COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1901-CR **Cir. Ct. No. 2007CF132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. JENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Jensen appeals a judgment, entered upon his guilty pleas, convicting him of twenty-seven counts of possessing child

pornography contrary to WIS. STAT. § 948.12(1m) (2005-06).[1] Jensen argues the trial court erroneously exercised its sentencing discretion and erred by denying his motion for postconviction relief. We reject Jensen's arguments and affirm the judgment and order.

BACKGROUND

¶2 An Information charged Jensen with fifty-three counts of possessing child pornography. In exchange for his guilty pleas to twenty-seven of the charged offenses, the State agreed to dismiss and read in the remaining counts and recommend consecutive sentences consisting of one and one-half years' initial confinement and two years' extended supervision on seven of the counts, for a total of ten and one-half years' initial confinement and fourteen years' extended supervision. With respect to the other twenty counts, the State agreed to recommend withheld sentences with three years' probation on each count, concurrent with each other, but consecutive to the prison sentences. Jensen was convicted upon his guilty pleas and a presentence investigation report was ordered. The court ultimately imposed a sentence consistent with the State's recommendation. Jensen's postconviction motion for resentencing was denied and this appeal follows.

DISCUSSION

¶3 Jensen argues the trial court erroneously exercised its sentencing discretion. Sentencing lies within the trial court's discretion. *See* ***State v. Echols***,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the trial court's sentencing discretion, and sentences are afforded the presumption that the trial court acted reasonably. *See* ***id.*** at 681-82. Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983).

¶4 The sentence imposed should be the minimum amount of confinement that is consistent with three primary sentencing factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶23, 59-61, 270 Wis. 2d 535, 678 N.W.2d 197. The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When imposing sentence, the court must "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Gallion***, 270 Wis. 2d 535, ¶46. Sentencing objectives "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Although the court should explain the reasons for the particular sentence imposed, "[h]ow much explanation is necessary … will vary from case to case." ***Id.***, ¶39.

¶5 Finally, when a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶6 Here, the court summarized Jensen's offenses and the exposure he faced because of them. On each of the twenty-seven counts, Jensen faced a maximum term of three and one-half years' imprisonment.[2] The court acknowledged the various factors it considered in fashioning a sentence, including the PSI, counsel's respective arguments, the statements of Jensen and his supporters, the primary sentencing factors, and the sentencing objectives of rehabilitation and deterrence. After acknowledging these factors, the court examined information associated with them as either aggravating or mitigating Jensen's case.

¶7 The court noted that Jensen had been employed in the truck driving industry and had the support of his family. On the other hand, it recognized Jensen had two prior misdemeanor convictions (for unrelated offenses) and had repeatedly committed this serious offense despite realizing it was wrong. With respect to Jensen's character, the court acknowledged that other than his attraction to pornography involving children, there did not appear to be problems in any other area of Jensen's life. Noting that the depicted victims were "real live

[2] At the time Jensen committed these May 2005 offenses, possession of child pornography was a Class I felony. The legislature has since changed the classification to a Class D felony.

children," the court also indicated its intent to protect the public by making "sure that somebody who views these pictures would not act on them given the chance."

¶8 With respect to rehabilitation, the court expressed skepticism that Jensen's deviant sexual interest could be changed, stating:

> It is suggested that [Jensen] is a good candidate for rehabilitation because he has been cooperative throughout these proceedings. And I am again no expert. But what little training I have had in these kind of things, it's not easy to change a person's preference for children, seeing children in this manner. So counseling—[h]e is willing to take counseling, but whether it will have an effect—Maybe he will learn how to deal with it, but I don't think it will go away. That is my understanding of people who have these problems.

Turning to deterrence, the court emphasized:

> Whatever I do here today, I want to deter this man and any others who might be tempted—or women for that matter—to not do it. We certainly don't want these children exploited in the first instance and we don't want people—[i]t can't be good for a person to be viewing this kind of material. And there is always going to be the question of whether they would act out on it given the chance.

