

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1680-CR

Cir. Ct. No. 2008CF163

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. PAGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Matthew Pagel appeals from a judgment of conviction of three counts of sexual assault of a child by a school staff member and from an order denying his postconviction motion for sentence modification. He argues that the sentencing court erroneously exercised its discretion by not

considering all the primary sentencing factors and by not explaining why the sentence meets the sentencing objectives; he also claims his sentence is unduly harsh. We affirm because the sentence is reasonable and the product of a demonstrated exercise of discretion.

¶2 Pagel was employed at a high school as a paraprofessional and coach when he began a sexual relationship with a fifteen-year-old female student at the school. Pagel was twenty-two at that time. The sexual conduct occurred in the fall of 2006, January 2007, and in the summer of 2007 after the student turned sixteen years old. He was charged with two counts of second-degree sexual assault of a child, three counts of fourth-degree sexual assault, and three counts of sexual assault of a child by a school staff person. He entered a guilty plea to the three counts of sexual assault of a child by a school staff person and the remaining charges were dismissed and read-in at sentencing.

¶3 Pursuant to the plea agreement, the prosecution made no sentencing recommendation. The presentence investigation report recommended that Pagel be sentenced to two consecutive terms of two years' initial confinement and two years' extended supervision and a consecutive period of probation. Pagel asked the court to impose and stay a lengthy prison term with five or more years of probation and twelve months' conditional jail time. Pagel was sentenced to two consecutive five-year prison terms consisting of three years' initial confinement and two years' extended supervision. On the third conviction, a six-year sentence of three years' initial confinement and three years' extended supervision was imposed but stayed in favor of probation.

¶4 Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of

discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, our strong and consistent policy is to refrain from interfering with the circuit court’s decision. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. Because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant, we afford a strong presumption of reasonability to that court’s sentencing determination. *Id.*

The principal objectives of a sentence include, but are not limited to, the protection of the community, the punishment of the defendant, rehabilitation of the defendant, and deterrence to others. A sentencing court should indicate the general objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives. Besides the objectives of the sentence, the sentencing court must also identify the factors that the court considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision. The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. The weight to be given to each factor is within the discretion of the sentencing court.

Id., ¶23 (citation omitted).

¶5 A sentencing court properly exercises its discretion when it states on the record its reasons for selecting the particular sentence imposed. *Gallion*, 270 Wis. 2d 535, ¶5 n.1. However, the exercise of discretion does not lend itself to mathematical precision. *Id.*, ¶49. We do not expect a court to explain why it selected the precise number of years it did instead of some other number or invoke “magic words” to justify what it thought appropriate. *See id.* What is necessary is an on-the-record explanation for the general range of the sentence imposed. *Id.*

¶6 Pagel contends that the sentencing court did not consider and gave no weight at all to his character and rehabilitative needs. He also argues that the sentencing court failed to explain why six years of initial confinement was necessary to the sentencing objective of protecting the public. He points out that he was not assessed a high risk to reoffend and contends that six years of confinement is not needed to protect the public.

¶7 At the outset of the sentencing hearing the circuit court acknowledged receipt of a packet of materials consisting of a social worker's evaluation of Pagel and letters from Pagel's friends, family, and work related individuals. The court indicated that it had reviewed all that material and during its sentencing remarks, it recognized that Pagel had some very good qualities. The court also mentioned that Pagel had cooperated with authorities and accepted responsibility for his conduct so as to prevent the victim from having to testify. The court recognized that Pagel would receive sex offender treatment.

¶8 The sentencing court gave sufficient consideration to Pagel's character and rehabilitative needs but in the end placed more weight on the seriousness of the offense. In particular, it found that sexual conduct by a twenty-two year old man with a girl he knew to be just fifteen years old was reprehensible and never acceptable. The court's assessment of the seriousness of the offense also touched upon previous warnings Pagel had received about inappropriate contact with students, the breach of trust in the pre-existing relationship with the victim's family, the emotional and psychological harm the crimes had on the victim and her family, and the negative impact Pagel's conduct had on the confidence of parents and students in teachers and school employees. Because of the multiple occurrences in multiple locations and over an extended period of time, the court could not accept the assertion that Pagel had simply exercised bad

judgment. It found that despite rehabilitative efforts Pagel needed to be monitored for a significant period of time, particularly as to his future contact with juvenile females. It rejected probation supervision alone as an adequate consequence for Pagel's serious conduct. The court sought to send Pagel a message that his conduct was serious and deserving of punishment. The total of six years' initial confinement and four years' extended supervision with three years' probation falls within the range of time identified by the sentencing court as necessary to meet its sentencing objectives.

¶9 In short Pagel's argument is nothing more than disagreement with the weight the sentencing court placed on the serious nature of the offenses and the need to protect the public in fashioning the sentence that it did. We conclude that the sentencing court adequately expressed the reasons behind the sentence and that the sentence was a proper exercise of discretion.

¶10 Pagel's final argument on appeal is that his sentence is unduly harsh.

When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion "only where 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."

State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citing *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). We review the circuit court's postconviction determination that its sentence is not unduly harsh for an erroneous exercise of discretion. *State v. Mata*, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 632 N.W.2d 872.

¶11 To support his claim that the sentence is unduly harsh, Pagel lists mitigating circumstances: he never disputed responsibility for his conduct, he was an immature twenty-two year old man who was near-in-age to students in the school, he had not completed college or received training and had no experience in setting boundaries with near-in-age students, he was not directly coaching or teaching the victim at the school but knew her from activities outside of school, he did not use drugs, alcohol, force or threat of force to engage in sexual conduct, and no pregnancy or physical harm resulted from the sexual conduct. He also notes that some of the aggravating factors the circuit court relied on are intrinsic to the offense of sexual assault of a child by school staff: the breach of trust between the defendant and student, the disparity of ages between the defendant and victim, the negative impact the offense has on the confidence of parents and students in teachers and school employees. However, the balance of these circumstances is not the test of whether the sentence is unduly harsh. Indeed the circuit court identified other circumstances that tipped the balance in favor of the sentence imposed.

¶12 Here the maximum prison sentence on each count was six years. *See* WIS. STAT. §§ 948.095, 939.50(3)(h) (2009-10). Pagel faced a total maximum of eighteen years' imprisonment. He received an aggregate sentence of ten years' imprisonment. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Pagel's sentence does not shock the public conscience as it is well supported by the sentencing court's exercise of discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

