COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1694-CR **Cir. Ct. No. 2008CF339**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. CALLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Daniel Callan appeals a judgment convicting him of child enticement and causing a child to view sexual activity. He also appeals an order denying his postconviction motion to modify the sentences. He argues:

(1) statements he made to police should have been suppressed because he was not given his ***Miranda***[1] rights even though he was in custody; (2) the sentences were unduly harsh; and (3) new factors justify a sentence reduction. We reject these arguments and affirm the judgment and order.

¶2 Eleven-year-old John F. told police that Callan, his teacher, showed him his erect penis and touched John's penis in a school bathroom. Officers interviewed Callan in his classroom after school. Callan closed the door and the officers asked Callan to speak with them in the carpeted corner of the classroom where the only adult-sized chairs were located. They began by asking Callan about his Growth and Development curriculum and eventually asked Callan whether John ever stayed after school and whether Callan knew of any reason why John might be upset. Callan admitted touching John's penis while showing him how to masturbate. Callan ultimately wrote out and signed a statement containing the same admissions.

¶3 Even though Callan expressed surprise at being arrested after the interview, he testified that he believed he was not free to leave during the interview. He testified he believed he needed the officer's permission to get up and walk around the classroom to retrieve the books he used to teach the curriculum. He also believed he needed the officers' permission to call his chiropractor to reschedule an appointment. The circuit court concluded Callan was not in custody during the interview, and therefore his ***Miranda*** rights were not implicated.

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶4 Callan's subjective belief that he was not free to leave, even if true, does not establish that he was in custody for ***Miranda*** purposes. Custody is determined by the perspective of a reasonable person. *See* ***State v. Torkelson***, 2007 WI App 272, ¶13, 306 Wis. 2d 673, 743 N.W.2d 511. Courts consider the totality of the circumstances when determining whether a reasonable person would believe he was in custody. ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. A suspect's ability to leave, the purpose and length of questioning, the place of the interview, and the degree of restraint are circumstances that must be considered. ***Id.***

¶5 Callan was not in custody because he was not told he was under arrest, was not placed in handcuffs, was not restricted in his movements, and was interviewed for only one hour, a relatively short time. He was not moved from one location to another and there is no evidence that he was frisked. Callan asked the officers whether they wanted him to "grab" the anatomy book he used in his classroom. That is not the functional equivalent of asking permission to move about the room. Callan's statement that he felt he needed to ask permission to call his chiropractor to reschedule an appointment does not suggest that he believed he was taken into custody. Rescheduling the appointment for the next day suggests he did not believe he was in custody or would be taken into custody, consistent with the officers' observations that he appeared to be surprised when he was told he was under arrest. The transcript of the interview suggests a relaxed, threat-free conversation in the classroom that is not the equivalent of custodial restraint.

¶6 After the court denied the motion to suppress Callan's statements, he pled no contest to amended charges of child enticement and causing a child to view a sex act. The court imposed consecutive sentences totaling seventeen years' initial confinement and eighteen years' extended supervision. The court

appropriately considered the gravity of the offenses, Callan's character and the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The court considered allegations from other boys and Callan's minimization of his conduct. The court found that the public needed to be protected from Callan. Although the seventeen years' initial confinement is significantly more harsh than the recommendation contained in the presentence investigation report, it is not so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶7 In his postconviction motion, Callan alleges two new factors that require resentencing: a pyschosexual evaluation that indicates he would benefit from receiving treatment earlier because he does not have any underlying "characterlogical disorder," and the district attorney's decision not to prosecute allegations from other boys. The court denied the motion for resentencing, conceding that the evaluation and decision not to prosecute the other cases were not available to the court at the time of sentencing. However, the court found no basis to modify the sentences even if these facts are considered "new factors." The district attorney's stated reason for not prosecuting the other cases was "there is insufficient evidence to prove guilt beyond a reasonable doubt." The court stated, "I have no reason to disbelieve those boys."

¶8 We need not determine whether the psychosexual evaluation and the decision not to prosecute other offenses constitute new factors because the court properly exercised its discretion when it concluded these facts would not justify a reduced sentence. *See* ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. The court was primarily concerned with protecting the public. Callan's amenability to sex offender treatment was discussed in both the presentence report and a report prepared for Callan before sentencing by Truth in

Sentencing Investigations, LLC. Cumulative expert opinion that Callan was amenable to treatment does not compel the court to risk public safety by reducing the sentence.

¶9 Likewise, the court appropriately decided to give no weight to the district attorney's decision not to prosecute other cases because they could not be proved beyond a reasonable doubt. A sentencing court must acquire full knowledge of a defendant's character and pattern of behavior. ***State v. Frey***, 2012 WI 99, ¶45. The court is not limited to considering other offenses that can be proved beyond a reasonable doubt. Rather, the court can consider uncharged or unproved offenses, pending charges, and even charges for which the defendant has been acquitted in order to measure his character and the pattern of his behavior. ***Id.***, ¶35. The court set forth its objective, protection of the public, and reasonably explained its justification for the sentence regardless of the existence of the new factors. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 106, 585 N.W.2d 899 (Ct. App. 1998).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).