COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

Nos. 98-1511-CR
98-1512-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES HILL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. James Hill appeals from a judgment of conviction entered pursuant to his ***Alford*** plea to one count of first-degree sexual assault of a

child, *see* WIS. STAT. § 948.02(1) (1997-98),[1] and from a judgment of conviction entered pursuant to his guilty pleas to six counts of second-degree sexual assault of a child, *see* WIS. STAT. § 948.02(2), three counts of sexual exploitation of a child, *see* WIS. STAT. § 948.05(1)(a), one count of second-degree sexual assault by use or threat of force, *see* WIS. STAT. § 940.225(2)(a), one count of pandering, *see* WIS. STAT. § 944.33, and one count of possession of a short-barreled rifle, *see* WIS. STAT. § 941.28.[2] He also appeals from an order denying his motion for postconviction relief. He argues: (1) that the trial court erred in denying his motion to suppress evidence that was seized from his home; (2) that he received ineffective assistance of counsel; and (3) that the trial court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 On February 27, 1996, Dana N. called Officer Gerald Books to report that her sister, Larkin N., a juvenile who had been reported missing, had just phoned her from Hill's home. Dana N. told Officer Books that Larkin N. was working as an exotic dancer under the name "Deja." Officer Books, Officer Paul Leshok and Officer Douglas Zaworski went to Hill's home. Officer Zaworski waited in an alley while Officer Books and Officer Leshok knocked at Hill's door. Hill's girlfriend answered the door, and the officers told her that they were looking for Larkin N. Hill's girlfriend let the officers into the living room, and then went to get Hill.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

¶3 Hill came to the living room, and the officers told him that they were looking for Larkin N., but Hill said that she was not there and that he did not know her. Hill did not allow the officers to look around his home, however, so the officers called their supervisor, and two detectives were sent to Hill's home. While the officers waited for the detectives, they heard some noise from the upstairs of Hill's home. Hill told the officers that someone lived upstairs, and he escorted the officers there and then went back downstairs.

¶4 When the officers went upstairs, they met Quinnsanna Dawson, who told them that she lived on the second story of Hill's home. The officers explained that they were looking for Larkin N., and Dawson told them that they were welcome to look around upstairs. The officers found Larkin N. upstairs, hiding in a crawl space behind a couch.

¶5 Dawson and Larkin N. then told the officers that Larkin N. had been working for Hill as an exotic dancer. Dawson said that she had helped Larkin N. hide in the crawl space, and that Hill knew Larkin N. was present. The two detectives arrived while the officers were talking to Larkin N. and Dawson. One of the detectives, Daniel Ruzinski, testified at Hill's preliminary hearing that Hill allowed him to enter his first-floor office, and that he saw videos in a file cabinet in the office and a sawed-off rifle under the desk in the office. Both Hill and his girlfriend were arrested and taken to the police station.

¶6 After Hill was arrested, Officer Books and Officer Zaworski remained at the scene with Dawson while Officer Leshok went to obtain a search warrant. Officer Books spoke further with Dawson while waiting for the warrant. Officer Books called Officer Leshok and gave him the information he received from Dawson.

¶7 Officer Leshok's affidavit in support of the request for a search warrant stated that it was based upon information from Detective Ruzinski and Officer Books, as well as his personal knowledge. Officer Leshok related the foregoing information regarding the discovery of Larkin N. at Hill's home. He then averred that Dawson had told the police that Hill was running a business that provided exotic dancers to clubs, that he ran the business from his home-office, that he had photographs of the exotic dancers on the wall in his living room, and that Larkin N. worked for him as an exotic dancer. Officer Leshok averred that Dawson had shown the police a trunk of costumes that Larkin N. wore while dancing. He further averred that Dawson said that, on February 22, 1996, Hill had brought some men home for a private show, and the men paid Hill in order to engage in sexual conduct with the exotic dancers.

