COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP23-CR **Cir. Ct. No. 2015CF19**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK R. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Mark Scott appeals a judgment of conviction for two child-related sexual offenses and an order denying his motion for

postconviction relief. Scott argues the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence that relied on improper factors. We conclude Scott's sentence was neither excessive nor tainted by reference to improper factors. We therefore affirm.

¶2 A Second Amended Information charged Scott with three offenses: (1) use of a computer to facilitate a child sex crime, contrary to WIS. STAT. § 948.075(2015-16)[1]; (2) attempted child enticement, contrary to WIS. STAT. § 948.07(1); and (3) attempted second-degree sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.02(2). Scott agreed to plead guilty to counts two and three, with the remaining charge to be dismissed and read in at sentencing. The maximum penalty for count two was a fine not to exceed $100,000 or imprisonment not to exceed twenty-five years, or both, while the maximum penalty for count three was a fine not to exceed $50,000 or imprisonment not to exceed twenty years, or both. *See* WIS. STAT. § 939.50(3)(c), (d).[2] The parties were free to argue at sentencing.

¶3 The probable cause portion of the criminal complaint formed the factual predicate for Scott's pleas. According to the complaint, Scott posted advertisements on the Wisconsin Craigslist website seeking young males who were interested in engaging in sexual activities. An undercover officer responded to one of the advertisements posing as a fourteen-year-old boy and arranged a

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] By statute, anyone attempting to commit a crime under WIS. STAT. § 948.07 is subject to the penalty for the completed act. *See* WIS. STAT. § 939.32(1)(d). An attempt to commit a crime identified in WIS. STAT. § 948.02 is subject to one-half of the maximum penalty for the completed crime. *See* § 939.32(1g)(a), (b).

meeting with Scott at an Eau Claire area hotel. During these communications, Scott described various sex acts in which he wished to engage with the boy. Some telephone communication took place between Scott and the undercover agent, but Scott left the area of the hotel after observing marked police vehicles. Police then obtained a warrant for records and communications relating to Scott's cell phone. Police were able to trace Scott's location to a residential area in Polk County. Police also obtained records showing Scott, using specific email addresses, had posted at least 100 other sexually explicit personal ads seeking encounters with young males.

¶4 Approximately one week after the failed apprehension attempt, another undercover officer contacted Scott through one of Scott's Craigslist postings. The officer, again posing as a fourteen-year-old boy, arranged a meeting with Scott at an Eau Claire park. During these communications, Scott again described the sex acts he hoped to engage in with the fictitious child. A police surveillance team at the park spotted Scott at the designated date and time, and he was arrested. Police observed no other vehicles or pedestrians in the park at the time. During a subsequent interview with police, Scott claimed he did not believe the subject he arranged to meet was in fact fourteen years old.

¶5 As noted above, Scott had sent sexually explicit communications to both undercover officers that posed as underage children. Among other things, Scott wrote that he "would love to worship you, milk a few loads from you." Scott stated he was "[w]illing to do whatever you want, into body contact, foreplay, makeout, oral, love to 69, rim you boipussy, anal play. Like some kink too, what would you like to do, have done?" Scott stated he would "[l]ove to be your teacher, show you what to do. Ongoing if you want, get together as often as we can ;) Like rollplay, ws, bondage, have gear, toys, many other kinds of kink

too." Scott offered to get a hotel room, and he stated that he "love[d] 420" and offered to obtain some "good nug" for the meeting.

¶6 After Scott's arrest, police executed a search warrant at Scott's residence. They located at least one computer hard drive with images on it that were consistent with child pornography, as well as non-commercial CDs and DVDs that had handwritten labels indicative of child pornography. Police also found pornographic photographs of children. They discovered numerous sex toys, including "dozens of electronic vibrating devices, rubber replica penises, an inflatable penis, men's sexual attire, as well as a stainless steel anal hook with a metal ball attached to the end of the hook."

¶7 At sentencing, the circuit court stated it had reviewed both the Pre-Sentence Investigation (PSI) prepared by the Department of Corrections (DOC) and an alternative PSI prepared by the defense. The DOC's PSI expressly noted the uniqueness of Scott's conduct as compared to other defendants who had been arrested following similar investigations. The State argued Scott had demonstrated actions and plans that had "nothing to do with mental fantasy" and that illustrated that Scott was a "child sex predator." The State urged the court to order consecutive sentences totaling twenty years' initial confinement and fifteen years' extended supervision. Defense counsel responded that a sentence such as that requested by the State represented a significant departure from the sentences courts had ordered for other offenders convicted of child enticement. Defense counsel requested that the court follow the recommendation of the alternative PSI for five to ten years of probation.

¶8 The court ultimately ordered concurrent sentences totaling eleven years' initial confinement followed by ten years' extended supervision. The

circuit court began its sentencing remarks by stressing its obligation to impose the minimum amount of custody or confinement necessary. The court then discussed mitigating circumstances, including Scott's decision to plead guilty, his age, and his lack of previous criminal offenses. However, the court found aggravating factors required the imposition of a substantial prison term. These factors included Scott's desire to meet in a secluded location with an underage person, the child pornography and sexual and bondage-type paraphernalia found during the search of Scott's residence, Scott's sexually explicit communications with undercover officers, and his admitted long-term sexual contact with a relative beginning before either was a teenager.[3] The court denied Scott's subsequent postconviction motion seeking sentence modification.

