COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1296-CR **Cir. Ct. No. 2009CF376**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES M. SAXON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Charles M. Saxon appeals from a judgment convicting him of second-degree sexual assault of a child and from the order denying his postconviction motion seeking resentencing. Saxon claims he was

sentenced on the basis of inaccurate information, specifically, the trial court's allegedly mistaken belief that he lacked a history of being a child sex abuse victim. That history, Saxon argues, is a mitigating factor in sentencing. We conclude that Saxon has not met his burden of proving his claim by clear and convincing evidence. We therefore affirm the judgment and order.

¶2 Fifty-four-year-old Saxon sexually assaulted his teen-aged daughter's best friend, who was spending the night at the Saxon home. The girl awoke to find Saxon whispering to her and stroking her hair. As she feigned sleep, Saxon fondled her breasts over and under her clothing, then digitally penetrated her. Saxon said he did not recall the incident because he had been drinking heavily and had snorted a mixture of cocaine and Oxycontin.

¶3 Saxon pleaded guilty. The court-ordered presentence investigation report noted that, at age fourteen, Saxon had had sexual contact with two of his younger siblings and that, also when Saxon was fourteen, a priest had sexually abused him on multiple occasions. The PSI made no reference to the temporal order of the sibling and priest events.

¶4 At sentencing, defense counsel referred to the apparently isolated nature of the charged incident but did not mention the claimed history of priest sexual abuse. The prosecutor did not mention it, either, and Saxon did not refer to it in his allocution.

¶5 In its sentencing remarks, the trial court observed:

> There are so many victims here. And in my experience of dealing with sexual assault cases, *there may be significant issues that Mr. Saxon has not discussed at this point in his life that came up before he was molesting his siblings*. People don't usually fall into this circumstance out of nowhere and it is very often—far too

> often in our criminal courts that the many … presentences I have read—*and I'm not saying this is in yours*, Mr. Saxon, but many presentences that … I have read, I could not tell you but I think it's a very high percentage of the people that are involved in the criminal court have themselves been sexually molested. (Emphasis added.)

¶6 A few minutes later, in commenting on Saxon's relatively recent alcohol and drug abuse, the trial court observed:

> It is amazing to me that a man of your age, Mr. Saxon, would have immersed himself into the drugs and alcohol circumstance that you immersed yourself into, based on this normal lifestyle that seemed to be going on. And I—as I said, often times *in other circumstances* there's evidence of abuse or neglect as a child when people get into those circumstances. (Emphasis added.)

The court imposed a fourteen-year sentence, bifurcated as six years' initial confinement and eight years' extended supervision.

¶7 Postconviction, Saxon moved for resentencing on the basis that the trial court relied on inaccurate information in fashioning his sentence. He argued that the court's sentencing remarks both evinced no recognition of the PSI statement that he had been sexually abused as a young teen and suggested that such a history might have been a mitigating factor.

¶8 Before filing a response to Saxon's motion, the assistant district attorney wrote a letter to the court noting that the court's sentencing remarks were "unclear … as to the consideration [the court] gave to the information contained within the [PSI] regarding the defendant's history of being a victim of sexual abuse." The ADA asked for clarification to better prepare a response.

¶9 The court held a hearing to explain its remarks:

> It was my understanding, and you can correct me if I'm wrong, that Mr. Saxon engaged in incest[ous] behavior at

> the age of about 14 with sisters and brothers and at that period of time was molested by the priest. I think it was the priest. *And my comments about ["]things have happened previous to that["] were in reference to things that could have happened prior to that because that seems very odd that all of that would happen at 14 and that perhaps something else had happened that wasn't in there.* I didn't see—I don't recall any other inference of molestation at a younger age and I—It's not real definite. I don't know about the contact with the sister, but I thought, as I recalled it, they were kind of in that same time block.
>
> ….
>
> Well, prior to him being—involving in sexual behavior with his brother[] and sister[] .... And the priest experience was right around that same time as I read the presentence. Let me see if I can find it.
>
> Okay…. He was 14 and his brother was eight. And I think later on or someplace in here he talks about the priest around the age of 14.
>
> ….
>
> Yeah. And it says age of 14 with two different family members, his sister [], who was 10, his brother [], eight, and that's when he reported that this abuse by the priest occurred about that same time. I read it as it occurring at that time. I didn't read it as that's when he told it.
>
> MR. BUTING [Defense counsel]: So was the Court's concern then whether the timing of which came first, whether—
>
> THE COURT: No, I wasn't concerned at all. I think—*I think he may have issues that happened before that. That's what I think. I mean, I don't know.* I'm sure he's able to work through that at some point in his life, but *I certainly thought at the sentencing that there may have been other issues that came before 14 years old*. (Emphasis added.)

¶10 At the hearing on the postconviction motion, the trial court again indicated that oftentimes there is "more of a history before some of these things get told" and that, although it could not say with certainty that it was true in

Saxon's case, sometimes "all of the facts might not yet come out about being molested as a kid."

