**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 28, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP1235-CR** **Cir. Ct. No. 2010CF541**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KERRY L. CHASE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kerry L. Chase appeals his judgment of conviction for second-degree sexual assault of a child under sixteen, WIS. STAT. § 948.02(2)

(2011-12),[1] for the sexual assault of his teenage daughter, whom he had repeatedly sexually assaulted since she was an infant. Chase also appeals the court's order denying his request for modification of his sentence. We affirm the judgment and the order.

¶2 Chase was charged with sexual assault of a child, *see* WIS. STAT. § 948.02(2), and repeated sexual assault of a child, *see* WIS. STAT. § 948.025(1)(a). He admitted to sexually touching his daughter beginning when she was an infant and up until she was eleven or twelve years old, including penis to vagina contact at that time. Pursuant to a plea agreement, Chase pled no contest to the sexual assault charge, and the State dismissed and read in the repeated sexual assault charge. The presentence investigation report (PSI) recommended nine to ten years' initial confinement and four years' extended supervision, and the State followed this recommendation. Defense counsel recommended six years' initial confinement followed by an unspecified extended supervision. The court sentenced Chase to twenty-five years' initial confinement and two years' extended supervision. The court later modified the sentence to twenty years' initial confinement and five years' extended supervision in order to comply with the bifurcated sentence requirement. *See* WIS. STAT. § 973.01(2)(d). Chase moved postconviction for the court to modify its sentence; the court denied the motion.

¶3 Chase argues on appeal that the court erroneously exercised its discretion because (1) it "[e]quat[ed] sexual assault with homicide for purposes of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

sentencing" and (2) it failed to explain why it did not follow the PSI recommendation.

¶4 Sentencing rests within the discretion of the circuit court, and we review a circuit court's sentence for an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court's sentencing determination will not be disturbed as long as the court considers appropriate factors and gives an explanation of its sentence that shows it has exercised its discretion on a "rational and explainable basis." ***Id.***, ¶49 (citation omitted). While there are several factors a court may consider when it sentences a defendant, the three primary factors to be considered are the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight to be given each factor is within the discretion of the circuit court. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). An appellate court will find an erroneous exercise of discretion "only where 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." ***Id.***

*Homicide Metaphor*

¶5 In addressing the severity of the offense and the need to protect the public, the circuit court stated:

> The gravity of the offense here to me sexual assaults of children are the equivalent of essentially shooting someone in cold blood. When it now involves your own child that you spawned it's the equivalent of shooting somebody in cold blood and then kicking them after you did so. To me it is the equivalent of killing someone because you're

> actually killing something within that person that was assaulted.

Chase maintains that these comments show an erroneous exercise of discretion. Chase points to ***Kennedy v. Louisiana***, 554 U.S. 407 (2008), in which the Supreme Court held that a state may not impose the death penalty for child rape because the punishment is disproportionate to the crime.

¶6 ***Kennedy***, while also about repeated sexual assault of a young daughter, does not help Chase. ***Kennedy*** was about the penalties the state may impose for a crime, not about the exercise of discretion. Indeed, the ***Kennedy*** Court acknowledged the severe, lifelong consequences a child will suffer after sexual abuse by her father:

> Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood.… Rape has a permanent psychological, emotional, and sometimes physical impact on the child. *See* C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2-24, 111-112 (1990); Finkelhor & Browne, Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization, in Handbook on Sexual Abuse of Children 55-60 (L. Walker ed. 1988). We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

***Kennedy***, 554 U.S. at 435. The circuit court's choice of the homicide metaphor reflected the lasting damage Chase has done by his repeated sexual assault of his daughter. The circuit court never suggested that Chase actually committed homicide, but rather that the crime he inflicted on his daughter was severe and permanent.

¶7 Wisconsin's maximum penalty for the crime Chase pled no contest to is forty years, *see* WIS. STAT. §§ 948.02(2), 939.50(3)(c), not death. At the plea

colloquy, the court informed Chase that it did not need to follow the plea agreement and that it could sentence Chase to the maximum forty-year sentence. The circuit court did not impose the maximum sentence, but explained that the twenty-five-year sentence it did impose was due to the gravity of Chase's offense. It was not an erroneous exercise of discretion for the court to highlight the gravity of the offense by using a homicide metaphor.

*Consideration of PSI*

¶8 We turn to Chase's argument that the circuit court failed to acknowledge the PSI recommendation and to explain why it did not follow that recommendation. Chase maintains that ***Gallion*** "encouraged" the sentencing court to use the sentencing recommendations of the parties and of the presentence report as "touchstones in their reasoning." *See* ***Gallion***, 270 Wis. 2d 535, ¶47. While Chase acknowledges that the court is not required to follow a PSI recommendation, *see* ***Ocanas***, 70 Wis. 2d at 188, he argues that the court's decision not to start with the PSI and explain where it went from there was an erroneous exercise of discretion.

¶9 The court did specifically address the PSI's findings. The court looked at the actuarial assessment and the COMPAS factors and acknowledged that, according to the report, Chase's risk of recidivism was low. However, the court also noted that information in the PSI shed light on Chase's character, indicating "the one striking thing that stood out the most to me was noted in the PSI you said I am angry and upset that she threw her dad in jail." The court noted that, as indicated in the PSI, not only had Chase sexually assaulted his daughter, but he had also humiliated her by taking sexually explicit photographs of her. In

fact, far from ignoring the PSI, as Chase suggests, the court paid attention to and used the PSI, just not the way Chase wanted it to.

¶10 The court here properly addressed the relevant factors in sentencing. Chase did not even receive the maximum sentence for his very serious felony offense considering the allegations of sexual abuse of his daughter going back to infancy. A sentence that is "'well within the limits of the maximum sentence' … is presumptively *not* unduly harsh or unconscionable." ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶11 Given the gravity of the offense, the court's sentence was not one that would "shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas***, 70 Wis. 2d at 185. The court properly exercised its discretion in sentencing Chase.

*By the Court.*—Judgment and order affirmed.

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