COURT OF APPEALS DECISION DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1309-CR | **Cir. Ct. No. 2006CF89**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY TRINIDAD, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Johnny Trinidad, Jr., appeals from a judgment of conviction for two counts of incest with a child and an order denying his motion for postconviction relief seeking resentencing and sentence modification. Because

we disagree that the trial court sentenced Trinidad based on materially inaccurate information, we affirm.

¶2 Trinidad was charged with five counts of incest with a child, contrary to WIS. STAT. § 948.06(1) (2005-06).[1] The incidents occurred when the victim, Trinidad's natural daughter, was fifteen and sixteen years old. Trinidad maintained that the incidents were "instructional" and meant to teach his daughter responsibility. Pursuant to a plea agreement, he pled guilty to two counts; the remaining three counts would be dismissed but read in at sentencing. He faced forty years' imprisonment (twenty-five years' initial confinement, fifteen years' extended supervision) and/or a $100,000 fine on each count.

¶3 The trial court ordered a presentence investigation (PSI). The PSI report recommended consecutive sentences of eleven to fourteen years of imprisonment, consisting of six to eight years of initial confinement and five to six years of extended supervision on each count, for a total of twenty-two to twenty-four years, with twelve to sixteen years of initial confinement. The State recommended concurrent thirty-year prison sentences, with twenty years of initial confinement and ten years of extended supervision, for a total of twenty years of imprisonment. Trinidad's counsel recommended concurrent twenty-year prison sentences, with ten years of initial confinement and ten years of extended supervision, for a total of ten years of imprisonment. The trial court sentenced him to two consecutive fifteen-year prison terms, nine years of initial confinement and six years of extended supervision each, for a total of eighteen years of initial confinement and twelve years of extended supervision.

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

¶4 Postconviction, represented by new counsel, Trinidad moved for resentencing or sentence modification. Trinidad asserted that the circuit court sentenced him in reliance on inaccurate information, namely the PSI writer's conclusion that Trinidad posed a medium risk to reoffend and that his rationalization and minimization of the offense "would only appear to increase that risk." The motion cited a "new factor," a prison psychologist's testimony that Trinidad's risk of reoffense actually was low and that rationalization and minimization present treatment issues but have not been shown to increase risk of reoffense. Trinidad also asserted that the sentence was unduly harsh compared to those imposed for similar offenses.

¶5 PSI writer Michael Musurlian testified at the postconviction motion hearing at the court's request. Musurlian testified that he used a "PSI Risk Assessment" to make his sentencing recommendation. Ten areas of inquiry, including recent address changes, employment history, drug or alcohol usage and prior offenses, are scored and tallied to provide a numeric "risk score." The risk score determines whether the subject's general risk to reoffend is considered low (0-9), medium (10-22) or high (23 and above). Trinidad's score was 12.[2]

¶6 Two psychologists testified on Trinidad's behalf. Dr. Christopher Tyre supervises the Department of Corrections' WIS. STAT. CH. 980 forensic evaluation unit, which performs risk assessments of sex offenders who are about

[2] Musurlian gave Trinidad a "5" on attitude for rationalizing and minimizing his offenses; a "1" for employment, based on Musurlian's understanding that Trinidad worked 40-59% of the time in the year preceding the offense; and a "4" for prior probation based on Trinidad's self-report of a two-week period of "what was like probation" in Tennessee until he paid fines and fees stemming from a misdemeanor conviction for driving while intoxicated. Trinidad does not challenge the attitude score.

to be released from prison and are being considered for commitment as sexually violent. Dr. Tyre acknowledged that he is unfamiliar with the standards used for PSI evaluations and has "no idea" what the low, medium and high risk assessments mean in the PSI evaluations.[3]

¶7 Dr. Robert DeYoung, the psychologist supervisor at Dodge Correctional Institution where Trinidad was incarcerated, assesses incoming offenders and recommends custody levels, placement and treatment programs. Dr. DeYoung evaluated Trinidad shortly after he arrived at Dodge and, although he did not himself assess Trinidad's risk to reoffend, he would have said Trinidad manifested a low risk of reoffending sexually. He also noted that recent studies have not shown rationalization and minimalization to be associated with a risk to reoffend. Dr. DeYoung also testified that he is "not real familiar with" the assessment tools PSI writers use and did not know whether the instrument Musurlian used was accurately scored or developed.

