

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2445-CR

Cir. Ct. No. II

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS J. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Curtis J. Schmidt has appealed from a judgment convicting him of five counts of possession of child pornography in violation of

WIS. STAT. § 948.12(1m) (2005-06),¹ one count of exposing a child to harmful materials in violation of WIS. STAT. § 948.11(2)(a), and one count of sexual exploitation of a child in violation of WIS. STAT. § 948.05(1m). In exchange for Schmidt's pleas of guilty to the possession of child pornography charges and his pleas of no contest to the charges under §§ 948.05(1m) and 948.11(2)(a), fifteen additional counts of possession of child pornography were dismissed and read in for purposes of sentencing.

¶2 The trial court sentenced Schmidt to consecutive sentences totaling fifteen years of initial confinement and seventeen years of extended supervision, eighteen months less than the total maximum sentences possible for the convictions. Schmidt moved for sentence modification and the trial court denied the motion. We affirm the judgment and the order denying sentence modification.

¶3 The issues on appeal relate solely to sentencing. Schmidt contends that the trial court erroneously exercised its discretion by considering disputed, unproven, and inaccurate information at sentencing, and by giving undue weight to past undesirable conduct while failing to consider positive factors. He also contends that the trial court failed to explain why lengthy consecutive sentences were necessary and appropriate. We reject Schmidt's arguments.

¶4 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

court follows a strong and consistent policy of refraining from interference with the trial court's decision. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied*, 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. *Id.*

¶5 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.* The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Ziegler*, 289 Wis. 2d 594, ¶23. Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; the length of pretrial detention; and the rights of the public. *Id.* The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. *Id.*

¶6 An erroneous exercise of discretion may occur if the trial court gives undue weight to one factor in the face of other contravening factors. *Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975). However, in general, the

weight to be given each of the sentencing factors is within the wide discretion of the trial court. *Stenzel*, 276 Wis. 2d 224, ¶9.

¶7 Schmidt's contentions that the trial court gave undue weight to his past undesirable conduct and considered disputed and inaccurate information are interrelated. Essentially, he objects to the trial court's consideration of information about his lengthy history of misconduct related to sexual matters.

¶8 A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate, and that the trial court actually relied on the inaccurate information. *Id.*, ¶31. Whether a defendant has been denied his right to be sentenced on the basis of accurate information presents a constitutional issue that this court reviews de novo. *Id.*, ¶9.

¶9 Based upon our review of the record, we are not persuaded that the trial court considered inaccurate or disputed information at sentencing.² In contrast, the record reveals that the trial court took care to protect Schmidt's right to be sentenced based upon true and accurate information.

¶10 In reaching this conclusion, we note that prior to sentencing, Schmidt moved the trial court to disregard letters written by his brother, his

² The State acknowledges that a defendant has a due process right to be sentenced on the basis of accurate information, but contends that this does not mean that the trial court may consider only undisputed information. We need not discuss this argument because, as set forth in this decision, the trial court limited its consideration to information conceded by Schmidt.

brother's wife, and a third person, and to prohibit those individuals from speaking at sentencing. At a hearing on the motion, the trial court recognized that problems might arise related to proving and rebutting the allegations made in the letters or in oral statements discussing those allegations. It stated that it would therefore limit its consideration of background information to information as set forth in the PSI.

¶11 At the commencement of sentencing, the trial court permitted Schmidt to make all of the corrections he requested to the PSI, encompassing ten pages of the twenty-five page report. Subsequently, when discussing allegations regarding sexual contact between Schmidt and his brothers, the trial court noted Schmidt's denial and stated, "I'll take him at his word for that."

¶12 On appeal, the only specific inaccuracy alleged by Schmidt relates to his contact with two nephews. Schmidt contends that while he denied all but one instance of sexual contact with his nephew, Boyd, the trial court relied on disputed information indicating that it happened more than once. In support of this argument, Schmidt cites the following statement by the trial court:

[Schmidt] also, at a minimum, engaged in sexual contact with two nephews. According to him it didn't occur until they were 17. Others find—I think Boyd said it started when he was nine, occurred about ten times. Reality is that Boyd was still only 17 when the incident occurred involving him and Mr. Schmidt. The complete disregard of what was going on around them was incredible. It appears that this first sexual contact between Boyd and Mr. Schmidt occurred while the rest of the family was celebrating Christmas, and it happened in a bathroom.

