COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP849-CR **Cir. Ct. No. 2011CF708**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. David Townsend appeals a judgment convicting him of two counts of possessing child pornography and an order denying his postconviction motion to modify his sentences. He contends that his sentence was based on inaccurate information regarding the type of treatment his therapist

offers, and that the court erroneously exercised its discretion in refusing to impose sentences less than the presumptive statutory minimum. For these reasons, Townsend contends he is entitled to a sentence modification. We reject Townsend's arguments and affirm the judgment and order.

BACKGROUND

¶2 The complaint charged Townsend with two counts of possessing child pornography, despite the fact he admitted downloading over 1,000 still images and fifteen to twenty videos of child pornography. He saved the images and videos to a folder on his computer named "pedo pics."

¶3 Townsend entered no contest pleas to both counts, each of which carries a maximum term of imprisonment of twenty-five years and a presumptive minimum term of three years' initial confinement. The presentence investigation report (PSI) prepared by the Department of Corrections credited Townsend with voluntarily seeking sex-addiction treatment (possibly with referral from his attorney), attending almost weekly meetings, and actively participating in a "sexaholics anonymous" group. The report indicated Townsend had a low risk of reoffending. However, the report also recounted that Townsend "talked about hearing stories of people who molested children and their path to self-destruction and wondered if he was on that path." The PSI author expressed concern that while Townsend sought help for his addiction to pornography by attending a twelve-step addiction support group, he had not pursued "a Sex Offender Treatment Program." In this regard, the author viewed Townsend's counseling treatment as "addiction therapy" and not sex offender treatment. The PSI author suggested that if Townsend had been serious about addressing his sex addiction, Townsend's disclosure that he was fearful of the path he may have been on when

his crimes were discovered would have reasonably prompted Townsend to seek more substantial forms of sex offender treatment than he previously participated in. The author recommended a stayed sentence of three years' initial confinement and three years' extended supervision, and the imposition of probation.

¶4 Townsend submitted a private PSI report that concluded although Townsend made significant progress, "He has more work to do." The report found it crucial that he remain in the community to continue his treatment. The report recommended a withheld sentence and three years' probation.

¶5 Townsend called his counselor, Michael Mervilde, to testify at the sentencing hearing, wherein Mervilde described the progress Townsend made in their thirty-three sessions together. Mervilde indicated he used a twelve-step addiction program to treat Townsend, but they had not arrived at the point of dealing with the impact of his offenses on the child victims of pornography. When asked about his professional experience dealing with addictions regarding pornography, Mervilde responded: "Not a great deal of the pornography. That's a relatively newer casework for me." On the State's cross-examination, Mervilde conceded that Townsend indicated to him that his viewing of the child pornography was accidental in nature. In response to questions from the court, Mervilde stated he was a social worker, not a psychologist or psychiatrist. Mervilde testified he had a general practice of working with outpatients on mental health issues including depression, anxiety, co-parenting and work with children and adolescents. When asked whether he typically provides any sex offender treatment, Mervilde responded that he only did individual treatment and refers his clients to another counselor for group treatment. Mervilde also stated he was not familiar with the characteristics of people who typically collect child pornography.

Following the circuit court's questioning of Mervilde, the court invited additional questions from counsel, both of whom declined.

¶6 In imposing Townsend's sentences, the circuit court found it incredible that Townsend accidently ended up with the large amount of child pornographic images found on his computer. The court concluded Townsend possessed 358 images and fifteen video recordings on his computer; however, it accepted the State's stipulation of only two child pornographic images solely for purposes of the $500 per image surcharge required by WIS. STAT. § 973.042(2).[1] After reviewing the seriousness of the offenses, Townsend's character, and the need to protect the public, the circuit court credited Townsend with being "much more insightful" than the court expected, and indicated Townsend had gained obvious benefit from his treatment. However, the court commented Townsend had a "long way to go." In particular, the court stated

> Your counselor—and he is not the typical psychologist or psychiatrist, and indicated that he doesn't typically deal with Sex Offender Treatment. He indicated that you really haven't touched upon yet what impact this crime has had on the victims that are associated with it. So, obviously, I think it's clear that there is a long way to go.

The court then considered the presumptive statutory minimum of three years' initial confinement, as set forth in WIS. STAT. § 939.617. That statute allows a sentencing court to impose a lesser sentence only if it finds both that it is in the best interest of the community and that the public will not be harmed.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The court concluded

> There just hasn't been an adequate showing of that …. I just can't find that it's in the community's best interests to place you on probation. I can't find that the public would not be harmed if you are placed on probation.