¶8 The trial court denied the motion. It concluded that, as completed by Musurlian, the PSI risk assessment tool was not inaccurate. Comparing the presentence and prison sex offender risk assessment tools, the court said, was "talking … apples and oranges." Prison sex offender tools are designed to measure sex offenders' risk to reoffend sexually. The PSI instrument, on the other hand, assesses all offenders. Further, the court concluded that the sentencing recommendation also was based on the combined expertise of Musurlian and his supervisor who approved it.

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[3] Dr. Tyre testified in his capacity as a psychologist, not on behalf of the DOC.

¶9 On appeal, Trinidad again seeks resentencing. A motion for resentencing based on a trial court's alleged reliance on inaccurate information, a defendant must establish (1) that the sentencing court had before it inaccurate information (2) upon which it actually relied. ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. A court actually relies on inaccurate information when the court gives it "explicit attention" or "specific consideration" such that the misinformation "form[s] part of the basis for the sentence." ***Id.***, ¶14 (citation omitted). If the defendant makes the dual showing, the burden shifts to the State to show that the error was harmless. ***Id.***, ¶3. We review de novo the constitutional issue whether Trinidad was denied his due process right to be sentenced upon accurate information. *See* ***id.***, ¶9. We will not disturb the trial court's factual findings unless they are clearly erroneous. *See* ***State v. Delgado***, 194 Wis. 2d 737, 749-50, 535 N.W.2d 450 (Ct. App. 1995).

¶10 Trinidad's accuracy challenge is multiple. He contends that Musurlian incorrectly: (1) scored the employment and probation criteria of the PSI risk assessment and gave him five too many points, causing him to be deemed a medium risk to reoffend; (2) recommended consecutive sentences, resulting in a recommendation four and a half times longer than the median sentence for other Class C felonies and than the median prison sentence imposed in Racine and Kenosha counties for second-degree sexual assault of a child; and (3) stated that Trinidad's minimization of the offense increases the risk of reoffending.

¶11 The employment criterion asks about percent time employed in the previous year. Three scoring options are available: "0" for 60% or more; "1" for 40% to 59%; and "2" for under 40%. Trinidad claims Musurlian should have given him a "0" instead of a "1." Trinidad's mother testified that he worked "like 60 hours a week" in the year before his arrest. Musurlian testified, however, that

to his best recollection Trinidad told him he had worked the full year but it was a "kind of on[-]and[-]off type thing or he had been part-time, then full-time and then part-time, something to that effect." The PSI report states that Musurlian attempted to contact Trinidad's work supervisor but that person was unavailable for comment. Trinidad did not testify.

¶12 Trinidad also challenges his score on the number of prior periods of probation/parole supervision criterion. Trinidad told Musurlian that in 1997 he was placed on a two-week period of "what was like probation" in Tennessee until he paid fines and fees stemming from a first-offense misdemeanor conviction for driving while intoxicated. Two scoring choices are available: "0" for none, and "4" for one or more. Musurlian gave Trinidad a "4." Trinidad argues that first-offense OWI is not a criminal offense in Wisconsin so probation could not even be ordered; if there were probation, the minimum in Wisconsin is six months, not two weeks, *see* WIS. STAT. § 973.09(2); and something "like probation" in Tennessee cannot reasonably be considered tantamount to the probation the risk assessment form contemplates to justify an increased score.

¶13 Trinidad also contends Musurlian erroneously recommended consecutive rather than concurrent sentences. Trinidad bases his argument on the DOC's "Bifurcated Sentence Recommendation Grid" instructions which provide:

> Legislation and case law presume that in multiple[-]case situations, sentences will be concurrent unless specifically ordered consecutive. Agents are directed to start with the presumption of concurrent recommendations. However, in extremely aggravated cases or when it is in the best interests of victims to order consecutive cases, the agent/Supervisor should consult with other staff to insure that the sentence structure recommended will accomplish the intended goals.

Trinidad also emphasizes that the victim, his daughter, did not request lengthy incarceration or consecutive sentences and, in fact, wrote to the court asking it to reconsider the sentence it imposed.