¶13 Nothing in the record supports Schmidt's contention that the trial court's statement contained inaccuracies. In denying Schmidt's motion for sentence modification, the trial court stated that it relied on information that was essentially conceded by Schmidt and his counsel and that, "[a]s far as the

information that I relied on with Boyd and John Schmidt, I took Mr. Schmidt's version at face value."³ The trial court's statement is supported by the record. As set forth in the PSI as corrected by Schmidt, Schmidt admitted to engaging in sexual activity with Boyd on more than one occasion beginning on Christmas Eve when Boyd was seventeen. Similarly, in the PSI, Schmidt admitted to one episode of sexual touching of John when John was seventeen and Schmidt believed he was sleeping. No basis therefore exists to conclude that the trial court relied on inaccurate or disputed information when it considered that, at a minimum, Schmidt had engaged in sexual contact with John and Boyd when they reached seventeen years old, and engaged in more than one episode of sexual contact with Boyd.

¶14 Schmidt's next argument is that the trial court placed too much weight on his past undesirable conduct and failed to consider contravening considerations. Nothing in the record supports this argument. As noted above, the trial court was required to consider the gravity of the offenses, the character of the defendant, and the protection of the public. A defendant's past history of undesirable conduct is a relevant factor for a trial court to consider in evaluating the defendant's character and rehabilitative needs, and the public's need for protection from him.

¶15 In assessing Schmidt's character, the trial court considered that he had no prior criminal record, was part of a long-established family run business, had raised a family that remained supportive of him, and had a lengthy history of

³ When this court reviews a sentence, we look to the entire record, including the reasons given by the trial court for denying postconviction relief. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

positive community involvement. It considered that he had cooperated with authorities when these charges arose, thus saving E.A.G. the stress of a trial. However, it also considered that he had a lengthy history as a consumer of child pornography, as evidenced by the current charges and material retrieved from his former home, including child pornography and photographs of the genitals of young men taken by Schmidt in his role as a funeral home operator in the 1960s and 1970s. It considered an incident in a men's room in 1969 or 1970 that led to a citation, and another incident about ten years later in a viewing room of an adult book store for which Schmidt paid a fine. While these incidents did not lead to criminal charges, they were conceded by Schmidt. Based on his conduct and activities, the trial court reasonably concluded that Schmidt should have realized he had serious issues that he needed to confront, but he did not confront them.

¶16 In evaluating Schmidt's past history of undesirable behavior, the trial court also considered the behavior with his nephews that he conceded in the PSI. Based on his lengthy history of aberrant behavior, the trial court concluded that Schmidt should have recognized that he needed counseling much sooner. However, instead of dealing with his problems, he engaged in the conduct for which he was convicted. In the trial court's view, Schmidt knew that what he was doing was wrong but minimized responsibility for his actions. Based upon these factors, the trial court concluded that Schmidt had very serious issues and that he posed a substantial risk of reoffending. It concluded that he had enormous rehabilitative needs that could not be met in the community and that the public needed to be protected from him.

¶17 Nothing in the record renders the trial court's conclusions unreasonable or provides a basis for this court to disturb its determination that Schmidt's history demonstrated that he posed a risk to the public that necessitated

lengthy confinement, regardless of his positive attributes. The mere fact that the trial court failed to give the positive portions of Schmidt's history the weight that he wished does not constitute an erroneous exercise of discretion. *See Stenzel*, 276 Wis. 2d 224, ¶16.

¶18 In reaching this conclusion, we also reject Schmidt's argument that the trial court erroneously exercised its discretion by treating his community involvement and social standing as a negative factor rather than a positive attribute. A particular factor or characteristic can be construed as a mitigating or aggravating factor depending upon the particular defendant and case. *State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). While acknowledging Schmidt's contributions to the community, the trial court also noted that his ability to move in and out of accepted social settings without drawing negative attention to himself was indicative of the risk he posed to the community. Because the trial court could reasonably conclude that Schmidt's standing in the community could deflect suspicion and help conceal the danger he posed to the community, it was a relevant factor that the trial court was entitled to consider at sentencing.

