COURT OF APPEALS DECISION DATED AND FILED

February 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2012AP285-CR

Cir. Ct. No. 2009CF221

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICAH D. STERN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

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

¶1 PER CURIAM. Micah D. Stern appeals from a judgment convicting him of using a computer to facilitate a child sex crime and from an

order denying his postconviction motion. We reject his challenges to the relevant jury instruction and the severity of his sentence and affirm.

¶2 The charges against Stern stemmed from a personal ad he posted in the "Men Seeking Men" category of an internet bulletin board service. "Peter," one of the responders, actually was a police investigator posing as a fourteen-year-old boy. The ensuing e-mail and Myspace correspondence with Stern culminated in an arrangement to meet in the restroom of a local McDonald's. Police staked out the location and arrested Stern. The jury did not buy Stern's claim that he had intended to find an adult male and knew "Peter" was over eighteen because the chat language seemed "contrived" and the photographs "Peter" posted looked dated, and found him guilty of violating WIS. STAT. § 948.075(1r) (2011-12).[1] The trial court denied Stern's postconviction motion challenging the jury instruction and his sentence. This appeal followed.

¶3 Stern first contends that the jury instruction permits a finding of guilt without proof of all of the statutory elements. He acknowledges that his failure to object to the jury instruction at trial has waived his right to direct review. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 408-09, 424 N.W.2d 672 (1988). He thus asks that we exercise our discretionary reversal power because the real controversy was not tried, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 22, 456 N.W.2d 797 (1990), and contends that the failure to object was due to ineffective assistance of counsel, *see* ***Schumacher***, 144 Wis. 2d at 408 n.14.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶4 Stern contends that the jury instruction permitted his conviction upon a mere "reason to believe" that "Peter" was not yet sixteen. The instruction is defective, he asserts, because the "intent portion" of WIS. STAT. § 948.075(1r) requires proof beyond a reasonable doubt that the defendant *actually* believed the target individual was underage because he or she must intend to violate a statute criminalizing certain sexual offenses against children. We disagree.

¶5 WISCONSIN STAT. § 948.075(1r) provides:

> Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of [WIS. STAT. §] 948.02 (1) or (2) is guilty of a Class C felony.

¶6 In nearly identical language, the jury was instructed that the State had to prove beyond a reasonable doubt that Stern used a computerized communication system to communicate with an individual; believed or had reason to believe that the individual was under the age of sixteen; used a computerized communication system to communicate with the individual with intent to have sexual contact or intercourse with the individual; and did an act, in addition to using a computerized communication system, to carry out the intent to have sexual contact or intercourse. *See* WIS JI—CRIMINAL 2135.

¶7 In construing a statute, we look first to its language. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If, when given its common, ordinary, and accepted meaning, the statute is clear and unambiguous, we stop the inquiry. *See* ***id.*** Simple disagreement about the meaning is insufficient. ***Id.***, ¶47. Rather, the test for ambiguity is whether it

"reasonably gives rise to different meanings." ***Id.*** (citations omitted; emphasis omitted).

¶8 WISCONSIN STAT. § 948.075(1r) is plain. It is violated when the actor either believes or has reason to believe the individual is underage. Stern's proffered construction is not reasonable because it would require reading "has reason to believe" out of the statute. Rewriting a statute is for the legislature, not this court. The jury instruction parallels the statute, and the jury was convinced beyond a reasonable doubt that Stern had reason to believe "Peter" was fourteen. Stern has not persuaded us that the instruction prevented the real controversy from being fully tried. We see no basis to exercise our discretionary reversal power.

¶9 Stern's ineffectiveness claim therefore also must fail. To establish ineffective assistance of counsel a defendant must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's failure to object to a jury instruction which was not objectionable cannot constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441 (defense counsel not ineffective for failing to bring meritless motion).