¶8 Additionally, Officer Leshok averred, among other things, that Hill's girlfriend told the police that Hill kept in his office video equipment and videotapes of the girls he employed as exotic dancers, and that "officers observed videotapes and video equipment in this same office." A search warrant was issued for the living room and office of Hill's home, and Leshok thereafter returned to Hill's home with the warrant.

¶9 After the warrant arrived, the police seized photographs of young girls from the wall in Hill's living room, and video equipment, sexually explicit videotapes and a short-barreled rifle from Hill's first-floor office. Some of the videotapes depicted Larkin N. and Hill engaging in sexual conduct, one incident of which involved a threat of force against Larkin N.

¶10 A police detective went throughout the home, with Dawson's permission, and took photographs of each of the rooms. The police later noticed

some vibrators in a photograph of an upstairs bedroom, and returned, with Dawson's permission, to get the vibrators.

¶11 Hill was subsequently charged with six counts of second-degree sexual assault of a child, three counts of sexual exploitation of a child, one count of second-degree sexual assault by use or threat of force, and one count of pandering, based on his conduct regarding Larkin N. and another juvenile with whom he had had sexual contact. He was also charged with one count of possession of a short-barreled rifle. The foregoing charges exposed Hill to a potential 132 years of imprisonment. Additionally, the police discovered that Hill had had sexual contact with his girlfriend's eight-year-old daughter, and Hill was charged in a separate information with two counts of first-degree sexual assault of child.[3] These charges exposed Hill to a potential 80 years of imprisonment.

¶12 Hill filed a motion to suppress the evidence that was seized from his home. After a hearing, the trial court denied the motion. Hill then proceeded to trial on the original information in the case involving his girlfriend's daughter, but on an amended information charging 28 counts in the case involving Larkin N., which exposed Hill to nearly 200 additional years of imprisonment. After the trial began, the State struck a plea-bargain with Hill, pursuant to which he entered an ***Alford*** plea to one count of first-degree sexual assault against his girlfriend's daughter, and guilty pleas to the charges set forth in the original information that was filed in the case involving Larkin N. The trial court accepted the pleas, and entered judgments accordingly. The trial court sentenced Hill to 110 consecutive years, and 22 concurrent years of imprisonment.

[3] The two cases against Hill were consolidated in the trial court, and have been consolidated for appeal.

¶13 Thereafter, Hill filed a postconviction motion, raising the issues he argues on appeal. After a hearing, the trial court denied the motion.

DISCUSSION

¶14 Hill argues that the trial court erred in denying his motion to suppress the evidence that the police seized from his home. He asserts that the police searched his office prior to obtaining a search warrant, and that the warrant was defective because the police used information gained in the allegedly illegal search in order to obtain the warrant. In support of this argument, Hill relies on the affidavit in support of the search warrant, in which Officer Leshok averred that the police saw videotapes and video equipment in Hill's office, and the preliminary-hearing testimony of Detective Ruzinski, who testified that he saw videotapes and video equipment in Hill's office before the search warrant was issued.[4] Alternatively, Hill argues that if the police did not search his office before the warrant was issued, the warrant was defective because it was based on a material misrepresentation.[5]

¶15 "[E]vidence initially discovered during an illegal search, but subsequently acquired through an independent and lawful source, is admissible." ***State v. Lange***, 158 Wis. 2d 609, 624, 463 N.W.2d 390, 395 (Ct. App. 1990).

[4] Detective Ruzinski testified at the preliminary hearing that Hill allowed him into the office, where he saw the videotapes, video equipment and the sawed-off rifle, apparently in plain view. Detective Ruzinski's prior testimony was not presented during the suppression hearing, however. Therefore, the trial court did not make a finding as to whether Hill consented to Officer Ruzinski's entry into the office.

