COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2514-CR **Cir. Ct. No. 99-CF-435**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE RASMUSSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Jesse Rasmussen appeals a judgment entered on his no contest plea convicting him of second-degree sexual contact and an order denying his motion for postconviction relief. Rasmussen argues the trial court erroneously exercised its discretion when it refused to find his sentence unduly harsh and unconscionable after his co-defendants received significantly lesser sentences.

Rasmussen also contends he was similarly situated to his co-defendants and, therefore, equal protection requires that his sentence should have been similar to theirs. We conclude the trial court properly determined several factors distinguished Rasmussen from his co-defendants and reasonably exercised its discretion when it refused to lower his sentence. Consequently, the court did not violate Rasmussen's right to equal protection. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 In the summer of 1998, Rasmussen, Benjamin Hermes, Timothy Hermes and Joseph Bain sexually assaulted a fifteen-year-old girl in Bain's home.[1] The four men approached the victim in the bathroom and indicated they wanted to have sex with her. Timothy attempted to unbutton the victim's pants, but she resisted and left the bathroom. The four men followed the victim into a bedroom in Bain's house, where she was lying on a bed. According to Bain, Rasmussen began "messing with her and feeling her and stuff and then everybody else got into it." Rasmussen and Benjamin then held the victim down by her arms. Timothy held her down by her legs and also placed a pager set to vibrating mode on her vagina over her pants.

¶3 Bain left and returned with some ice, which he began rubbing on the victim's stomach and chest. Rasmussen removed the victim's shirt and he and Benjamin placed their mouths on her breasts for approximately three minutes. The men then heard someone coming and stopped.

[1] The facts are taken from the criminal complaint, which provided the basis for Rasmussen's plea.

¶4 The men were all charged with second-degree sexual contact. Rasmussen pled no contest and the court sentenced him to eight and one-half years in prison. His co-defendants were sentenced by other judges and all received probation with jail time as a condition. The probation terms were four, five and eight years long and none of the jail time exceeded a year. Rasmussen filed a motion for postconviction relief, arguing his sentence was unduly harsh and unconscionable in light of his co-defendants' sentences. The court denied the motion, distinguishing Rasmussen's sentence by pointing to his prior criminal record, including a sexual assault with a thirteen-year-old girl, his role as the instigator of the assault, his probation revocation, his attitude toward the assault and the victim, his lack of remorse and his jail discipline record. Rasmussen appeals.

DISCUSSION

¶5 Rasmussen argues the trial court erred when it refused to find his sentence unduly harsh and unconscionable. Generally, a trial court only modifies a sentence when a new factor is presented. *See* ***State v. Ralph***, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990). The court may, however, modify a sentence without a new factor if the sentence is unduly harsh or unconscionable. ***Id.*** at 438. Under these circumstances, the trial court is allowed to review its sentencing decision for an erroneous exercise of discretion. *See* ***id.*** (citing ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979)).

¶6 We review the trial court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App 1995). A court properly exercises its discretion if it examines the relevant facts, applies a proper

standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). A sentence given to a similarly situated co-defendant is relevant to the sentencing decision, but is not controlling. ***Geibel***, 198 Wis. 2d at 220-21. The defendant bears the burden of proving the court erroneously exercised its sentencing discretion. *See* ***State v. Perez***, 170 Wis. 2d 130, 142, 487 N.W.2d 630 (Ct. App. 1992).

¶7 Rasmussen also argues equal protection requires he be given a sentence similar to his co-defendants. Equal protection under the Fourteenth Amendment requires substantially the same sentence for substantially the same case histories. *See* ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). Equal protection does not preclude different sentences for persons convicted of the same crime based on their individual culpability and need for rehabilitation. ***Id.*** A finding that there has been a denial of equal protection must rest on a conclusion that the sentence disparity was arbitrary or based upon improper sentencing considerations, and insofar as length of the sentence is within the statutory maximum, there can be no denial of equal protection unless there has been an unreasonable exercise of discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

¶8 Rasmussen compares himself to Timothy Hermes and Bain because they also pled no contest to second-degree sexual contact and had prior criminal probation histories. He claims the only difference is the role each played in the crime. In that respect, Rasmussen argues he is most like Benjamin Hermes because they both held the victim's arms and placed their mouths on her breasts. He notes that Benjamin was, according to the district attorney, the "least culpable" defendant. Bain and Timothy, Rasmussen argues, were much more culpable in the

assault because Bain got the ice and removed the victim's shirt and Timothy placed the pager over her pants and also attempted to remove her pants.

¶9 Rasmussen's argument obscures several of the factors the trial court considered when it determined Rasmussen was not similarly situated to his co-defendants. The court noted Rasmussen was the instigator of the assault, not just a participant. In addition, the court pointed to Rasmussen's criminal history. At the time of sentencing, Rasmussen had recently been sentenced for sexually assaulting a thirteen-year-old girl and also had disorderly conduct convictions. While both Timothy and Bain had prior records, neither had a felony conviction. Further, Rasmussen's probation was revoked and he had been uncooperative with his agent, missing several meetings. The other defendants had been more successful in their probation. Also, Rasmussen had been involved in two fights in jail while awaiting sentencing. Finally, the court noted Rasmussen had recently called the victim a "slut" and showed no remorse for his crime. In contrast, Bain had cooperated with the investigation, taken responsibility for his actions, and apologized to the victim. Timothy had also expressed remorse for the assault.

¶10 We conclude the trial court's refusal to reduce Rasmussen's sentence reflects a reasonable exercise of discretion. Rasmussen had a felony conviction, unlike his co-defendants, and was not responding to probation. Further, he expressed no remorse for his crime. At sentencing, the court noted Rasmussen's history of sexual assaults showed he preyed on weak and defenseless victims. The court found he needed to be rehabilitated and punished, and added that the public would be protected from his further offenses if he was placed in prison. The record does not reflect these same concerns exist for Rasmussen's co-defendants. The trial court reasonably exercised its discretion when it refused to find Rasmussen's sentence unduly harsh and unconscionable.

¶11 Our conclusion that the court did not erroneously exercise its discretion when it refused to lower Rasmussen's sentence also leads us to conclude the court did not violate equal protection. Rasmussen does not allege any erroneous exercise of sentencing discretion by the court other than failing to find his sentence harsh and unconscionable. We have determined the court did not erroneously exercise its discretion when it made this ruling and, therefore, it did not violate equal protection. *See* ***Ocanas***, 70 Wis. 2d at 187.

By the Court.—Judgment and order affirmed.

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