COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2710-CR **Cir. Ct. No. 2009CF830**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. BLUME,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS AND KATHRYN W. FOSTER, Judges.[1] *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

[1] The Honorable J. Mac Davis entered the judgment of conviction. The Honorable Kathryn W. Foster heard and decided Blume's postconviction motion.

¶1 PER CURIAM. James R. Blume appeals from a judgment of conviction for two counts of second-degree sexual assault of a child and an order denying his postconviction motion for sentencing relief. Blume argues that he is entitled to sentence modification either because his deteriorating health constitutes a new factor or because his sentence is unduly harsh. In the alternative, Blume requests a new sentencing hearing on grounds that the trial court erroneously exercised its sentencing discretion or in the interest of justice. We conclude that Blume has failed to demonstrate the existence of a new factor. We further conclude that the trial court properly exercised its discretion at sentencing and that the sentence imposed is not unduly harsh. Because Blume has failed to establish either a new factor or an erroneous exercise of discretion at sentencing, we decline to order a new sentencing hearing in the interest of justice. We affirm the judgment and order.

¶2 In 2010, Blume pled guilty to and was convicted of two counts of second-degree sexual assault of a child. A third count was read in for purposes of sentencing. Each count represented a minor child sexually assaulted by Blume in the late seventies or early eighties while Blume was training to become or had already been ordained a Catholic priest.

¶3 At sentencing, the parties informed the court of two additional victims and agreed that the court could consider Blume's criminal conduct with the additional victims as character evidence.[2] Defense counsel informed the court that Blume had a variety of serious health conditions and was terminally ill with

[2] The State named the two additional victims in a letter to the court and verified on the record its agreement not to file charges in connection with these two victims.

leukemia. Defense counsel argued that Blume's age and medical condition lowered his risk of re-offense. The presentence investigation report and one of the victim impact statements contained information that a civil lawsuit involving Blume's abuse was previously settled with the Archdiocese.

¶4 The trial court noted that though there were two convictions, "what we're talking about here is multiple acts for each of the victims in count one and count two; certainly more than a handful, perhaps dozens, maybe scores." Further, the trial court considered the read-in count, which again involved "many acts of illegal sex conduct" with a minor victim. Based on the repeated and ongoing conduct along with the severe and substantial impact on the victims, the court characterized the offenses as "highly aggravated for sentencing purposes, about as aggravating as it can be within these categories." The trial court considered a number of mitigating factors concerning Blume's character, and agreed that he was not at a high risk for re-offending due to intervening treatment, the present felony convictions, and "his advancing age and deteriorating health."

¶5 The trial court stated that its primary sentencing objectives were protection of the public through general deterrence, and the need to punish Blume for his serious offenses, which profoundly impacted his victims and violated the trust of the church and the community. The court imposed consecutive ten-year prison sentences on each count.

¶6 Blume filed a postconviction motion seeking either sentence modification or a new sentencing hearing. Blume's motion attached recent medical records demonstrating that since the time of sentencing, his kidneys had failed, he started chemotherapy for his leukemia, and he underwent colon surgery. The postconviction court denied Blume's motion for sentencing relief.

¶7 On appeal, Blume maintains that his deteriorating health constitutes a new factor justifying the modification of his sentence. A trial court may modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***Id.***, ¶40. Whether a new factor exists presents a question of law that this court reviews independently. ***Id***., ¶36. The new factor requirement prevents the modification of a sentence "based on second thoughts and reflection alone." ***Id***.

¶8 We conclude that the deterioration of Blume's physical health does not constitute a new factor for two reasons. First of all, the trial court was aware at the time of sentencing that Blume had myriad health problems, including skin cancer, significant urinary issues, and leukemia. The trial court was informed that chemotherapy was already being considered to treat Blume's leukemia. A fact known to the court at the time of sentencing does not constitute a new factor. ***Id.***, ¶57. As explained by the postconviction court,[3] given the severity of Blume's health problems at the time of sentencing, it was foreseeable that Blume's condition would only deteriorate and would require further medical intervention.

¶9 Second, Blume's deteriorating health is not a new factor because it is not highly relevant to the sentence imposed. The trial court did not rely on Blume's health as a justification for its sentence. The record demonstrates that

[3] The postconviction court explained that it had familiarized itself with the record and had carefully reviewed the sentencing transcript.

even after considering Blume's poor health, the trial court believed its sentence was necessary to accomplish the primary objectives of general deterrence and punishment: "Trying to have the good and the bad and the other considerations involved here, to me the ones that seem most weighty are the need to punish, and the need to deter others."

