COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP467-CR **Cir. Ct. No. 2003CF1786**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS PETER IKELER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Douglas Peter Ikeler appeals from a judgment of conviction for sexually assaulting a child, and from a postconviction order denying

his sentence modification motion. The issue is whether the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence in the context of Ikeler's mitigating factors. We conclude that Ikeler's sentence was not unduly harsh, and that the trial court considered Ikeler's mitigating circumstances, and properly exercised its sentencing discretion. Therefore, we affirm.

¶2 Ikeler was charged with sexually assaulting his seven-year-old daughter. Incident to a plea bargain, the State agreed to not charge Ikeler with two additional sexual assaults of this same daughter. The prosecutor would advise the trial court however, that Ikeler had engaged in similar conduct with this victim on two other occasions.

¶3 Ikeler pled guilty to first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2001-02).[1] The prosecutor recommended a twenty-year sentence, consecutive to any other sentence, comprised of a range of seven-to-ten years of initial confinement, and a range of ten-to-thirteen years of extended supervision. The presentence investigator recommended a range of five-to-eight years of initial confinement, and a range of three-to-five years of extended supervision. Defense counsel recommended a three-year period of initial confinement, and did not recommend a specific term of extended supervision. The trial court imposed a seventeen-year sentence to run consecutive to any other sentence, comprised of seven- and ten-year respective periods of confinement and extended supervision. Ikeler sought sentence modification, which the trial court summarily denied.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 On appeal, Ikeler seeks sentence modification, claiming that the trial court erroneously exercised its discretion by failing to consider his mitigating circumstances, and imposing an unduly harsh sentence.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). "[Giving] too much weight to one factor in the face of other contravening considerations" constitutes an erroneous exercise of discretion. ***State v. Krueger***, 119 Wis. 2d 327, 337-38, 351 N.W.2d 738 (Ct. App. 1984). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28.

¶6 The trial court considered the primary sentencing factors. It characterized the sexual assault of one's daughter as "one of the most horrific offenses that one can be involved in." It explained the "extremely destructive" nature of this offense and the probability that the victim's "emotional scars … will never be able to heal. Hopefully to some extent they will, but these types of cases cause significant emotional and mental health issues for victims for the remainder of their lives." The trial court considered Ikeler's character, noting that his record

was "relatively minimal" and that his adult record involved offenses that were "not the worst … in the world." It even characterized a juvenile arson disposition as "mischief gotten out of hand." It was concerned that Ikeler had inappropriate sexual relations with his stepsister, but afforded him considerable credit for his cooperation and pleading guilty with alacrity in this case to spare the victim and her mother from testifying against him. The trial court explained why a prison sentence was warranted, not only to protect the public, but also to allow Ikeler to obtain treatment to avoid a recurrence of sexually related criminal behavior. The trial court properly exercised its discretion and imposed a reasoned and reasonable sentence.

¶7 Ikeler contends that the trial court failed to "properly" consider certain mitigating circumstances, such as his acceptance of responsibility and his remorsefulness. Although the trial court did not again consider these mitigating factors in its postconviction order, it was not obliged to do so because it fully considered them when it originally imposed sentence. The trial court credited Ikeler with accepting responsibility, and believed that his "extreme[] remorse[]" was sincere, acknowledging that Ikeler was unlike many defendants who blame others or attempt to minimize their conduct. The record belies Ikeler's criticism that the trial court failed to "properly" consider mitigating circumstances.

¶8 Ikeler also claimed that the trial court imposed an unduly harsh sentence. A sentence is unduly harsh when it 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We review an allegedly harsh and excessive sentence for an erroneous exercise of

discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶9 Ikeler contended that the trial court failed to "properly" consider his mitigating circumstances and that this is one of the reasons why his sentence was unduly harsh. As previously addressed, the trial court expressly considered Ikeler's acceptance of responsibility and deep remorse as mitigating circumstances. There is also an ample basis to consider Ikeler's admitted sexual assaults of this same daughter, which were not charged. Whether the trial court considered these as uncharged offenses, or as evidence that the sexual assault conviction was not an isolated incident, or at all, neither the law nor the facts compel the conclusion that the sentence was unduly harsh.

¶10 Another basis for Ikeler's unduly harsh contention is that his sentence was "much closer to the State's recommendation than to the recommendation of defense counsel." The trial court is not obliged to follow any sentencing recommendation. *See* ***State v. Johnson***, 158 Wis. 2d 458, 464-65, 463 N.W.2d 352 (Ct. App. 1990). Ikeler has not shown a valid basis for modification simply because his sentence was within the ranges recommended by the prosecutor, rather than the three-year period of confinement recommended by defense counsel.

¶11 Ikeler has not shown that his sentence was predicated on some unreasonable or unjustifiable basis, only that the trial court exercised its discretion differently than defense counsel had suggested. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not

whether it could have been exercised differently). As previously addressed, we conclude that the trial court properly exercised its discretion.

¶12 First-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) is a Class B felony, authorizing imposition of a maximum total sentence of sixty years. *See* WIS. STAT. § 939.50(3)(b). A seventeen-year sentence, comprised of a seven-year confinement period, for sexually assaulting one's seven-year-old daughter does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances," and thus, is not unduly harsh. *See* ***Ocanas***, 70 Wis. 2d at 185.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).