¶14 Musurlian acknowledged that Trinidad's was not an "extremely aggravated" case. He testified that he based his recommendation in part on the case's numerous aggravating factors, such as that Trinidad committed multiple incestuous acts over a period of time and justified his behavior as "instructional." Musurlian testified he also considered the victim's best interests, including her vulnerability and her ongoing treatment. He then reviewed the sentence structure with his field supervisor, and the two jointly made the recommendation.

¶15 Trinidad has not established that any of these claimed errors are, in fact, inaccuracies. Musurlian testified that his "best recollection" was that Trinidad's employment history was somewhat on and off; Trinidad's mother testified otherwise. Trinidad self-reported having been on something like probation, for which Musurlian selected the scoring choice that seemed most apt. The PSI report contains a variety of areas where the PSI writer makes discretionary determinations. *See* ***State v. Howland***, 2003 WI App 104, ¶34, 264 Wis. 2d 279, 663 N.W.2d 340. Moreover, Trinidad might have testified to explain his work history or the nature of the probation, but did not. In addition, the victim's desire for a shorter sentence for her father does not establish that Musurlian misjudged her best interests. Children's wishes and their best interests do not always coincide. *See* ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 536, 485 N.W.2d 442 (Ct. App. 1992). Finally, the time to challenge the PSI and its recommendation was at sentencing. Trinidad did not. Indeed, his counsel assured the court that he had reviewed the PSI "word for word" with Trinidad and they had no additions or corrections. We find no error in the trial court having

considered matters in the presentence report that went unchallenged at sentencing. *See* ***State v. Johnson***, 158 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990). In any event, a PSI sentencing recommendation is not binding on the sentencing court. ***Id.*** at 469.

¶16 Finally, we agree with the trial court that Dr. Tyre's and Dr. DeYoung's opinions that Trinidad presents a low risk to reoffend does not establish that the DOC's assessment was inaccurate. Trinidad claimed in his postconviction motion that Dr. DeYoung's opinion constituted a "new factor." A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, ***State v. Kaster***, 148 Wis. 2d 789, 803, 436 N.W.2d 891 (Ct. App. 1989), or which frustrates the sentencing court's intent. *See* ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a fact constitutes a new factor is a question of law. ***Id.*** at 97.

¶17 The psychologists' risk opinions arose from the assessment tools geared toward sex offenders. They use the tools in a prison setting to channel sex offenders into appropriate housing and treatment groups and to predict the risk of future sexual offenses. The presentence risk assessment, by contrast, is designed, tested and validated for use with all offenders as an aid to determine what to recommend in the way of sentence structure and to assess the person's general risk of reoffense. We note that the chance Trinidad would reoffend, generally or otherwise, was not the prime focus of the court's sentencing rationale. Dr. DeYoung's opinion did not frustrate the original sentence. Trinidad has not established that the sentencing court had before it inaccurate information. Therefore, we need not consider his claim that the court actually relied on it.

¶18 The State asserts that Trinidad's real challenge is to the PSI writer's recommendations. To the extent that is true, if at all, we do not review those recommendations. *See* ***State v. Miller***, 180 Wis. 2d 320, 325, 509 N.W.2d 98 (Ct. App. 1993). We review only the trial court's exercise of its sentencing discretion. ***Id.*** at 325-26. 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 generally afford a strong presumption of reasonability because the trial court is best suited to consider the relevant factors. ***Id.*,** ¶18. If the record demonstrates a proper exercise of discretion, we will not substitute our preference even if we might have meted out a different sentence. ***Id.***

¶19 Here, the trial court considered the primary factors: (1) the gravity of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public. *See* ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). It also considered mitigating factors, such as Trinidad's age, education, work history, his role as a single parent and the absence of other undesirable behaviors. The court focused, however, on the "vicious and aggravated" nature of the offense, the long-term devastation wreaked on the victim and the family, and Trinidad's rationalization. The emphasis placed on the factors, or even on a single primary factor, is within the sentencing court's wide discretion. *See* ***id.*** at 507-08. Further, Trinidad's sentence was well within the permissible limits, especially in light of his agreement to have three counts read in, exposing him to the risk of a longer sentence within the statutory allowance. *See* ***Austin v. State***, 49 Wis. 2d 727, 732, 183 N.W.2d 56 (1971).

By the Court.—Judgment and order affirmed.

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