Acknowledging all of the sentencing recommendations, the court ultimately followed the State's recommendation, concluding it was "appropriate." Noting the existence of guidelines, the court expressed its belief that although they give the court an idea of what other courts might impose, "every judge has to make their own decision."

¶9 Jensen challenges his sentence on grounds the court erroneously exercised its discretion. Citing ***Gallion***, Jensen contends the court mentioned only some of the factors relevant to sentencing, and specifically emphasizes what he believes were three deficiencies in the court's analysis. First, Jensen claims the

court did not make any findings regarding whether he needed close rehabilitative control. ***Gallion***, however, does not require the sentencing court to make specific findings regarding a defendant's need for close rehabilitative control. Rather, it merely recognizes that a court may consider such a factor in the exercise of its discretion. ***Gallion***, 270 Wis. 2d 535, ¶43 n.11. Here, the court addressed the issue of Jensen's rehabilitation more generally, expressing its skepticism that his deviant sexual interest could be altered.

¶10 Second, Jensen contends the court failed to make any finding that he posed a danger to public safety. We disagree. The court observed, "[W]hat we're trying to do here is to eliminate the source of child pornography which is the exploitation of young children and using them as sex objects." As noted above, the court further indicated an intent to protect the public by making "sure that somebody who views these pictures would not act on them given the chance." These comments exhibit recognition by the court that Jensen's behavior in obtaining the pornography helped fuel an industry that contributes to the abuse and exploitation of children.

¶11 Third, Jensen argues the court failed to articulate why the initial confinement imposed was necessary for the objective of deterrence, and further failed to explain how it balanced deterrence with other factors to be considered at sentencing. ***Gallion***, however, does not require a court to explain its rationale for the amount of confinement imposed with any greater specificity than was done here. *See* ***id.***, ¶¶54-55. The ***Gallion*** court recognized that "the exercise of discretion does not lend itself to mathematical precision." ***Id.***, ¶49. There is no expectation for courts "to explain the difference between sentences of 15 and 17 years." ***Id.*** Rather, the sentencing court must provide an explanation for the general range of sentence. ***Id.*** Here, Jensen's conduct, resulting in twenty-seven

convictions and twenty-six read-ins, justified the court's adoption of the State's recommendation in order to deter Jensen and others from similar behavior in the future.

¶12 Citing both the bifurcated sentence recommendation grid of the Department of Corrections and the federal sentencing guidelines, Jensen nevertheless argues his sentence was unduly harsh. We are not persuaded. Consistent with ***Gallion***, the court here delineated the primary sentencing factors and sentencing objectives under the particular facts of Jensen's case, emphasizing deterrence as the dominating objective justifying the sentence imposed. Out of a maximum possible sentence of ninety-four and one-half years' imprisonment, Jensen received just over one-quarter of that time. "A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶13 Further, the cited sentencing guidelines do not alter this analysis. With respect to the DOC's bifurcated sentence recommendation grid, Jensen contends "he would fall into a square on the grid with, at most, one year of initial confinement" for his Class I felony. This claim, however, ignores the fact that Jensen was not convicted of just one Class I felony—rather, he was convicted of twenty-seven Class I felonies. Moreover, despite Jensen's emphasis on the federal sentencing guidelines, Wisconsin courts "are not bound by a sentencing rubric applicable only to the federal courts." ***State v. Kaczynski***, 2002 WI App 276, ¶11 n.1, 258 Wis. 2d 653, 654 N.W.2d 300.

¶14 Finally, Jensen challenges the denial of his postconviction motion for resentencing. Jensen argues that at the postconviction motion hearing, the court failed to provide a convincing rationale for the sentence imposed. We are

not concerned, however, with whether the court adequately explained its sentencing rationale during postconviction proceedings but, rather, whether its rationale at the original sentencing hearing supports the sentence imposed. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105-06, 585 N.W.2d 899 (Ct. App. 1998). Because the trial court considered relevant factors and imposed a sentence authorized by law, we conclude it properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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