The court then imposed concurrent sentences of three years' initial confinement and five years' extended supervision, further explaining its bases for the length of Townsend's extended supervision.

¶7 Townsend filed a postconviction motion to reduce his sentence, noting the circuit court inaccurately found that Mervilde "doesn't typically deal with Sex Offender Treatment." The motion contended the court misconstrued Mervilde's testimony that he only provides individual treatment and refers offenders to another person for group therapy. The circuit court responded that it was not concerned about Mervilde's providing individual rather than group-based treatment, but rather was concerned about Mervilde's lack of familiarity with the characteristics of people who collect child pornography. The court concluded that, taken as a whole, Mervilde's testimony demonstrated he was not an expert in providing sex offender treatment as opposed to addiction treatment, and pornography addiction was "newer case work for him."

¶8 Townsend's postconviction motion also faulted the circuit court for failing to detail its reasons for imposing the presumptive minimum term of initial confinement. At the postconviction hearing, the court concluded the statute did not require explicit findings if the sentence is not less than the presumptive minimum period of confinement. The court further found it had sufficiently set forth its reasons for the sentence it imposed. In particular, the sentence was primarily dictated by the facts that Townsend had not received any sex

offender-specific treatment and that he still had a long way to go in understanding the impact of his crimes on the victims associated with them.

DISCUSSION

¶9 A defendant who claims he or she was sentenced upon inaccurate information must show by clear and convincing evidence that the information was inaccurate and that the court actually relied on the misinformation when sentencing the defendant. ***State v. Tiepelman***, 2006 WI 66, ¶2, 26, 291 Wis. 2d 179, 717 N.W.2d 1; ***State v. Harris***, 2010 WI 79, ¶34 n.12, 326 Wis. 2d 685, 786 N.W.2d 409. The test for actual reliance is whether the court gave "explicit attention" or "specific consideration" to the misinformation so that it formed a part of the basis for the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶14. Whether a defendant has been sentenced on inaccurate information is reviewed de novo. ***Id.***, ¶9.

¶10 The State concedes the sentencing court erred when it asserted Mervilde "*indicated* that he doesn't typically deal with sex offender treatment." Mervilde did not so indicate. Rather, Mervilde stated he provides individual treatment to sex offenders, just not the group process provided by another expert in this field.

¶11 However, Townsend has not established by clear and convincing evidence that the sentencing court's decision not to depart from the presumptive minimum sentence was based on that error. Rather, the record shows the court's decision was based on its assessment that Townsend "ha[d] a long way to go," along with its assessment of Townsend's lack of progress in understanding the impact this crime has had on its victims. Therefore, the court's erroneous assertion that Mervilde *indicated* that he did not typically provide sex offender

treatment had either no impact or a de minimis impact. Townsend has not shown by clear and convincing evidence that the circuit court gave "explicit attention" or "specific consideration" to its erroneous restatement of what Mervilde "indicated." Rather, Townsend's argument that the court would have imposed a different sentence—i.e., less than the presumptive statutory minimum—had it understood Mervilde's testimony to be that Townsend had successfully participated in regular "sex offender treatment" from someone with sufficient training is entirely speculative.

¶12 We also reject Townsend's argument that the circuit court failed to adequately explain its refusal to impose a sentence less than the presumptive minimum. In particular, Townsend argues that the circuit court merely applied considerations applicable to anyone convicted of viewing or possessing child pornography, with little or no attention to factors specific to Townsend. We disagree.

¶13 On appeal, our review is limited to determining whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. To validly exercise discretion, the sentencing court should consider three primary factors: the gravity of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered. ***Id.*** at 507-08. The weight to be given one factor is within the sentencing court's wide discretion. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

¶14 In addition to considering other sentencing factors, including facts supporting leniency, the circuit court specifically considered individualized factors regarding the seriousness of the offenses, Townsend's character, and the need to protect the public. These factors included the sheer number of images and videos on Townsend's computer, his incredible statement that they were downloaded by accident, the extended time period over which he engaged in these activities, and Townsend's continued failure to appreciate the harm to the victims of child pornography. The court was well within its discretion to weigh these considerations as it did, and they provided an individualized basis for the sentence the court imposed. Furthermore, Townsend's own expressed fear regarding "the path he was on" created a reasonable basis for the PSI author and the court to believe Townsend required sex offender treatment beyond that which he had experienced principally through Mervilde.

By the Court.—Judgment and order affirmed.

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