COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2415-CR **Cir. Ct. No. 01CF000445**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. KUSLITS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. John Kuslits appeals from a judgment convicting him on seven counts of second-degree sexual assault of a child, and two counts of fourth-degree sexual assault of a child. He challenges his sentence as an erroneous exercise of discretion, and a violation of due process and equal protection. We affirm.

¶2 The complaint alleged that on various occasions Kuslits fondled, masturbated and performed oral sex on two boys, aged thirteen and fourteen. Kuslits entered no contest pleas to all nine counts of the complaint and the information, without benefit of a plea bargain.

¶3 At sentencing Kuslits argued the following mitigating factors: (1) he accepted full responsibility from the outset of the prosecution, he cooperated with police, waived his preliminary examination, and entered pleas to all charges without any concessions from the state; (2) he was the victim of prolonged sexual abuse as a child; (3) he had voluntarily entered sexual offender treatment and was showing signs of rehabilitation; (4) one expert considered him a low to moderate risk of reoffending and a good candidate for community based treatment; (5) he had no criminal record; (6) he did not force himself on his victims; and (7) he had friends and family in the community willing to provide him support during his rehabilitation.

¶4 Aggravating factors included the fact that Kuslits, then fifty-one, admitted sexual relationships with twelve or more under-age boys, and one under-age girl, beginning at the age of twenty-two, and the psychological problems one of his victims was experiencing, as reported by the victim's mother. She asked for the equivalent of a life sentence for Kuslits. The mother of the other victim, who was in a close relationship with Kuslits, asked for probation. She told the court that her son was not particularly damaged by his sexual contacts with Kuslits.

¶5 In sentencing Kuslits, the court primarily considered the very serious nature of the crimes, which the trial court proclaimed to be probably worse than

shooting the victims.[1] The court further considered the life-long psychological and adjustment problems the victims of such crimes face, and the need to protect the public from any subsequent sexual assaults on juveniles. The court also noted the betrayal of trust and manipulation necessarily involved in the offenses, and Kuslits' failure to seek treatment until he was arrested, although his assaults on children had begun almost thirty years before. The court acknowledged that Kuslits may have a relatively low risk of reoffending, but discounted that opinion because "even a flicker of a possibility [of reoffending] is so overbearing" as to be unacceptable. The court expressly considered other mitigating factors, but ultimately concluded that "the scale leans toward punishment." The court stated that it was not considering any of the sexual assaults on juveniles that Kuslits may have committed in the past, and was basing the sentence solely on the crimes committed in this case.

¶6 The trial court sentenced Kuslits to consecutive and concurrent terms totaling thirty years of initial confinement and fifteen years of extended supervision, such that he will remain in prison until he is at least eighty-one, and will remain under supervision until he is ninety-six years old. The sentence substantially exceeded the State's recommendation and the recommendation made in the presentence investigation report. In this appeal Kuslits contends that the sentence was an erroneous exercise of discretion because it is excessive and

[1] The court stated:

> Nobody got stabbed here. Nobody got shot here. But you know something, what happened here is probably worse than going to the emergency room and having somebody remove a .22 caliber round or a .357 round or a .45 caliber round from somebody. Because a person's pride, a person's integrity, a person's heart, a person's very fiber quite frankly has been compromised here."

because the trial court did not provide adequate reasons for it. He also contends that imposing sentence under truth-in-sentencing (TIS), but without guidelines, violated his due process and equal protection rights. Before deciding the appeal we ordered, and have received, supplemental briefs on the effect ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, might have on our decision.

¶7 In ***Gallion*** the supreme court reiterated that under TIS, sentencing remains within the trial court's discretion, and continues to receive a strong presumption of reasonableness on review. ***Id.***, ¶¶17-18. As before, the "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶23 (citation omitted). As before, "the court, by reference to the relevant facts and factors, [must] explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for proper exercise of discretion." ***Id.***, ¶46 (citation omitted). In short, "while ***Gallion*** revitalizes sentencing jurisprudence, it does not make any momentous changes. The weight to be given each factor is still a determination particularly within the wide discretion of the sentencing judge." ***State v. Stenzel***, No. 03-2974-CR, slip op. at ¶9 (Wis. Ct. App. August 11, 2004).

¶8 Kuslits first contends that the sentence was excessive. He argues that the trial court imposed what is, for all intents and purposes, a life sentence, without adequate or fair consideration of his numerous mitigating factors. However, the sentence is a life sentence, practically speaking, only because of Kuslits' age, and it is well within the trial court's discretion to discount that fact in view of the gravity of his offenses. *See* ***id***., ¶¶13-20. It was also well within the trial court's discretion to discount the other mitigating factors, in view of the

seriousness of the offense and what the court deemed an unacceptable risk of reoffending. *See* ***id***., ¶17. We will find a sentence excessive only when it is so excessive and unusual, and so disproportionate to the offenses committed, as to shock public sentiment and violate the judgment of reasonable people. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Here, with repeated offenses against two juvenile victims, a history of offenses against other juvenile victims spanning almost thirty years, and a measurable risk of reoffending, the sentences do not shock public sentiment or violate the judgment of reasonable people even if Kuslits remains in prison the rest of his life.

¶9 Kuslits next contends that the trial court did not provide adequate reasons for the sentence imposed. Again, we disagree. The court made clear that it considered sexual assaults on juveniles to be among the most serious crimes, using words such as "heinous" and "vicious," to describe them. The court also declared its belief that the victims of such assaults never recover from them, and that the public must be protected from further assaults if there is the slightest chance of reoffending. The court acknowledged the mitigating factors and explained why the aggravating factors took precedence. In short, the trial court went beyond the disfavored "magic words" approach, and satisfied the ***Gallion*** criterion of an express, on the record explanation for the particular sentence. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶49-50.

¶10 Finally, Kuslits contends that the sentences violated his right to due process and equal protection because he was sentenced without the benefit of the discretionary sentencing guidelines now in effect for truth-in-sentencing cases. *See* WIS. STAT. §§ 973.017(2)(a) and 973.30. This court has held that the subsequent implementation of sentencing guidelines is not a new factor justifying

resentencing, nor is it the basis for a due process and equal protection claim. *See* ***State v. Smart***, 2002 WI App 240, ¶¶13-14, 257 Wis. 2d 713, 652 N.W.2d 429.

By the Court.—Judgment affirmed.

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