

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 21, 1995

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

NOTICE

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

No. 94-2161-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES BUCKETT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. James Buckett appeals from a judgment convicting him of second-degree sexual assault of a person between the ages of twelve and sixteen years contrary to § 940.225(2)(e), STATS., 1987-88.¹ Buckett only challenges his sentence. Because the sentence was a proper exercise of the trial court's discretion, we affirm.

¹ The assaults allegedly occurred in May 1987. Section 940.225(2)(e), STATS., was repealed as of July 1, 1989, by 1987 Wis. Act 332, § 30.

In August 1992, Buckett was charged with one count of first-degree sexual assault of a victim between the ages of twelve and sixteen years, a Class B felony. The charge was based upon the allegations of Buckett's stepdaughter that he had sexual intercourse with her in May 1987 when she was twelve years old and continued to have sexual contact with her on a weekly basis for the next year and a half. Buckett subsequently entered a no contest plea to a reduced charge of second-degree sexual assault and received a ten-year sentence, the maximum for the crime to which Buckett pled. The trial court declined to reconsider its sentence.

On appeal, Buckett argues that the sentence was excessive and that the trial court largely ignored mitigating factors and otherwise erroneously exercised its discretion. We decline to address every argument made by Buckett. "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." *State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151, *cert. denied*, 439 U.S. 865 (1978).

We review whether the trial court misused its sentencing discretion. *State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. *Id.* The weight given to each of the sentencing factors is within the sentencing judge's discretion. *Id.* at 662, 469 N.W.2d at 195. Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. *State v. Teynor*, 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We conclude that the trial court properly exercised its discretion in sentencing Buckett and that its sentence does not shock public sentiment. *See id.*

The primary factors to be considered by the trial court in imposing a sentence are the gravity of the offense, the offender's character and the need to protect the public. *State v. Borrell*, 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). More particularly, the trial court can consider the following:

[T]he vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality,

character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

Id. at 773-74, 482 N.W.2d at 892.

Our review of the record reveals that the trial court considered the proper factors and properly exercised its discretion in weighing them. At the sentencing hearing, the State argued that Buckett should receive the maximum sentence because the offense was extremely serious, Buckett took advantage of a child with whom he had a trust relationship, the sexual assaults were ongoing over a period of time and Buckett intimidated the victim and harassed members of the victim's family. The State noted the ongoing psychological harm to the victim as a result of the assaults. With regard to Buckett's character, the State advised the court that Buckett was abusive to his stepchildren and that he failed to accept responsibility for the offense and blamed the victim. The State also advised the court that Buckett had made inquiries about having one or more of his stepchildren killed. The State strenuously objected to the presentence investigation report's recommendation requesting lengthy probation and a one-year conditional jail term.

The victim's mother testified regarding the impact of the sexual assaults on her family. She related that Buckett had stalked the family and they had to seek restraining orders against him. She described a pattern of abuse by Buckett and the fear he engendered. The victim's brother testified that Buckett abused him and separated him emotionally and physically from other members of the family. He saw Buckett abuse other members of the family.

The victim's father and stepmother described the harm to the victim and asked the court to impose the maximum sentence. In her remarks to the court, the victim's psychotherapist stated that the abuse suffered by the child placed her at higher risk for psychological maladjustment at various

stages of her life. Finally, the victim described for the court the impact of the sexual abuse and described how Buckett terrorized her family.

Buckett's counsel made the following points about Buckett to the court: he did not have a prior criminal record; he was convicted of one offense of second-degree sexual assault; he was aware that he committed an offense; and he did not believe the victim was responsible for the sexual assaults. Counsel argued against the maximum sentence and in favor of treatment.

In exercising his right of allocution, Buckett apologized to the victim and her family, stated he did not blame the victim, accepted responsibility "for everything" and apologized to his family.

In sentencing Buckett, the trial court referred to the Wisconsin Sentencing Guidelines Scoresheet (the matrix). The trial court rejected the matrix's determination that probation would be appropriate in light of Buckett's lack of criminal history.

The trial court considered the severity of the crime, Buckett's character and the need to protect the public. The trial court found that the sexual assault in this case was particularly despicable because it was perpetrated by a family member. The court noted that after Buckett ceased assaulting the victim sexually, he assaulted her mentally and emotionally. With regard to Buckett's character, the trial court aptly characterized the competing portraits of Buckett presented at sentencing as reminiscent of Dr. Jekyll and Mr. Hyde. The trial court was required to consider the portrayals of Buckett as a good friend and artist versus the perpetrator of sex crimes and victimizer of the child and her family.² The court discounted letters sent in support of Buckett because they were inconsistent with the more credible portrait painted of him by the victim and her family. The trial court saw a "grave need to protect the public from people like [Buckett]" who prey on children. Finally, the court considered Buckett's age, his educational background and his employment

² The trial court discounted suggestions that Buckett seriously intended to have his stepchildren killed and attributed the statements to "beer influenced, stupid conversation."

record and questioned the depth of his remorse and repentance. Based upon the foregoing, the trial court imposed the maximum sentence of ten years.³

Buckett complains that the trial court did not give sufficient weight to the probation recommendation made by the author of the presentence investigation report. Trial courts do not blindly accept or adopt sentencing assessments and recommendations from any particular source. *State v. Johnson*, 158 Wis.2d 458, 465, 463 N.W.2d 352, 355 (Ct. App. 1990). Here, the trial court considered the presentence investigation report but disagreed with the recommended sentence. It is clear from the sentencing record that the trial court rejected the probation recommendation because it was inconsistent with its balancing and weighing of the other sentencing factors.

We reject Buckett's complaints that he received a lengthy sentence. Reversal due to the length of a sentence is warranted "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." *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). Sentences are to be individualized and "[w]hether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case." *State v. Thompson*, 172 Wis.2d 257, 265, 493 N.W.2d 729, 733 (Ct. App. 1992). Here, the trial court individualized its sentence after considering the facts of this case and the sentencing factors.

Buckett complains that the trial court decided to impose the maximum sentence before the sentencing hearing. As evidence of this predisposition, Buckett relies upon the trial court's statement that prior to the hearing it reviewed letters and notes submitted by the victim's family and friends. Reviewing such material prior to sentencing was appropriate preparation for the sentencing hearing and does not, in and of itself, permit an inference that the trial court predecided the sentence.

³ Buckett has not appealed from the order denying his postconviction motion to modify his sentence. Therefore, we do not refer to those proceedings.

Finally, Buckett argues that there was no reason for the trial court to conclude that he could not be rehabilitated. Rehabilitation is just one of the sentencing factors. As we have stated, the trial court may, in its discretion, assign more weight to other factors.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.