¶10 Stern next asserts that WIS. STAT. § 948.075(1r) is unconstitutionally vague; this presents a question of law. *See* ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). A statute is unconstitutionally vague if it fails to give fair notice of the conduct prohibited and to provide an objective standard for enforcement. ***State v. Ruesch***, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). To be impermissibly vague under the "fair notice" prong, "the statute must be so ambiguous that one who is intent upon obedience cannot tell when proscribed conduct is approached." ***Id.***

¶11 "Peter" told Stern he was fourteen, was in ninth grade, lived with his mom, and knew he was "jailbait." When the plan to meet at McDonald's was set, Stern e-mailed, "You are 18, right?" followed by a "smiley face" emoticon. "Peter" responded, "If you want me to lie about being 18 I'm down with that. I just don't want you to freak out when you see me, okay? I can't even get into R movies. I look my age." Stern cannot credibly maintain that he could not tell that his conduct at least approached the proscriptions of the statute.

¶12 Stern also contends that the statute, construed as we construe it, stifles his right to consensual adult sexual privacy because it would allow the prosecution of one who actually believes the target individual is an adult, and the individual actually is. Once again, that argument nullifies the "reason to believe" language. Stern thus has not demonstrated beyond a reasonable doubt that the statute is unconstitutional. *See* ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶13 Stern next challenges his sentence. The trial court sentenced him to ten years' initial confinement and fifteen years' extended supervision, exceeding the recommendations of the parties and the presentence investigator. To properly exercise its discretion at sentencing, a trial court must discuss relevant sentencing factors and objectives, like the gravity of the offense, the character and rehabilitative needs of the offender, and the need for punishment, protection of the public, and general deterrence. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In an exercise of its discretion, a trial court may reasonably reach a conclusion that another judge or another court might not. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Our sole inquiry is whether the sentence resulted from a proper exercise of discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶18.

¶14 Stern claims the trial court did not give due weight to his lack of a criminal record and "exemplary" employment history. The court did acknowledge Stern's positive attributes, but deemed deterrence, protection of the public, and Stern's culpability to be more important in this case. The weight given to sentencing factors lies particularly within the wide discretion of the trial court. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

¶15 The legislature made violating WIS. STAT. § 948.075(1r) a Class C felony, exposing a defendant to forty years' imprisonment. *See* WIS. STAT. § 939.50(3)(c). Well within that limit, Stern's twenty-five-year sentence presumptively is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. The legislature also saw fit to pair § 948.075(1r) with WIS. STAT. § 948.02, reflecting a belief that sexually assaulting a child and taking acts in contemplation of it are serious offenses. We cannot say that Stern's sentence was "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." ***Ocanas v. State,*** 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶16 Finally, we reject Stern's claim that the trial court erroneously denied his motion for sentence modification. Stern argues that he received a far stiffer sentence than others who violate WIS. STAT. § 948.075 or commit child sexual assaults. He contends this disparity violates his due process and equal protection rights. We review a sentence modification motion "by determining whether the sentencing court erroneously exercised its discretion in sentencing the defendant." ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895.

¶17 Assuming this disparate sentencing occurred, it is well established in Wisconsin that mere disparity in the sentences received by persons committing similar crimes does not establish a denial of due process, ***State v. Smart***, 2002 WI App 240, ¶13, 257 Wis. 2d 713, 652 N.W.2d 429, or equal protection, ***State v. Macemon***, 113 Wis. 2d 662, 669, 335 N.W.2d 402 (1983). The philosophy of modern criminal law does not require that the punishment fit the crime alone or that there be an identical sanction for every violation of a particular statute. ***McCleary v. State***, 49 Wis. 2d 263, 271-72, 182 N.W.2d 512 (1971). Unless the sentence was arbitrarily imposed, an equal protection violation will exist only if the court erroneously exercised its discretion. *See* ***Ocanas***, 70 Wis. 2d at 187. We already have determined that such was not the case.

¶18 Stern also contends the alleged disparity presents a new factor warranting resentencing. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). We conclude Stern has not shown the existence of a new factor because he has not shown how any disparity between his sentence and that of other offenders was "highly relevant" to the imposition of his sentence.

¶19 Thus, having determined that the trial court properly exercised its sentencing discretion, we conclude that it did not err by denying Stern's motion.

By the Court.—Judgment and order affirmed.

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