COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0080-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP J. FOSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Philip J. Foster appeals from a judgment of conviction of two counts of first-degree sexual assault of a child and from an order denying his postconviction motion for resentencing. He contends that at sentencing the prosecutor breached the plea agreement, that the trial court

erroneously exercised its sentencing discretion, and that new factors justify sentence modification. We affirm the judgment and the order.

¶2 Foster was charged with two counts of first-degree sexual assault of a child for conduct that occurred on July 30, 1995. During the investigation, several adult women came forward with information that Foster had sexual contact with them when they were children or members of the dive team which Foster coached. The prosecution obtained a ruling that six adult females could testify at trial that when they were children, between 1974 and 1990, Foster had sexual contact with them. Foster entered a guilty plea pursuant to a plea agreement. Under the agreement, the prosecution was free to recommend prison as to count one but would not ask for a certain number of years. On count two, the prosecution agreed to recommend consecutive probation. The defense was free to argue for any appropriate sentence.

¶3 Foster argues that he should be permitted to withdraw his plea because the prosecutor materially breached the plea agreement by her comments at sentencing.[1] This is a case where the facts are undisputed and the question of whether the prosecution materially violated the spirit of the plea agreement is reviewed under a de novo standard. *See* ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995). "To be entitled to a remedy, the defendant must rely on the agreement and the prosecutor's breach must be material and substantial. Even an oblique variance will entitle the defendant to a remedy if it 'taints' the sentencing

[1] No objection that the plea agreement was breached was made at sentencing. Foster alleges that trial counsel was ineffective for not objecting. If a breach actually occurred, Foster is entitled to withdraw his plea. *See* ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997). We need not address the ineffective assistance claim. *See* ***State v. Hanson***, 2000 WI App 10, ¶31 n.5, 232 Wis. 2d 291, 606 N.W.2d 278, *review denied*, ___ Wis. 2d ___, 612 N.W.2d 733 (Wis. Apr. 26, 2000) (No. 99-0120-CR).

hearing by implying to the court that the defendant deserves more punishment than was bargained for." ***State v. Knox***, 213 Wis. 2d 318, 321, 570 N.W.2d 599 (Ct. App. 1997) (citation and footnote omitted). The prosecution "may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278, *review denied*, ___ Wis. 2d ___, 612 N.W.2d 733 (Wis. Apr. 26, 2000) (No. 99-0120-CR).

¶4 Here, the prosecutor did not violate the agreement not to recommend a certain number of years. However, Foster claims that by urging a significantly lengthy prison sentence, the prosecutor made an end-run around the plea agreement. Not only does Foster rely on the prosecutor's comments,[2] but also on the reading of a letter from Foster's daughter which asked the court to put Foster

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[2] Foster quotes and emphasizes the following comments:

> Because I believe that *substantial* prison time is necessary here, I am focusing my comments as to why I believe count 1 should be prison. I don't want this to be interpreted in any way as not complying with the plea agreement.
> ....
> As the PSI points out and the report even from the defendant's agent is that this defendant has had victims in every decade since the 1950's. The 1950's, the 60's, the 70's, the 80's, and the 90's. *What we are asking the court today is to make that stop so that there aren't victims until the year 2000.*
> ....
> It's appropriate for the court to look at the results of the Department of Corrections presentence report and the—*their recommendation is 60 years in prison, even exceeding the state's recommendation*. But I think the message is clear that *substantial* and *lengthy* prison is required here for the protection of the community.
> ....
> And, finally, looking to the rights of *the public, public demands, and rightfully so, that pedophiles be incarcerated for a long time.* We want our children to be protected.

away "for the rest of his life." He also points to the prosecutor's repeated reference to other alleged sexual offenses against victims who had come forward after his arrest.

¶5 We conclude that there was no violation of the plea agreement. This is much like what occurred in ***Hanson***, 2000 WI App 10 at ¶¶26-30. The plea agreement in ***Hanson*** required the prosecutor to "cap its prison recommendation at ten years." ***Id.*** at ¶21. Hanson claimed that the prosecutor's comments on the violence associated with the crime and other aggravating circumstances amounted to a less than neutral recital of the capped recommendation. *See* ***id.*** at ¶23. This court held that the prosecutor had not violated the plea agreement given her strong affirmation of the plea agreement and the absence of any statements that expressly, or covertly, suggested that the State no longer adhered to the agreement. *See* ***id.*** at ¶29.

¶6 Here, the prosecutor was free to argue at sentencing without recommending a specific length of prison sentence. We cannot equate the request for a "substantial" prison term as suggesting a number of years and no direct violation occurred.[3] Like ***Hanson***, the prosecutor started out with a direct affirmation of the plea agreement. Discussing the severity of the offense and pointing out the aggravating factors was within the scope of the prosecutor's freedom to argue for an appropriate sentence. The prosecutor's request that the

[3] To some extent Foster's claim rests on the promise not to recommend the "maximum" sentence. This was not a promise as the plea agreement was recited at the plea hearing by Foster's trial counsel. At sentencing the prosecutor reminded the court that "the agreement calls for the State to be free to argue on Count 1. However, not specifying a number of years of prison and not asking for the maximum or anything that would imply a certain number and the parties are recommending probation on Count 2." The prosecutor's reference to not asking for the maximum was unnecessary and without a basis in the plea agreement previously stated on the record.

court make sure that "there aren't victims until the year 2000" did not imply a four-year sentence recommendation.[4] That remark came in the context of discussing the long history of abuse Foster visited on many victims, decade upon decade. Reading the daughter's letter with the recommendation that Foster be put away for life was merely a mechanism for conveying victim sentiment. The prosecutor did not covertly undermine the agreement not to recommend a specific term of imprisonment.