¶19 Schmidt's final argument is that the trial court erroneously exercised its discretion by imposing maximum consecutive sentences on six of the seven counts for which he was convicted, and a near maximum consecutive sentence on the remaining count, without providing an explanation of why consecutive sentences were warranted. Again, we conclude that the record supports the trial court's exercise of discretion.

¶20 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.” *Gallion*, 270 Wis. 2d 535, ¶23. However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, “minimum” does not mean “exiguously minimal,” or insufficient to accomplish the goals of the criminal justice system. *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483.

¶21 When a defendant is convicted of more than one offense, the trial court may impose as many sentences as there are convictions and may provide that each sentence is consecutive or concurrent. WIS. STAT. § 973.15(2)(a). Whether to make sentences consecutive, as opposed to concurrent, is committed to the sound discretion of the trial court. *Ramuta*, 261 Wis. 2d 784, ¶24. In imposing consecutive sentences, the trial court must provide sufficient justification for the sentences and apply the same factors concerning the length of a sentence to its determination of whether the sentences should be served concurrently or consecutively. *State v. Hall*, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41.

¶22 In sentencing Schmidt, the trial court placed great weight on the seriousness of the offenses. It discussed the significant impact of child pornography on the children who appear in it and noted that such pornography exists only because people like Schmidt provide a market for it. It found that Schmidt’s conduct toward E.A.G. was reprehensible, concluding that Schmidt had clearly established a relationship with E.A.G. despite his youth and had attempted to tangentially involve E.A.G.’s friend. While acknowledging that the psychological assessment submitted by Dr. Charles Lodl on Schmidt’s behalf indicated that, with intervention and specialized sex offender treatment, Schmidt presented a low to moderate risk of reoffending, the trial court concluded that the

seriousness of the offenses, the risk posed by Schmidt to the community, and his rehabilitative needs necessitated lengthy confinement. In imposing sentence, it also appropriately considered the deterrence of others, noting that probation with county jail time would diminish the severity of the offenses and send the wrong message to others who might consider engaging in similar conduct.

¶23 In light of these factors, the trial court concluded that consecutive sentences totaling fifteen years of initial confinement and seventeen years of extended supervision were warranted. It reiterated these factors in denying postconviction relief, noting Schmidt's deep involvement in child pornography through the internet and adding that the child pornography possessed by Schmidt was more of a collection than something acquired through curiosity, and was very abusive of young children. It also reiterated its conclusion that Schmidt posed a significant danger to the community, its concern about the seriousness of the conduct involving E.A.G., and its goal of deterrence. It stated that these factors formed the basis for its conclusion that consecutive sentences were warranted for each of the violations.

¶24 Because the trial court engaged in a thorough and meaningful sentencing analysis, no basis exists to conclude that it erroneously exercised its discretion in imposing consecutive and lengthy sentences.⁴ The trial court explained at great length why it was imposing the aggregate sentences it did, and

⁴ In challenging the trial court's decision to impose consecutive sentences, Schmidt cites to American Bar Association (ABA) standards for imposing consecutive sentences. However, the Wisconsin courts have repeatedly refused to adopt the ABA guidelines as a limitation on the trial court's authority to impose consecutive sentences. *See, e.g., State v. Paske*, 163 Wis. 2d 52, 66-67, 471 N.W.2d 55 (1991).

considered appropriate sentencing factors.⁵ Nothing more was required. *See Ramuta*, 261 Wis. 2d 784, ¶¶25-26.

By the Court.—Judgment and order affirmed.

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

⁵ At sentencing, the trial court acknowledged that Schmidt was sixty-eight years old and that the sentence it imposed was harsh and would be very difficult for him. However, it reiterated its conclusion that the circumstances called for a long period of incarceration and the removal of Schmidt “from circulation.” The trial court was not required to find that Schmidt’s age compelled a shorter sentence. *See Stenzel*, 276 Wis. 2d 224, ¶¶16-17.