¶11 The court then addressed the merits of Saxon's motion. We set the court's comments out in full:

> I think the basis for the motion is did I base my sentence on false or wrong information. I based my sentencing based on the offense, the rehabilitative needs, and the need to protect the public, which is required of me when I sentence.
>
> I did read the presentence. I did know that he had been molested. My reference to sometimes there are sexual offenses was to previous—was to younger[-]aged molestation of children which gets them to an older age. I regret having not been more specific, but I certainly did know that he had been molested and I don't think I need to go to the issue of whether it's a mitigating factor in a person's history or not or it makes it a more serious need for treatment in that whether or not a person has been previously molested because I understand you argue clearly that that means it's a mitigating circumstance. So if a person has been previously molested by a priest, they should get a less[er] sentence.
>
> I don't—I don't know where that would come from. And I don't know that it means that because they got molested by a priest or there was this other incident in the family that they should get a longer sentence. I think you have to take all of the facts of the person's life, all of their needs for treatment, and impose it. And this was a six initial and eight extended.

¶12 The court denied the motion. Saxon appeals, renewing his claim that he merits resentencing because the trial court actually relied on inaccurate information in sentencing him.

¶13 A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a

constitutional issue that this court reviews independently. ***Id.*** A defendant who seeks resentencing claiming that the trial court relied on inaccurate information must establish both that inaccurate information was before the sentencing court and that the court actually relied on it. ***Id.***, ¶31. Actual reliance is determined by whether the court gave the misinformation "explicit attention" or "specific consideration" such that it "formed part of the basis for the sentence." ***Id.***, ¶14.

¶14 The inaccuracy Saxon alleges is that the court believed he lacked a mitigating history of being a childhood victim of sexual assault. This claim has two facets: that the court believed he lacked such a history and that it is a mitigating factor. Saxon establishes neither.

¶15 Saxon asserts that the abuse by the priest prompted him to act out sexually against his siblings and complains that the PSI does not make the sequence clear. His claim falters because he might have commissioned an independent PSI to put forward the information that he maintains is true and correct, *see* ***State v. Mosley***, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996), or clarified the sequence at sentencing. Although his counsel offered at the outset of the postconviction motion hearing to have Saxon clarify the sequence for the record "if we need to," he did not press the matter.

¶16 Saxon claims his testimony essentially was pointless once the court confirmed that it had read the PSI and that it was aware of the alleged priest-perpetrated sexual abuse when Saxon was fourteen. We agree. The court evidently did not consider the sequence to be dispositive of anything. It declined to "go to the issue of whether it's a mitigating factor in a person's history or not or it makes it a more serious need for treatment," which would weigh in favor of more confinement—in other words, the sequence could have cut both ways. A

court may construe a particular factor to be mitigating or aggravating depending upon the defendant and the circumstances. *See* ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). The court stated that it deemed it a better practice to fashion a sentence based on "all of the facts of the person's life, [and] all of their needs for treatment."

¶17 We conclude, therefore, that Saxon has not clearly and convincingly established the existence of inaccurate information. Because he must prove both inaccuracy and actual reliance, we could stop there. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶31. We briefly comment that the court stated that it based its sentence on the offense, Saxon's rehabilitative needs and the need to protect the public. Although this assertion is not dispositive, *see* ***State v. Anderson***, 222 Wis. 2d 403, 409-10, 588 N.W.2d 75 (Ct. App. 1998), our independent review of the sentencing and postconviction transcripts satisfies us that the court did not give any alleged misinformation "explicit attention" or "specific consideration" such that it "formed part of the basis for the sentence," *see* ***Tiepelman***, 291 Wis. 2d 179, ¶14.

¶18 Saxon also argues that his sentence is the product of an erroneous exercise of discretion because the trial court did not justify the sentence's length. The State asserts Saxon has waived this issue by raising it here for the first time. We disagree. An aspect of Saxon's argument was that the court focused too heavily on the forty-year-old sibling abuse, isolated from the context of his own victimization. An erroneous exercise of discretion may occur if the trial court gives undue weight to one factor in the face of other contravening factors. ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

¶19 Sentencing rests within the trial court's sound discretion and we examine only whether the court has properly exercised its discretion. ***State v.***

Spears, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a strong public policy against interfering with that discretion. ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. We will affirm if the court's decision is based on the facts of record and in reliance on the appropriate law. ***Id.***

¶20 Here, the court considered the three primary sentencing factors, the gravity of the offense, the character of the offender and the protection of the public. ***Spears***, 227 Wis. 2d at 507. As was its right, it focused most strongly on the seriousness of the offense. *See* ***id.*** at 507-08. The court observed that Saxon's "dangerous" crime produced "so many victims." It also noted the devastating impact on the particular victim and on Saxon's daughter, individually and on their long-term friendship. The court recognized Saxon's remorse and his post-arrest diligence to address his AODA issues, but concluded that his crime required confinement, for treatment, for punishment and for protection of the community.

¶21 The trial court did not recite any particular magic words to address why it rejected probation as a sentencing option, but the amount of explanation needed for a sentencing decision varies from case to case. *See* ***State v. Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude that the court sufficiently explained how the confinement term meets the minimum amount of confinement consistent with the sentencing objectives. *See* ***id.***, ¶23. Well under the forty-year potential sentence and satisfactorily justified, we see no erroneous exercise of sentencing discretion.

¶22 As a final note, we make an observation about the trial court's comment that it "regret[ted] having not been more specific." We appreciate that it may be difficult to speak frankly about sensitive topics, especially in the presence of friends and family members who may be unaware of certain unpleasant,

perhaps shocking, information. We urge trial courts, however, to be clear and specific in their sentencing comments so as to make a proper record for review.

By the Court.—Judgment and order affirmed.

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