COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP200-CR **Cir. Ct. No. 2011CF512**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK S. RIGDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Mark Rigdon appeals from a judgment of conviction and an order denying his postconviction motion. He contends that the circuit court erroneously exercised its discretion in sentencing him to a near-maximum prison sentence for a second-degree child sexual assault conviction. He

further contends that the court erred in refusing to consider information about the sentences of similarly-situated defendants in denying his request for sentence modification. We reject Rigdon's claims and affirm the judgment and order.

¶2 In May 2011, Rigdon was charged with four counts of second-degree child sexual assault of C.V., a young teenage girl. The complaint alleged that Rigdon, who was a close friend of C.V.'s parents, had developed an inappropriate relationship with her in 2010, when she was thirteen and fourteen and he was forty-six and forty-seven. On several occasions, Rigdon and C.V. met privately and had sexual contact, including oral and digital intercourse.

¶3 Less than three months after the complaint was filed, Rigdon pled guilty to the first count against him. The other counts were dismissed and read in. The circuit court then sentenced Rigdon to twenty years of initial confinement and fifteen years of extended supervision.

¶4 Rigdon subsequently filed a postconviction motion, arguing that the circuit court erroneously exercised its discretion in sentencing him. The motion included an alternative request for sentence modification based on the alleged harshness of the sentence, citing information about the sentences of similarly-situated defendants.[1] Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

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

[1] The information was presented in a spreadsheet listing each of the forty-nine cases filed in Waukesha County since 2008 in which a defendant was ultimately sentenced for at least one count of second-degree child sexual assault.

discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. Our analysis includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶6 To properly exercise sentencing discretion, the circuit court must state on the record its reasons for selecting the particular sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶39. The sentence imposed should "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶44 (citation omitted). However, a proper exercise of discretion does not require a circuit court to justify the sentence with mathematical precision. ***Id.***, ¶49.

¶7 Finally, a circuit court has the inherent authority to modify a sentence when it determines that the sentence was "unduly harsh." ***State v. Harbor***, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828. A sentence is unduly harsh if 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶8 On appeal, Rigdon first contends that the circuit court erroneously exercised its discretion in sentencing him to a near-maximum prison sentence for his conviction. Specifically, he complains that the court erred by: (1) comparing his case to another case that was categorically worse and arbitrarily determining that the two cases should be treated identically; (2) reasoning down from a starting point of the maximum sentence, rather than up from the minimum amount of confinement required; and (3) failing to explain any rational link between the sentencing colloquy and sentence imposed. We consider each argument in turn.

Comparing Rigdon's Case with Another Case

¶9 Toward the end of the circuit court's remarks at sentencing, the court made the following statement regarding another case:

> The difficult time is for courts to figure out the amount of time that one should sentence for. And, indeed, before this sentencing … this court also compared and contrasted the facts in this case with the case that was immediately before us back on October 13th. The case your attorney sat through, you weren't in the courtroom. That was another sexual assault case with one count, read-ins. The defendant in that case asked for a year in the county jail. The presentence report in that case asked for a sentence similar to this. This presentence investigation recommends that the court sentence you to nine to ten years. In that case I sentenced that defendant to twenty years in the state prison system.

¶10 The case the circuit court was referring to was ***State v. Jose L. Perez Lemus***, Waukesha County Case No. 11-CF-103. There, Perez Lemus was charged with two counts of first-degree sexual assault of a child for offenses he committed against his young female relative when she was between the ages of seven and eleven and he was between the ages of twenty-four and twenty-eight. Perez Lemus admitted to police that when the child was seven or eight years old, he had

taken off her pants and underwear and rubbed his penis between her upper thighs until he ejaculated, and that, on four or five occasions he had "taken his penis out of his pants" and taken the child's hand and "made her masturbate him." Ultimately, Perez Lemus pled guilty to one count of second-degree child sexual assault, and the circuit court sentenced him to twenty years of initial confinement and fifteen years of extended supervision—the same sentence that Rigdon received.

