COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1605-CR **Cir. Ct. No. 2005CF419**

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

STATE OF WISCONSIN,

PLAINTIFF–RESPONDENT,

V.

ROBERT MICHAEL THERRIAN,

DEFENDANT–APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Judgment modified and, as modified, affirmed; order affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Robert M. Therrian appeals from an amended judgment of conviction and a postconviction order following his guilty plea to one

count of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1).[1] Therrian contends that the circuit court relied on inaccurate information at sentencing and erroneously exercised its sentencing discretion. We reject his contentions, but determine that the amended judgment of conviction erroneously omits the court's order for sex offender therapy. Accordingly, we affirm the postconviction order; we direct that upon remittitur the circuit court shall enter an amended judgment of conviction to reflect its mandate that Therrian successfully complete sex offender therapy as a condition of probation.

Background

¶2 In February 2005, five-year-old A.A.[2] accused Therrian, aged twenty, of touching her vaginal area. At the time, A.A. and her mother lived with Therrian's brother in a household that shared quarters with Therrian. Therrian admitted to police that he went into A.A.'s room upon hearing her crying in bed and rubbed her vagina beneath her underwear.

¶3 Therrian entered a guilty plea to the charge of first–degree sexual assault of a child. The court ordered a presentence investigation and Therrian denied guilt during his interview with the presentence author. He claimed that the victim's father had assaulted her.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Although the transcripts on occasion refer to A.A. as four years old at the time of the incident, the complaint alleges that A.A. was born on January 24, 2000, and that the incident occurred on February 11, 2005.

¶4 The presentence report included a summary of statements given to police by Therrian's mother, Tammy Protic, during the assault investigation. Protic reported prior allegations against Therrian, including sexual touching of children for whom he was babysitting and sexual contact when he was seventeen with a fifteen-year-old boy. Protic further told police that Therrian had purchased $1700 of Internet pornography, worn her make-up, and stolen her underwear. The presentence author asked Protic to comment on these earlier statements.

¶5 Protic dismissed the prior sexual assault allegations as "hearsay" and "talk." Regarding the purchase of pornography, Protic stated that she had never seen the material, but that the charges had "show[n] up on [her] bill." Protic confirmed her concern over Therrian's theft of her underwear, and noted that she had called the police for help in this regard.

¶6 At sentencing, Therrian corrected and further explained Protic's allegations, beginning with a summary of Protic's history of mental health disorders. He described the incident with the fifteen-year-old boy as a mutual display of genitalia. He denied purchasing Internet pornography and stated that he had incurred $1700 in charges for a telephone call with "a sex type service" that charged $5.00 a minute.

¶7 Therrian's further sentencing comments highlighted his status as a first offender, his good work history, and his supportive family. He agreed with the State's recommended disposition: that the court impose and stay a six-year prison term and place him on probation for five years with conditions. The requested conditions included one year in the House of Correction with work release.

¶8 The circuit court imposed a term of ten years' imprisonment, comprised of four years of initial confinement and six years of extended supervision. It stayed the sentence in favor of eight years' probation. As conditions of that probation, the court ordered Therrian to serve a year in the House of Correction, and to complete anger management classes and sex offender therapy.[3] It denied him work release privileges, stating that they were not earned.

¶9 Therrian filed a postconviction motion for sentence modification. Claiming that the court relied on inaccurate information from Protic and erroneously exercised its discretion, he asked the court to reduce the imposed and stayed prison sentence, vacate or reduce the jail time imposed as a condition of probation, and allow him work release privileges. The court denied these requests.[4] This appeal followed.

Discussion

¶10 We begin with Therrian's contention that he was sentenced on the basis of inaccurate information provided by his mother. Therrian claims that Tammy Protic recanted her allegations and therefore the court should have disregarded her statements. We disagree.

¶11 Whether a defendant has been denied the due process right to be sentenced upon accurate information is a constitutional question that we review *de novo*. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d

[3] Other conditions not relevant here were also imposed.

[4] The court granted Therrian's request to vacate the condition that he abstain from alcohol during his probation. This component of the court's decision is not at issue on appeal.

1, 3. A defendant alleging that a sentencing decision is based on inaccurate information must prove "both that the information was inaccurate and that the [trial] court actually relied on the inaccurate information in the sentencing." ***Id.***, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7.

¶12 Therrian has not met his burden here. As to inaccuracy, at most he has shown that his mother's later statements were more circumspect than the accusations she voiced at the beginning of the process. Protic neither denied that others had accused Therrian of assault, nor that she had received a $1700 bill for Therrian's sex-related purchases. She merely acknowledged her lack of first-hand knowledge as to the truth of the accusations and the content of the sexual material.[5]

¶13 As to reliance, the sentencing court did not err when it considered evidence of unproven offenses and uncorroborated hearsay. *See* ***State v. Marhal***, 172 Wis. 2d 491, 502–503, 493 N.W.2d 758, 763–764 (Ct. App. 1992) (sentencing court may properly consider unproven offenses and uncorroborated hearsay). Nor did the court err in considering that Therrian purchased $1700 worth of a sexual product. To the extent that Therrian disputed his mother's claim that he purchased Internet pornography and affirmatively stated that he purchased telephone sex talk, the court acknowledged that it did not know which product was purchased. Plainly the court did not rely on Protic's version. The impulsive purchase was the

[5] Therrian also claims that his mother disavowed her reports of his stealing her underwear. He offers no record citation that supports his position. The State's brief, by contrast, points to Protic's subsequent confirmation of the theft accusation, to which Therrian's reply brief contains no response. "A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted." ***Curda-Derickson v. Derickson***, 2003 WI App 167, ¶18, 266 Wis. 2d 453, 467, 668 N.W.2d 736, 742.

pertinent fact and Therrian confirmed such a purchase. Opportunistic sexual gratification lay at the heart of this case, and other instances of such behavior were relevant to the sentencing as showing a history of undesirable behavior patterns. *See* ***Harris v. State***, 75 Wis. 2d 513, 519, 250 N.W.2d 7, 11 (1977) (history of undesirable behavior patterns is an appropriate factor for the sentencing court's consideration).