¶10 Though Blume argues that his deteriorating health is relevant to the trial court's intent to impose a punitive sentence, this is not supported by the record. The trial court's focus on punishment concerned Blume's conduct and his culpability:

> [p]unishment seems to fit best when someone makes a planned or intentional and obvious criminal act. That's what we have here. Regardless of any addiction or compulsion, regardless of any abuse in his own childhood, Mr. Blume certainly knew what he was doing was bad and not just bad but horribly bad. It is the kind of thing that calls for punishment.
>
> James Blume exhibited a grotesquely twisted morality for more than a decade. He committed disgusting acts. Not only did he commit sexual assault against boys, he raped the trust of those children, of their parents. He raped the trust of devout parishioners of his church and his community.

¶11 In sum, because the facts asserted by Blume were neither unknown to the sentencing court nor highly relevant to its sentence, we conclude that Blume has not demonstrated the existence of a new factor by clear and convincing evidence. *See* ***id.***, ¶36 (the defendant bears the burden to establishing a new factor by clear and convincing evidence).

¶12 Blume next argues that the trial court erroneously exercised its sentencing discretion by: (1) failing to consider his significant health problems and (2) imposing an unduly harsh sentence. On appeal, our review is limited "to

determining if discretion was erroneously exercised." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶13 First, we reject Blume's contention that the trial court failed to consider his health problems at sentencing and therefore erroneously exercised its discretion under ***Gallion***, 270 Wis. 2d 535, ¶¶17, 19. Blume's medical conditions were presented to the court through record documents and the parties' arguments, and the court was well aware that Blume was terminally ill. The trial court explicitly acknowledged that Blume's failing health would likely lower his risk of re-offense. What Blume really takes issue with is the trial court's failure to consider Blume's poor health as an overriding mitigating factor. However, the weight attributed to each sentencing factor is within the trial court's wide discretion. ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364. The trial court clearly stated its sentencing objectives and described the facts relevant to its primary objectives. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶40-42. We will not interfere with the trial court's proper exercise of discretion. ***Ziegler***, 289 Wis. 2d 594, ¶22.

¶14 Second, Blume argues that the trial court's sentence was unduly harsh in light of Blume's poor health and the existence of a settled civil lawsuit involving at least one of the victims. A sentence is unduly harsh only if the length of the sentence imposed by a trial court is "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698

N.W.2d 823 (citation omitted). In determining whether a sentence is unduly harsh or excessive, we review the trial court's sentence for an erroneous exercise of discretion, and we are to presume that the sentencing court acted reasonably. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449.

¶15 We reject Blume's assertion that the sentence was unduly harsh. Though Blume points out that he is sick, that is only one of many facts relevant to sentencing and does not speak to the severity of the offense or the protection of the public through general deterrence. While it is true that Blume received the maximum sentence on the two convictions, a third charge was dismissed and read in. All three charges involved not isolated acts, but repeated sexual assaults by Blume of each of the victims, and the victims reported that the abuse had a severe and lasting impact on their lives. Further, Blume's pattern of sexual abuse involving at least two other minor victims was considered by the trial court, as was the fact that Blume's relationship with all of his victims involved his position of trust and authority vis-a-vis the Catholic church.

¶16 We also reject the notion that the existence of a settled civil lawsuit is so significant that it renders Blume's criminal sentence unduly harsh. As Blume concedes, the details and outcome of that civil suit were sealed and unknown to both the trial and the postconviction court. It is unknown whether general or compensatory damages were awarded and to what extent Blume rather than the church was liable for any damages. Regardless of any civil consequence, Blume went decades without criminal consequence for his multiple assaults and was leading a productive and independent life before these offenses came to light. Given the record and considering the trial court's careful explanation, its twenty-year sentence does not shock the public conscience.

¶17 Finally, Blume asks that we exercise our limited power of discretionary reversal to order a new sentencing hearing in the interest of justice under WIS. STAT. § 752.35 (2009-10)[4]. We decline to do so. Because the trial court properly exercised its sentencing discretion and due to our conclusion that no new factors exist, there has been no miscarriage of justice in this case.

By the Court.—Judgment and order affirmed.

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

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.