COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1773-CR **Cir. Ct. No. 00-CF-286**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER LENOX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Roger Lenox challenges the sentence he received on his conviction for second-degree sexual assault of a child. Following his guilty plea, the court sentenced Lenox to twenty years' confinement and ten years' extended supervision. Lenox contends that the sentencing court erroneously exercised its discretion by imposing an unduly harsh and excessive sentence.

Because the record discloses a reasonable basis for the sentence, we affirm the judgment.

¶2 Lenox, age fifty-nine, pled guilty to second-degree sexual assault of a child. The criminal complaint alleged that on June 6, 2000, a fifteen-year-old girl and a friend were waiting for a bus. The fifteen-year-old told the investigating officer that Lenox came up to her and began calling her a "bitch." He then grabbed her by the head and shoulders and rammed her head into the side of a parked city bus. She stated that Lenox then grabbed her by her hair and forcefully rubbed her face into his genital area. The investigating officer observed red marks on her forehead, nose and shoulder that were consistent with her report. The victim did not know Lenox.

¶3 A witness stated that after he saw the assault, Lenox then went to his car, made motions with his hands as if to say "come and get me" and left the scene. The witness obtained Lenox's license plate number from the vehicle. When the officer questioned Lenox about the assault, he first stated, "all I did was call her a bitch." Later, he admitted that he pushed the victim's head down to his waist level and placed her face into his crotch because he wished to punish her for calling him a name.

¶4 Before sentencing, Lenox's mental status was evaluated, and the report from the Winnebago Mental Health Institute determined that he was competent to proceed. At sentencing, the State recommended a lengthy sentence in order to protect the public. It pointed out that Lenox had a history of assaulting vulnerable developmentally disabled males and has been convicted twice for sexual assault. He has served time in prison and participated in community

programming. It noted that Lenox remains in denial, which makes him a very high risk to re-offend.

¶5 Defense counsel stated that Lenox has the mental acuity and functions at about the level of a ten- to fourteen-year-old. Counsel acknowledged that Lenox has an extensive criminal record, has been placed in various secure settings, has been incarcerated and has not done very well. He was found to be in need of protective placement under WIS. STAT. ch. 55, but was placed in the community as the least restrictive environment for the last year and one-half. Counsel pointed out that before the assault, Lenox was consuming alcohol and hanging around the bus station, but not doing anything unlawful. While Lennox's behavior was clearly inappropriate, counsel recommended a lengthy period of probation instead of incarceration, along with conditions to give the department leeway to remove him from the community if he showed any sign of danger to himself or others.

¶6 Lenox argues that his sentence is excessive due to his tragic circumstances and is disproportionate to the offense. He recognizes that his placement in the community was chaotic because he was "placed in a variety of different housing settings because of the difficulty of dealing with his individual pathology that included aggressive homosexual behavior and the commission of thefts against other residents …." Although his competency was questioned in this proceeding, he acknowledges that after an evaluation he was deemed competent for the purposes of WIS. STAT. § 971.14. He claims that although the offense is serious, the aggravated nature of the offense, his character and the need for public protection do not rationally explain the sentence imposed. We disagree.

¶7 Lenox acknowledges the deferential standard an appellate court must apply when reviewing a sentence. A sentencing decision is reviewed for an erroneous exercise of discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Discretion is erroneously exercised when the sentence 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (Ct. App. 1975).

¶8 The primary factors to be considered are the gravity of the offense, the character of the offender and the need for protection of the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The sentence should call for the minimum amount of confinement consistent with these factors. ***State v. Kreuger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

¶9 Lenox's argument attempts to minimize the seriousness of the offense due to the lack of evidence of sexual gratification. We reject his contention that pushing and rubbing a child's face into the genital area of an adult male to punish or degrade her can be likened to disorderly conduct. We conclude that the seriousness of the offense, together with Lenox's criminal record, his previous conduct on probation and parole, and the need to protect the public provide a rational basis for the lengthy sentence.

¶10 The record demonstrates a reasonable exercise of sentencing discretion. The court took into account Lenox's age and background. It considered the two charges that were dismissed and read in: intentionally causing bodily harm to a child and disorderly conduct. It also considered his extensive record, including stealing a car, contributing to the delinquency of a minor,

disorderly conduct, and two sexual assaults, for which he received a total of seventeen years in prison. The second sexual assault was of a developmentally disabled individual and was committed while Lenox was on probation. After serving his prison sentence, while on parole, he committed another theft. Subsequently, he received thirty days and eight months in jail for two obstructing convictions.

¶11 The court noted that in 1987, Lenox was placed at the Wisconsin Resource Center for programming in the areas of dishonesty, thievery, manipulation, alcohol abuse and inappropriate sexual behavior. In 1988, on the day he was released, he stole a portable police scanner. The court considered that "The Department of Corrections used as many community resources as possible to assist Roger in making positive changes in his lifestyle." These included halfway homes, group homes, employment and training opportunities, counseling services, punishment in the form of probation/parole detentions at the county jail, verbal reprimands and placements in institutions. The court found: "Despite all this, Roger has continued to be a serious threat."

¶12 Lenox was institutionalized the first thirty-six years of his life and since he has been in the community has had a very difficult time adjusting. The court took into account that Lenox suffers from mental retardation, has no ability to read and write, has shown anger, hostility, alcohol abuse, and is diagnosed as a developmentally disabled individual and pedophile. The court considered that the nature of the assault, "a diagnosed pedophile acting out in anger in a sexually degrading way toward a 15-year-old female," underlines his inability to control himself. The court also considered that the offense is one of the most serious as designated by the legislature.

¶13 The court stated that the factors of Lenox's background, the seriousness of the crime and his danger to the community "far outweigh his rehabilitative potential." The court found that Lenox is a threat and his history of alcohol abuse and inability to recognize himself as responsible for what he has done weighed against him. The court considered the age and type of victims upon whom Lenox preys: "basically younger, defenseless, sometimes mentally disabled people." The court determined that on balance, protection of society compelled a lengthy sentence of twenty years' confinement followed by ten years' supervision.

¶14 The record reveals that the court considered proper factors and reached a conclusion that a reasonable judge could reach. That is the essence of a discretionary exercise. The issue before us is not whether the facts of record could support a contrary result. Our function is to determine whether a reasonable judge could have reached the same result as the one here. "It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Because the record discloses a reasonable exercise of discretion, we do not reverse it on appeal.

By the Court.—Judgment affirmed.

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