¶14 Therrian suggests that his mother is an unreliable narrator whose information should have been disregarded. Weight and credibility, however, are for the finder of fact to determine. ***State v. Anson***, 2004 WI App 155, ¶24, 275 Wis. 2d 832, 848, 686 N.W.2d 712, 720.

¶15 We turn next to Therrian's claim that the circuit court erroneously exercised its sentencing discretion in imposing sentence generally and in denying him work release privileges specifically. He claims that the court gave inadequate weight to mitigating factors, disregarded his treatment needs, and failed to link the sentence to its objectives.

¶16 In passing sentence, the court should consider the primary factors of the "'gravity of the offense, the character of the offender, and the need for protection of the public.'" ***State v. Lechner***, 217 Wis. 2d 392, 421, 576 N.W.2d 912, 926 (1998) (citation omitted). It may also consider a wide variety of additional related factors. *See* ***State v. Harris***, 119 Wis. 2d 612, 623–624, 350 N.W.2d 633, 639 (1984). The weight the trial court assigns to each factor is a discretionary determination. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶17 The court must specify the important objectives of its sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 232, 688 N.W.2d 20, 24.

These vary from case to case, but may include the protection of the community, punishment, rehabilitation, and deterrence. ***Ibid.*** The trial court's obligation is to consider the important factors in reaching chosen objectives and exercise its discretion in imposing a reasonable sentence. ***Ibid.*** We adhere to a strong public policy against interference with that discretion. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203.

¶18 Here, the court placed particular weight on Therrian's character, concluding that his denials of guilt revealed him as untruthful and uncaring. Although Therrian contends that his denials were made only in a private interview with the presentence investigator, the record reflects otherwise. The court questioned Therrian on this issue and he acknowledged "telling everybody that [he] didn't do it." Given this record, we reject Therrian's contentions that "there was no public or elongated denial."

¶19 In considering the gravity of the offense, the court observed that Therrian took advantage of a vulnerable child in his household and betrayed her trust. In considering protection of the public, the court highlighted Therrian's problems controlling his anger and the history of prior assault allegations. The court concluded that Therrian posed a risk to the public because he had not resolved issues arising from sexual deviance.

¶20 The court's postconviction order clarified that its sentence was linked to the goal of imposing punishment. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994) (the trial court has an additional opportunity to explain its sentence when challenged by postconviction motion). The court determined that the parties' recommended disposition was inadequate punishment for assaulting a small child and then denying her accusations. The

court may impose a sentence for the specific purpose of emphasizing the seriousness of the offense. *See* ***Harris***, 75 Wis. 2d at 521, 250 NW.2d at 12.

¶21 The court also properly considered mitigating factors. Therrian's guilty plea, his work history, and his strong family support were all factors in the court's decision. So too was the nature of the act, which the court described as "less intrusive" than some. Accordingly, the court considered probation as the first alternative and found it appropriate. *See* ***Gallion***, 2004 WI 42, ¶25, 270 Wis. 2d at 551, 678 N.W.2d at 204.

¶22 The court further concluded, however, that Therrian had not earned the privilege of work release as a condition of that probation. Work release is a means of recognizing rehabilitative progress. ***State v. Kluck***, 210 Wis. 2d 1, 9, 563 N.W.2d 468, 471 (1997). The court's sentencing remarks reflect its view that Therrian had not made sufficient progress as to warrant such recognition. Rather, Therrian had denied the offense, stirring up hostility between the two families involved. The court therefore declined to minimize the punitive impact of his jail term. This is an appropriate exercise of sentencing discretion that we will not disturb. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercise differently).

¶23 Therrian next faults the court for considering as an aggravating factor his willingness to blame the victim, and stresses that he did not blame the victim for his actions. Therrian misconstrues the court's remarks. Viewed in context, the court's comments reflect concern that Therrian blamed the victim for making a false accusation and blamed other possible suspects, including the victim's father, as a means of diverting attention from himself as the perpetrator.

¶24 As to Therrian's claim that the court failed to consider his need for treatment, Therrian is simply wrong in contending that the court "did not impose treatment in any way." In fact, the court ordered Therrian "to successfully complete anger management classes" and "to successfully complete sex offender therapy." Perhaps Therrian's confusion arises because the amended judgment of conviction does not include the court's order for therapy. The omission appears to be a clerical error.[6] Accordingly, upon remittitur, the court shall correct the judgment of conviction to reflect its order for sex offender therapy. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 247–248, 618 N.W.2d 857, 860 (stating that the circuit court must correct a clerical error in the sentence portion of a written judgment of conviction or direct the clerk's office to make the correction).

¶25 Finally, Therrian contends that the circuit court erroneously resolved his postconviction motion by rejecting his contention that the sentence was unduly harsh. Our role is to "review a motion for sentence modification by determining whether the sentencing court erroneously exercised its discretion in sentencing the defendant." ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 577, 653 N.W.2d 895, 897. We have already concluded that the circuit court's sentence was based upon appropriate factors with no improper considerations. Such a sentence, when well within the limits of the maximum, is unlikely to be unduly harsh or unconscionable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456. The circuit court did not err here.

[6] The judgment of conviction mandates "successful completion of sex offender registration" while the court's pronouncement mandated "successful completion of sex offender therapy."

By the Court.—Judgment modified and, as modified, affirmed; order affirmed.

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