¶7 A forty-year prison term was imposed on each sexual assault conviction; however, the forty-year term on count two was stayed in favor of forty years' probation consecutive to the prison term on count one. Foster challenges the length of the sentence. Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Petrone***, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991). A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997). The weight to be given the various sentencing factors is a determination particularly within the wide discretion of the sentencing court. *See* ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). The appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. *See* ***Petrone***, 161 Wis. 2d at 563.

[4] Foster was sentenced on May 23, 1996. He argues in his reply brief that the reference to the year 2000 implied a sixteen-year sentence given the twenty-five percent minimum parole eligibility.

¶8 Foster argues that the trial court erroneously exercised its discretion because it did not comply with the commentary in ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), that the trial judge must give reasons why a lengthy, near-maximum sentence is appropriate. Foster repeatedly refers to the sentence as a maximum sentence. Considering the totality of Foster's exposure, the sentence was not a maximum sentence because he could have been sentenced to a straight eighty years. Even considering that the maximum sentence was imposed on count one alone, we do not read ***McCleary*** as requiring the court to use magic words about the maximum. We may still sustain the sentence as a proper exercise of discretion under our obligation to review the record. *See* ***State v. Santana***, 220 Wis. 2d 674, 684, 584 N.W.2d 151 (Ct. App. 1998).

¶9 Foster claims that the trial court improperly relied on allegations of uncharged conduct.[5] It is clear that the court may consider uncharged conduct. A broad latitude of inquiry exists at the sentencing stage and includes consideration of other criminal conduct even though the defendant was never charged with it or convicted of it. *See* ***Handel v. State***, 74 Wis. 2d 699, 703, 247 N.W.2d 711 (1976). "[U]ncharged offenses may be considered by a sentencing court because they indicate whether the crime was an isolated act or a pattern of conduct." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). Here, the statements of other victims demonstrated Foster's long pattern of conduct and was critical to understanding his character and need for rehabilitation, as well as the need to protect the public. We cannot conclude that the trial court placed undue emphasis on this pattern of conduct. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105,

[5] At sentencing, several individuals testified that Foster had assaulted them when they were children. Other victims submitted letters. The presentence report also referred to other allegations of assaults.

585 N.W.2d 899 (Ct. App.), *review denied*, 222 Wis. 2d 675, 589 N.W.2d 629 (Wis. Dec. 15, 1998) (No. 97-2616-CR) (an erroneous exercise of discretion may be found if the sentencing court placed too much weight on one factor in the face of other contravening considerations). Indeed, the court would have been remiss to ignore the prior episodes which revealed that Foster used his status as a teacher, coach, and family member to gain access to the young girls he touched.

¶10 At sentencing, Foster acknowledged that he was likely to be subject to commitment under WIS. STAT. § 980.02 (1997-98) as a sexually violent person. In mitigation of a lengthy sentence, Foster urged the court to consider that his commitment under WIS. STAT. ch. 980 would serve to protect the public. He claims on appeal that the trial court erroneously exercised its discretion by failing to address the impact of ch. 980. We cannot agree that the trial court was obligated to consider this factor. While the objective of ch. 980 is to protect the community from sexual offenders who are at risk to reoffend, *see* ***State v. Carpenter***, 197 Wis. 2d 252, 259-60, 541 N.W.2d 105 (1995), its application in the individual case is speculative. The trial court has no control over whether a petition for commitment under ch. 980 will be pursued against an individual. The trial court needs to assess the factors as they exist at sentencing and cannot abdicate its duty to impose a sentence designed to protect the public. We conclude that the sentence was not the result of an erroneous exercise of discretion.

¶11 Foster's postconviction motion sought resentencing based on a new factor. Sentence modification because of a new factor requires the defendant to first demonstrate by clear and convincing evidence that there is a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact is a new factor warranting resentencing is a question of law. *See* ***id.*** The new factor must be an event or development that frustrates the purpose of the original

sentence. *See* ***Johnson***, 158 Wis. 2d at 466. Once a defendant has demonstrated the existence of a new factor, the trial court determines whether the new factor justifies modification of the sentence. *See* ***Franklin***, 148 Wis. 2d at 8. The defendant must persuade the trial court that the original sentence is unjust before the court can correct the sentence. *See* ***id.*** at 14. This decision is assigned to the trial court's discretion and we review it for an erroneous exercise of discretion. *See* ***id.*** at 8.

¶12 Foster argues that the trial court considered parole eligibility as a sentencing factor. The new factor information Foster presented to the trial court is that under the sentence imposed, his initial parole eligibility date is May 22, 2006, and that he is not eligible for sexual offender treatment in prison until he is within one year of his initial parole eligibility date, or 2005. He claims that the delay in receiving sexual offender treatment frustrates the trial court's sentence.

¶13 Foster cannot parlay the court's mere mention of parole eligibility into a controlling factor in the sentence. Although the trial court mentioned Foster's parole eligibility,[6] it specifically refused to speculate on how eligibility would be determined. Where the sentence is not based on parole eligibility but rather on the need to protect the public, new information about parole eligibility does not support sentence modification. *See* ***id.*** at 15.

By the Court.—Judgment and order affirmed.

[6] The trial court stated: "I look at likely parole eligibility and that's beyond my ability to guess when I look at someone your age and prison overcrowding and what the Department of Corrections may decide to do with you. I don't know. But I'm going to give them a lot of space to work with."

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).