[5] Hill also asserts that the police lacked probable cause to arrest him. He does not identify any evidence that was seized incident to his arrest, however; nor does the record indicate that the police seized evidence incident to his arrest. Thus, the admissibility of the evidence seized at Hill's home is not dependent on the validity of Hill's arrest, and we need not address whether the police had probable cause to arrest Hill.

"[E]vidence will not be excluded as 'fruit [of the poisonous tree]' unless the illegality is at least the 'but for' cause of the discovery of the evidence." ***Segura v. United States***, 468 U.S. 796, 815 (1984). Thus, when a warrant affidavit contains information acquired through an illegal search, the evidence seized under the warrant is admissible if "no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." ***Murray v. United States***, 487 U.S. 533, 540 (1988). Whether the information affected the magistrate's decision to grant a warrant is an objective inquiry that is "directed toward whether sufficient probable cause existed for a reasonable magistrate to have grounds for the issuance of a warrant absent the illegal intrusion." ***Lange***, 158 Wis. 2d at 628 n.3, 463 N.W.2d at 397 n.3.[6]

¶16 The trial court found that the police officers gained knowledge that Hill kept videotapes and video equipment in his office from a source independent of the allegedly illegal search of the office.[7] This finding supports the conclusion that the information gained in the allegedly illegal search did not affect the officers' decision to seek a warrant. The trial court further found that the warrant would have been issued if the affidavit had not included the averment that the police had observed the videotapes and video equipment in the office. As

[6] Similarly, when a warrant affidavit contains false information, the warrant is nonetheless valid if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause. *See* ***Franks v. Delaware***, 438 U.S. 154, 171–172 (1978). Thus, our analysis of the admissibility of the evidence discovered in the allegedly illegal search subsumes an analysis of Hill's alternate claim that the warrant was invalid due to the inclusion of false information in the warrant affidavit.

[7] Specifically, in response to Hill's argument that the police could not have included in the affidavit for the search warrant information regarding the location of the videotapes and video equipment unless they had illegally searched the office, the trial court found that "the information was provided otherwise."

explained below, the trial court's findings are supported by the record. We therefore conclude that the trial court properly denied Hill's motion to suppress.

¶17 Officer Books testified at the suppression hearing that, before he went to Hill's home, Larkin N.'s sister had told him that Larkin N. was working as an exotic dancer. After Officer Books discovered Larkin N. hiding in a crawl space, both Larkin N. and Dawson confirmed that Larkin N. had been working as an exotic dancer for Hill. According to Officer Leshok's affidavit, Dawson also told the police that Hill was running a business that provided exotic dancers to clubs, that he ran the business from his home-office, that he kept the business records in his office, and that he had photographs of the exotic dancers on the wall in his living room. Dawson also showed the police the costumes that Larkin N. wore while working as an exotic dancer. Moreover, Officer Leshok averred that Hill's girlfriend said that Hill made videotapes of the exotic dancers he employed, and that he kept the videotapes and video equipment in his office.

¶18 Hill's girlfriend's disclosure that Hill kept the videotapes and video equipment in his office supports the trial court's conclusion that the police learned of this evidence independently of the allegedly illegal search. Moreover, apart from any knowledge that the videotapes and video equipment were in Hill's office, the abundant evidence that Hill ran an illegal business from his office, and kept the records of that business in his office, provided probable cause to issue the warrant for Hill's office.[8] Thus, "no information gained from the illegal entry

[8] Hill asserts that the affidavit in support of the search warrant could not properly be based on information from Dawson and Larkin N., because they were not reliable witnesses, and their statements were not sufficiently corroborated. Contrary to Hill's assertion, the information provided by Dawson and Larkin N. was substantially corroborated by physical evidence of the exotic dancing business, and their statements were sufficiently reliable to support the warrant affidavit.

affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *See* ***Murray***, 487 U.S. at 540.

