COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal Nos. 2017AP356-CR **Cir. Ct. Nos. 2015CF1006**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kyle Johnson appeals a judgment convicting him of sixteen counts of possession of child pornography and an order denying his postconviction motion to modify the sentences. He contends sentences imposed on five other defendants by the same judge for the same crime constitute a new factor justifying a reduced sentence. We reject that argument and affirm the judgment and order.

BACKGROUND

¶2 Johnson entered no-contest pleas in return for the State's agreement not to bring charges related to hundreds of other images and video recordings of child pornography. At the sentencing hearing, the lead investigator testified Johnson possessed hundreds of images of child pornography and approximately seventy-five child pornography videos. The images included toddlers and infants, some of whom were being sexually assaulted in the photographs. Johnson's search history included search terms "incest, daughter, brother-sister," "daddy daughter" and "girls in diapers." The investigator was particularly concerned because Johnson's wife was pregnant with a daughter.

¶3 The State recommended a sentence of twenty years' initial confinement and ten years' extended supervision. The presentence investigation report (PSI) recommended six years' initial confinement and six years' extended supervision. The defense recommended concurrent terms of three years' initial confinement and three years' extended supervision. Johnson denied being sexually attracted to children and claimed he had a fetish for adult women in diapers. The circuit court imposed consecutive and concurrent sentences totaling fifteen years' initial confinement and fifteen years' extended supervision.

¶4 In his postconviction motion, Johnson requested sentence modification based on sentences that had been imposed on five other defendants convicted of possession of child pornography, claiming his sentence was much longer than these other sentences imposed by the same judge. He argued the disparity in the sentences constituted a new factor justifying sentence modification because the circuit court unknowingly overlooked the other sentences when it imposed Johnson's sentence. The circuit court rejected that argument, finding Johnson's sentences were comparable to those imposed on the other defendants on a per-conviction basis and the sentences were based on the individual circumstances of each case.

DISCUSSION

¶5 A new factor is:

> A fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Whether the defendant meets that burden is a question of law reviewed independently by this court. ***Id.***, ¶33.

¶6 Even if we assume that the circuit court in this case unknowingly overlooked the sentences imposed on other defendants and that the other sentences are relevant, Johnson has not established that they were highly relevant to Johnson's sentences for two reasons. First, on a per-conviction basis, Johnson's

sentences were comparable to the other sentences. Second, Johnson has not established by clear and convincing evidence that the other individuals or their crimes were substantially similar to Johnson and his crimes.

¶7 The five other defendants Johnson identified were sentenced by the same judge following the effective date of a statutory change imposing a mandatory minimum sentence. Richard Kramer was sentenced to six years' initial confinement and eight years' extended supervision for two counts of possession of child pornography. Aaron VanCaster was sentenced to eight years' initial confinement and eight years' extended supervision for nine counts. Adam Christopher was also sentenced to eight years' initial confinement and eight years' extended supervision for eleven counts. Shawn Haynes was also sentenced to eight years' initial confinement and eight years' extended supervision for ten counts. Peter Quinn was sentenced to four and one-half years' initial confinement and ten years' extended supervision for five counts. Johnson's sentence of slightly less than one year of initial confinement per count closely matches the sentences imposed for the other defendants.

¶8 Johnson contends sentences for this offense should not be considered on a per-conviction basis because "although relevant, the number of convictions is not a meaningful distinction given not only the substantial difference between Johnson's sentence and the other offenders but also because many of these cases involve a large number of images." The number of charges the State brought and the number of charges a defendant agrees to concede as a part of a plea agreement may reasonably reflect the strength of the State's case, the number and type of the images, personal characteristics of the defendant, and the defendant's access to children. The number of convictions is not a random number unrelated to the seriousness of the offenses, the defendant's character, and the need to protect the

public. A sentencing court may reasonably impose the sentences on a per-conviction basis, and therefore our review of the sentence (and whether subsequent information was highly relevant to that sentence) appropriately takes this fact into account.

¶9 To the extent Johnson's sentences differ from those of the other five defendants, Johnson also fails to establish sufficient similarities between his crimes and personal characteristics and those of the other five defendants requiring comparability. Kramer's sentence per conviction was substantially longer than Johnson's yet he possessed approximately half the number of images as Johnson. In VanCaster's case, the court rejected a joint recommendation for a lesser sentence, but also considered VanCaster's abuse as a child to be a mitigating factor. The images in Christopher's case involved bestiality and teen rape, however, his case did not include other uncharged offenses. While Haynes had prior convictions and possessed a comparable number of images including those of very young children, his sentence was the product of a joint recommendation. Quinn's sentence was also jointly recommended. He had no prior record and possessed only one photo of a child under six years old.

¶10 Johnson's argument is based on selecting individual characteristics of the other defendants or their crimes and comparing them to himself and his crimes. However, he fails to establish that the other defendants and their crimes, taken as a whole, mirror his own character and his crimes. Johnson's sentences are appropriately tailored to his individual circumstances.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).