COURT OF APPEALS
DECISION
DATED AND RELEASED

June 5, 1997

NOTICE

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.

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

No. 96-1252-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WELLS OSWALT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Wells Oswalt appeals from an order denying his motion for sentence modification. He pled guilty to two counts of first-degree sexual assault of his daughter and another girl, contrary to § 948.02(1), STATS., as well as one count of incest contrary to § 948.06(1), STATS., and was sentenced to two consecutive fifteen-year terms of imprisonment on the sexual assault

convictions, with a consecutive ten-year term of probation on the incest conviction. After the circuit court denied Oswalt's motion for sentence modification, he brought this appeal. He argues that the circuit court erroneously exercised its discretion by (1) refusing to modify a harsh and unconscionable sentence; (2) permitting the victims to make sentencing recommendations; and (3) permitting "other acts" evidence at the sentence modification hearing. For the reasons set forth below, we reject his arguments and affirm the order.

I. Background

Oswalt pled guilty to sexually assaulting his daughter and her friend, who were then eleven years old.[1] As part of the presentence investigation (PSI), the victims of Oswalt's assaults were permitted to make sentencing recommendations, which they did, recommending the maximum sentence of fifty years. The PSI writer made a similar recommendation. The circuit court conducted a lengthy sentencing hearing at which Oswalt made an extensive allocution. Oswalt's two daughters, his niece, his wife, and an expert witness, sex therapist Lloyd Sinclair, all testified at the hearing to Oswalt's various assaults. The court also considered other materials, including two psychological reports, as well as the PSI report.

Before imposing the sentence, the court considered the following factors on the record: the gravity of the offense; Oswalt's character; the need to protect the public; the absence of prior criminal history; the existence and nature of admitted—but uncharged and unproven—offenses; the two-decade span over

[1] He also admitted other sexual assaults, notably of his other daughter and his niece, but the statutes of limitations had run on these offenses.

which the offenses occurred; Oswalt's positive social traits in nonsexual areas; the nature of the crimes and his attitude toward them; his admitted high degree of culpability for the crimes; his demeanor and truthfulness; his age (fifty-three); the effect of a lengthy sentence on a man his age; his educational background; his remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; the victims' rehabilitative needs; estimated parole eligibility; and the balance among Oswalt's rehabilitative needs, the punitive aspects of the sentencing and the need to protect the public.

After considering and discussing each of these factors, the court concluded that it would be inappropriate to impose the fifty-year maximum sentence desired by the victims and recommended by the PSI (as well as the district attorney). Instead, the court imposed imprisonment totaling thirty years, to be followed by ten years' probation.

At the sentence modification hearing, Oswalt argued that the average period of incarceration for his convictions is twelve years, eighteen years fewer than his sentence. He also argued that he had not sexually assaulted anyone for several years when the present charges were filed. To refute this latter point, the State introduced telephonic evidence regarding Oswalt's behavior with three children in Mississippi after he had "reformed."

II. Analysis

Oswalt first argues that the circuit court erred by denying his motion to modify his sentence on the ground that it is unduly harsh and unconscionable. In support of this argument, Oswalt presented the circuit court with information showing that the average period of incarceration for the crimes he committed is twelve years, rather than the thirty years imposed here.

Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court erroneously exercised that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987) (citation omitted). The primary factors the trial court must consider are the gravity of the offense, the character of the offender, and the need for public protection. ***Id***. at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). In order to prevail on a motion to modify a sentence, a defendant must demonstrate by "clear and convincing evidence" that there is a "new factor"[2]—unknown to any party at sentencing—warranting sentence modification. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611-12 (1989). The new factor not only must be previously unknown but must strike at the very purpose for the sentence selected by the trial court. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether facts constitute a "new factor" is a question of law, which we review *de novo.* ***Id***. at 97, 441 N.W.2d at 279.

A circuit court may, of course, modify a sentence when no new factor is presented. ***Jones (Hollis) v. State***, 70 Wis.2d 62, 72-73, 233 N.W.2d 441, 447 (1975). However, a court may not modify its sentence merely on "reflection." ***Scott v. State***, 64 Wis.2d 54, 59, 218 N.W.2d 350, 353 (1974). It can do so only by placing on the record a determination that it misused its discretion in imposing an unduly harsh or unconscionable sentence. ***Cresci v. State***, 89 Wis.2d 495, 504, 278 N.W.2d 850, 854 (1979).

[2] Although Oswalt attacks the sentence as harsh and unconscionable, we also analyze the "new factor" standard because the evidence presented at the hearing could be understood this way.

We conclude that the circuit court did not erroneously exercise its discretion. The court's remarks at sentencing demonstrate a thorough and exemplary consideration of relevant factors.[3] The court considered the facts and the law together to reach a reasoned and reasonable conclusion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

As to error in failing to grant modification, we conclude that Oswalt's showing that the average incarceration is twelve years demonstrated neither a harsh and unconscionable sentence nor a "new factor" that "strike[s] at the very purpose" underlying his sentence. The court plainly concluded on the record that the pattern, duration and nature of Oswalt's crimes required longer incarceration for many reasons—including protection of the public. In addition, the court considered that Oswalt is in his mid-fifties, had worked all his life and supported his family, had no previous criminal record, and had lived a socially useful life aside from his sexual assaults. In fact, the circuit court considered precisely these factors in rejecting the recommendations for the maximum sentence.

[3] In sentencing, the court may consider, among other things, the defendant's criminal record; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; degree of culpability; the defendant's demeanor at trial; the defendant's age, educational record and employment record; the defendant's remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; and the length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 513 U.S. 1045 (1994). As set forth in Part I, the court considered all these factors.

III. Sentencing Recommendation

Oswalt argues that the circuit court erred in permitting the victims to make sentencing recommendations. He also argues that the PSI report was biased against him, and that the PSI writer merely adopted the victims' sentencing recommendations without further explanation or independent evaluation. We reject these arguments for two reasons.

First, it is not error to permit victims to make sentencing recommendations. In ***State v. Johnson***, 158 Wis.2d 458, 465, 463 N.W.2d 352, 356 (Ct. App. 1990), we held that consideration of the victims' comments and "wishes" was within the circuit court's discretion.

Second, as to the PSI report's deficiencies, the court noted before sentencing that "there was some[thing] lacking in the analysis with regard to what was behind the fifty-year recommendation." From our analysis of the transcript, we conclude that lack of such analysis contributed to the court's decision to impose considerably fewer years (twenty fewer years) than the fifty years the PSI writer recommended. Because the circuit court accounted for any deficiencies in the PSI report *before* sentencing, Oswalt was not aggrieved and his argument fails.

IV. "Other Acts" Evidence

Finally, Oswalt argues that the circuit court erred in permitting telephonic "other acts" evidence at the sentence modification hearing. Although he refers to the United States and Wisconsin constitutions generally, he offers no authority to support his argument that the evidence was improperly admitted. Instead, he characterizes the evidence as an "ambush" that the circuit court erred in some undefined way by admitting.

We reject this argument for two reasons. First, Oswalt cites no cases or authority to support his argument. *See* ***In re Balkus***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985). Second, we fail to understand how proceedings at a postsentencing hearing[4] can negate the propriety of a sentencing hearing that, as we already concluded, was conducted in exemplary fashion.

By the Court.—Order affirmed.

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

[4] Oswalt believes he was "entitled" to a modification hearing on sentence review. This is error. Whether to conduct a hearing in the first instance is a matter of discretion for the circuit court. ***Cresci v. State***, 89 Wis.2d 495, 506, 278 N.W.2d 850, 855 (1979).