dismissed charges. The State did not dismiss the charges because the episode never occurred. To the contrary, the prosecutor represented his belief that the episode had taken place, but he was concerned that the victim's credibility might not prevail with a jury. This belief is supported by the fact that McKay's probation had already been revoked as a result of the sexual assault episodes. The State also chose not to pursue the dismissed charges because McKay was already serving a six-year term as a result of the probation revocation and because the State would be seeking additional imprisonment on the pending charges.

Our supreme court has held that a sentencing court may consider unproven offenses which bear upon the defendant's character. *See* ***Elias***, 93 Wis.2d at 284, 286 N.W.2d at 562. This rule even extends to conduct for which the defendant has been acquitted. *See* ***State v. Marhal***, 172 Wis.2d 491, 503, 493 N.W.2d 758, 764 (Ct. App. 1992). If this were a case in which the State's dismissal represented that the episodes involving McKay and the alleged child victims had never occurred and if the episodes materially impacted the sentences,

we would likely agree with McKay that the trial court's reference to the episodes was improper. That, however, is not the state of the record.

McKay further contends that the sentences were unduly harsh and disproportionate to the crimes of which he was convicted. This question also is addressed to the trial court's discretion. *See* ***Cresci v. State***, 89 Wis.2d 495, 504, 278 N.W.2d 850, 854 (1979). As we have already noted, the trial court engaged in a lengthy sentencing statement which addressed all of the relevant sentencing factors. The most compelling factor in the court's mind was McKay's extensive criminal record and his repeated failures with probation and parole. In fact, the court stated that it had "never seen a record with so many revocations." The court aptly noted that it would unduly depreciate the seriousness of the offenses and result in a danger to the public if the court were to once again explore those alternatives. In short, McKay's dismal record left the court with little choice but to impose significant prison sentences. In light of this record, we do not conclude that the sentences were unduly harsh and disproportionate.

We hold that the trial court did not err in the exercise of its discretion when sentencing McKay and denying the motion for reconsideration.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* Rule RULE 809.23(1)(b)4, STATS.