¶11 Rigdon argues that his crime did not approach the seriousness of the crime in ***Perez Lemus*** and, therefore, he should have received a lesser sentence than Perez Lemus. Although Rigdon undoubtedly views the ***Perez Lemus*** case as "categorically more serious" than his, there were reasons for the circuit court to conclude otherwise. As noted by the State, the age disparity between Rigdon and C.V. far exceeded the age disparity between Perez Lemus and his victim. Moreover, Rigdon engaged in two types of sexual intercourse with C.V., whereas Perez Lemus engaged in sexual contact. Finally, while Rigdon was not related to C.V. like Perez Lemus was related to his victim, he stood in a functionally similar relationship. For these reasons, it was not error for the court to compare the cases and regard them as equally serious.

Reasoning its Way to the Sentence

¶12 Just before imposing its sentence, the circuit court made another statement to which Rigdon now objects. The court said, "[i]n deciding whether a maximum sentence is appropriate, the court takes into account the quick plea that you entered in this, your willingness to take responsibility, and the fact that up until now, at age 47, you've lead a crime-free life." It then imposed its sentence, which was five years less than the maximum available of forty years'

imprisonment. Rigdon cites this passage as evidence that the court reasoned its way from the maximum sentence as opposed to "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶44 (citation omitted).

¶13 During the hearing on Rigdon's postconviction motion, the circuit court rejected this argument. The court explained:

> The only reference the court has in sentencing to a maximum sentence is on page 33, and that comes up on line 11. Even though the defendant's brief spends a lot of time on it and talks about it as a starting point, nowhere does this sentencing transcript demonstrate that fact. What the court noted: In deciding whether a maximum sentence is appropriate, the court took into account the quick plea that you entered, your willingness to take responsibility and that you've led a relatively crime-free life.
>
> Courts often reference what victims say in sentencing or what other individuals say. Indeed, in judicial education judges are reminded that the only opportunity a judge has to respond in a setting under different types of sentences is to put it in the record. This court was making clear, contrary to the victim's wishes, why a maximum sentence was not appropriate. And then for the defense to indicate that the court has a starting point of a maximum sentence is not true and is not borne out by this record.

¶14 As shown by the above remarks, the circuit court did not impermissibly reason backward from the maximum sentence. Rather, the court was simply responding to a request for the maximum sentence by the victim's family and explaining why, in light of Rigdon's positive characteristics, the court would not impose such a sentence, even though it regarded Rigdon's behavior as "disgusting," "vile," and "predatory." Upon review of the record, we are satisfied that the court's sentence resulted not from reasoning backwards from the maximum sentence, but from reasoning from appropriate sentencing factors to a

decision that Rigdon's conduct warranted a sentence near the high end of the range.

Linking the Sentencing Colloquy and Sentence Imposed

¶15 Rigdon's last complaint about the circuit court's exercise of discretion is that the court failed to link its sentencing colloquy to the sentence imposed. He submits that the colloquy did not suggest that a sentence just shy of the maximum was necessary.

¶16 Given the seriousness of the crime and Ridgon's positive characteristics, the sentencing possibilities effectively ranged from a minimum disposition more constraining than probation to a disposition less lengthy than the statutory maximum of forty years' imprisonment. The court's discussion of the sentencing factors it considered show why, within this range, it chose a sentence much closer to the maximum than to the minimum. We are satisfied that its explanation sufficed for ***Gallion*** purposes to establish the necessary relationship between the court's colloquy and sentence imposed. Again, a proper exercise of discretion does not require a court to justify the sentence with mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶49.

¶17 Rigdon next contends that the circuit court erred in refusing to consider information about the sentences of similarly-situated defendants in denying his request for sentence modification. As noted, Rigdon included such information in his postconviction motion in an attempt to show that his sentence was unduly harsh. The circuit court declined to consider Rigdon's sentence in the context of these other sentences.

¶18 Rigdon's final argument is a nonstarter for two reasons. First, the information he provided to the circuit court was insufficient to give a meaningful comparison of sentences, as it lacked the facts and reasoning behind the other sentences. Second, the legislature has determined that the crime of second-degree child sexual assault merits up to forty years' imprisonment. Rigdon's sentence is within that maximum. We thus may presume it is reasonable, *see* ***State v. Scaccio***, 2000 WI App 265, ¶¶17-18, 240 Wis. 2d 95, 622 N.W.2d 449, and not so harsh as to shock public sentiment, *see* ***State v. Stenzel***, 2004 WI App 181, ¶22, 276 Wis. 2d 224, 688 N.W.2d 20.

¶19 For these reasons, we conclude that the circuit court properly exercised its sentencing discretion and imposed a sentence that was not unduly harsh. Accordingly, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).