¶9 Scott argues, as he did in his postconviction motion, that the sentence imposed by the circuit court was excessive because it relied on improper aggravating factors. Scott challenges the court's consideration of the following circumstances: (1) Scott's apparent intent to complete the commission of the offenses; (2) Scott's possession of sexual and bondage-type paraphernalia; and (3) Scott's directing the undercover officers to a secluded location. We agree with the State that Scott has failed to show his sentence was excessive.

¶10 A sentencing court has the discretion to determine the length of the sentence within the permissible range set by statute. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). An excessive sentence is one that is so unusual and disproportionate to the offense committed that it shocks public sentiment and

[3] Scott disputed only the relative's assertion that the contact was non-consensual, not that it had occurred.

violates the judgment of reasonable people concerning what is right and proper under the circumstances. ***Id.*** The sentences here were within the limits of the maximum sentences, and they are therefore presumed not to be excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.[4]

¶11 Nonetheless, a circuit court erroneously exercises its sentencing discretion when it relies upon factors that "are totally irrelevant or immaterial to the type of decision to be made." ***State v. Frey***, 2012 WI 99, ¶38, 343 Wis. 2d 358, 817 N.W.2d 436 (quoted source omitted). The defendant bears the burden of proving by clear and convincing evidence that the circuit court relied on improper factors. ***State v. Loomis***, 2016 WI 68, ¶31, 371 Wis. 2d 235, 881 N.W.2d 749.

¶12 A diverse array of information is fair game for consideration at sentencing. At a minimum, the sentencing court must consider the nature of the crime, the character of the defendant, and the need to protect the public. ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. There are at least a dozen secondary factors that the circuit court may consider, including the defendant's personality, degree of culpability, need for rehabilitation, and "history of undesirable behavior pattern." ***Id.*** "The responsibility of the sentencing court is to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980).

[4] The circuit court imposed the maximum amount of extended supervision allowable on count two, but the total sentence of twenty-one years on that count was within the twenty-five-year maximum.

¶13 First, Scott argues it was improper for the circuit court to consider his intent to commit a crime. Although the parameters of this argument are unclear, it appears that Scott argues the court could not use Scott's apparent intent to complete the sexual assaults in order to distinguish his crimes from those of other defendants sentenced for child enticement.[5] Scott's argument ignores that he was convicted of attempted crimes. An "attempt" requires intent to commit the unlawful act and steps taken toward the commission that demonstrate both such intent and that the actor would have committed the crime. WIS. STAT. § 939.32(3). Scott's apparent intent to complete the crimes was a valid sentencing consideration concerning the nature of his crimes. His argument that "evidence of intent, by itself, cannot be used by the court as an aggravating factor" is meritless. The court could validly consider both Scott's intent to complete the crime and the steps he took to effectuate that intent when arriving at an individualized sentence.

¶14 Second, Scott argues the sentencing court improperly relied upon his "lawful possession" of sexual and bondage-type paraphernalia. This argument presupposes that such materials were "neither used in nor related to the crimes then before the court." Again, this argument is meritless. In his communications to undercover officers, Scott had expressed an interest in being a "teacher" and engaging in "bondage" and "many other kinds of kink" with individuals whom he thought were underage males. The sentencing transcript shows Scott was not sentenced merely for his lawful possession of these materials, but rather his

[5] Notably, Scott does not appear to challenge his sentence on the ground that the disparity between his sentence and those of other offenders was impermissibly wide. Thus, to the extent he might be arguing that the circuit court erred by not sentencing him to probation consistent with the sentences in the cases mentioned in defense counsel's sentencing letter, we reject this argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

specific desire to use these materials during sexual encounters with underage persons.

¶15 Finally, Scott argues the circuit court cannot consider his intent to take the supposed victim to a secluded place because it is an element of the offense of child enticement under the circumstances of his case. *See* WIS. STAT. § 948.07 (making it a felony to attempt to cause a child to go into any vehicle, building, room or secluded place if acting with a prohibited intent). We find this argument meritless for the same reason as Scott's argument concerning the "intent" element. His intent to take what he believed to be a fourteen-year-old child into a secluded area for the purpose of engaging in sexual contact was a matter fundamentally pertaining to the "nature of the crime" for which he was convicted. It also further demonstrated that he, unlike perhaps other individuals convicted of similar crimes, had arranged for the meeting to occur in a place where an assault would be more likely to occur. It was therefore a relevant aggravating factor and a valid consideration for the sentencing court.

¶16 In sum, our review of the sentencing transcript demonstrates the circuit court provided an exemplary explanation of its sentencing decision. The court observed it was required to order the minimum amount of custody necessary, considered mitigating factors, and then rejected defense counsel's probation recommendation based on its consideration of permissible aggravating factors. We perceive no basis on which to conclude the circuit court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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