¶19 Hill next argues that his trial counsel was ineffective in failing to present witnesses who would have supported his assertion that the police searched his office prior to the execution of the warrant. As noted, the evidence seized from Hill's office after the allegedly illegal search was "subsequently acquired through an independent and lawful source." *See* ***Lange***, 158 Wis. 2d at 624, 463 N.W.2d at 395. Thus, the evidence was admissible even if the police initially discovered it in an illegal search. Hill's attorney was therefore not ineffective in failing to present additional witnesses to establish the illegality of the search. *See* ***Strickland v. Washington***, 466 U.S. 668, 690–694 (1984) (to prevail on a claim of ineffective assistance of counsel a defendant must identify specific acts or omissions that constitute deficient performance and demonstrate how the deficient performance prejudiced the defense). Moreover, Hill provides only speculative and conclusory allegations regarding the potential testimony of the proposed witnesses. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (conclusory allegations are insufficient to entitle a defendant to a hearing on a claim of ineffective assistance of counsel; the defendant must allege sufficient facts to raise a question of fact). The trial court did not err in denying Hill's ineffective-assistance-of-counsel claim.

¶20 Hill also argues that the trial court erroneously exercised its discretion in imposing Hill's sentence. He asserts that the trial court did not place enough weight on mitigating factors, and placed too much weight on the objectives of punishment and deterrence. Specifically, Hill asserts that he accepted responsibility for his crimes and spared the victims from testifying by entering pleas, that his crimes were nonviolent, and that he had rehabilitative

potential; he asserts that the trial court did not give enough weight to these mitigating factors. Hill further asserts that the trial court imposed an excessive sentence.

¶21 Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court erroneously exercised discretion. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. ***Id.***, 119 Wis. 2d at 622–623, 350 N.W.2d at 638–639.

¶22 The primary factors to be considered in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984); ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality, and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See* ***id.*** The weight afforded to each of the relevant factors is particularly within the wide discretion of the trial court. *See* ***id.***, 119 Wis. 2d at 434, 351 N.W.2d at 768. "Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered." ***Id.*** A trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

See ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992).

¶23 The record reveals that the trial court considered the appropriate factors in determining Hill's sentence. The trial court noted that Hill's offenses were serious sex crimes involving juveniles, the youngest of whom was Hill's girlfriend's eight-year-old daughter. The trial court also noted that one of the sexual assaults involved a threat of force against the victim. The trial court further observed that Hill's possession of the short-barreled rifle was a serious crime. The trial court considered Hill's character and found that he was a dangerous and egocentric man who preyed on vulnerable children to satisfy his own sexual fantasies. The trial court also noted that Hill had previously committed a drug offense, that he had alcohol and drug problems. The trial court concluded that although Hill had taken responsibility and spared his victims from testifying at a trial by entering pleas, Hill should receive a long sentence because he lacked remorse and insight into the crimes he had committed. The trial court found that it was necessary to protect the public from Hill, and to prevent him from further preying on vulnerable children. Hill's assertion that the trial court did not assign the appropriate weight to the sentencing factors is without merit. As noted, the weight to be assigned to the factors is particularly within the trial court's wide discretion. *See* ***Curbello-Rodriguez***, 119 Wis. 2d at 434, 351 N.W.2d at 768.

¶24 Hill's assertion that the trial court imposed an excessive sentence is also without merit. Hill entered pleas to one count of first-degree sexual assault of a child, six counts of second-degree sexual assault of a child, one count of second-degree sexual assault by use or threat of force, three counts of sexual exploitation of a child, one count of pandering, and one count of possession of a short-barreled rifle. These crimes exposed Hill to a potential of 172 years of imprisonment. The

trial court sentenced Hill to 110 consecutive years, and 22 concurrent years of imprisonment. This sentence is well below the maximum sentence. Considering the several crimes Hill committed and the seriousness of those crimes, Hill's sentence is not "so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Thompson***, 172 Wis. 2d at 264, 493 N.W.2d at 732.

By the Court.—Judgments and order affirmed.

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