COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2433-CR **Cir. Ct. No. 2003CF5211**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARRED H.,[1]

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Jarred H. appeals from a judgment of conviction for first-degree sexual assault of a child, and from a postconviction order denying

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[1] This court amends the caption *sua sponte* and refers to the defendant as Jarred H. or Jarred due to the sensitive nature of the crime and his relationship to the victim, who is a child.

his motion for sentence modification. The issue is whether the trial court erroneously exercised its sentencing discretion by failing to properly consider the appropriateness of probation, and by imposing an unduly harsh period of confinement. We conclude that the trial court's reasons for rejecting probation, and its consideration of the primary sentencing factors, albeit differently than contemplated by the parties' plea bargain, constituted an appropriate exercise of discretion, which did not result in an unduly harsh sentence. Therefore, we affirm.

¶2 Sixteen-year-old Jarred was charged with first-degree sexual assault of a child, and incest with a child, for multiple incidents of sexual intercourse with his twelve-year-old sister. Incident to a plea bargain, Jarred pled guilty to first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2001-02), which is a Class B felony, carrying a sixty-year maximum potential sentence.[2] *See* WIS. STAT. § 939.50(3)(b). In exchange for his guilty plea, the State agreed to dismiss, but read-in for sentencing, the incest charge, and recommend a seven-year term of probation conditioned upon, among other things, a one-year term in the House of Correction. The presentence investigator recommended a total sentence in the ten- to thirteen-year range, comprised of a five- to seven-year period of confinement. The trial court imposed a twelve-year sentence, comprised of five- and seven-year respective periods of confinement and extended supervision.

¶3 Jarred sought sentence modification, claiming that the trial court erroneously exercised its sentencing discretion, and imposed an unduly harsh sentence. The trial court denied the motion, citing the sentencing transcript for its

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

explanation and consideration of the sentencing factors. Jarred appeals on the same basis as he sought sentence modification.

¶4 Jarred claims that the trial court erroneously exercised its discretion by failing to explain why it: (1) summarily rejected probation as a sentencing option; (2) imposed the sentence it did; (3) unduly emphasized certain factors, such as the gravity of the offense and protection of the public; and (4) imposed an unduly harsh sentence.[3]

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***State v. Spears***, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999). The trial court's obligation is to consider the primary sentencing

[3] In challenging the sentence, Jarred H. cites to and quotes from ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. We do not cite ***Gallion*** because it does not apply to sentences imposed before it was decided. *See* ***State v. Trigueros***, 2005 WI App 112, ¶4 n.1, 282 Wis. 2d 445, 701 N.W.2d 54.

factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶6 A sentence is unduly harsh when 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶7 Jarred criticizes the trial court for failing to "properly" consider probation as an appropriate sentencing option. The trial court, however, expressly considered and rejected probation. At sentencing, the trial court reasoned,

> [Jarred] need[s] to learn … as well as be punished for [his] conduct, in an incarceration setting. [The trial court] do[es] not believe this is a probation case because of the forced nature of the sex, because of the number of times, because it was incestual, and because of [Jarred's] inconsistency in the acceptance of responsibility.

¶8 Jarred's next criticism is that the confinement period was too long, or stated otherwise, that the trial court erroneously exercised its discretion by "[giving] too much weight to one factor in the face of other contravening considerations." *See* ***State v. Krueger***, 119 Wis. 2d 327, 337-38, 351 N.W.2d 738 (Ct. App. 1984). We disagree.

¶9 The trial court considered the primary sentencing factors and assessed the gravity of the offense and the necessity to protect the public as more

persuasive than some of the mitigating character factors. Jarred's lack of a criminal history, his expressed remorse, and his pleading guilty, however, did not overcome the nature and repeated incidents of sexual assault with his twelve-year-old sister, and the need for Jarred's punishment and the community's protection. The trial court was also influenced by some of Jarred's character flaws, such as his problems with drugs and alcohol, which it characterized as risks to the community.

¶10 The following quotation from the trial court's sentencing comments refutes Jarred's criticism that the trial court failed to explain why the sentence imposed was the minimum amount of custody necessary to meet the sentencing objectives, and why imposition of a twelve-year total sentence for an offense that carries a potential sixty-year maximum sentence was not unduly harsh.

> In summary, the Court believes this is aggravated offense severity. Character is truly complex and mixed. There are some very good aspects here. There's also some very negative aspects. Need to protect the community, high intermediate because of the alcohol and drug issues, the depression issues, which need to be addressed or he would present a risk to others, as well as the heinous nature of this crime. If [Jarred]'s internal control system could be altered in a way such that he would repeatedly have sexual intercourse – forced sexual intercourse with his sister in this manner, he presents a higher risk to the community going forward because of that lowered control system. One hopes that this disposition will aid him in increasing that control such that he can be a contributing member of society.

¶11 In its postconviction order, the trial court refuted Jarred's criticisms, citing to and quoting from its sentencing remarks. Although these facts could have supported a different exercise of discretion, Jarred has not shown that his sentence was predicated on some unreasonable or unjustifiable basis, only that the trial court exercised its discretion differently than Jarred had hoped. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102

Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).