COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2420-CR **Cir. Ct. No. 2010CF223**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON J. HEROUX,

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. Aaron Heroux appeals from a judgment convicting him of repeated sexual assault of the same child after a jury trial and from an order denying his postconviction motion. On appeal, Heroux challenges the circuit court's refusal to grant him access to the victim's privileged treatment and therapy

records, argues that he should have been convicted under a newer version of the applicable statute, and claims that he should be resentenced. None of these arguments has merit. We affirm.

¶2 The victim alleged that Heroux had sexual contact and sexual intercourse with her starting when she was four years old (1989) and continuing until she was approximately sixteen years old (2001). In August 2010, Heroux told his parents about his sexual contact with the victim. However, Heroux denied the victim's later claims regarding the duration of the abuse and that the abuse included intercourse. The police became involved in September 2010.

¶3 Pretrial, Heroux moved the circuit court for an in camera review of the victim's treatment and therapy records from a 2001 or 2002 hospitalization in a mental health facility. Heroux alleged that the records were "relevant and necessary to a fair determination of guilt or innocence" because the records would shed light on whether the victim's hospitalization had anything to do with Heroux's alleged sexual abuse. As further grounds for the motion, Heroux alleged that the victim's father attended a therapy session and, during that session, the victim blamed her father for her distressed state.

¶4 The State countered that Heroux's motion did not satisfy the criteria set out in ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, for obtaining an in camera review of privileged records. In response to the State's objection, Heroux elaborated as follows: the victim developed an intimate relationship with her outpatient therapist, and the victim blamed her father, then her mother and then Heroux for all of her problems. Heroux claimed that the victim was the subject of falsely implanted and reinforced memories and that the hospital, Rogers Memorial, was the subject of a lawsuit based on a claim that

affiliated doctors reinforced patients' false beliefs of physical and sexual abuse by family members. Heroux argued that the victim's records would establish that her allegations against Heroux were not credible.

¶5 At the hearing on Heroux's ***Green*** motion, the circuit court concluded that receiving therapy years before making a sexual assault allegation was not a sufficient basis for an in camera inspection of privileged records. On appeal, Heroux argues that he made a sufficient showing to obtain an in camera inspection of the victim's records.

¶6 In order to obtain an in camera review of the victim's privileged therapy records, Heroux had to "show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." ***Green***, 253 Wis. 2d 356, ¶32. Information meets this standard "if it 'tends to create a reasonable doubt that might not otherwise exist.'" ***Id***., ¶34 (citation omitted). To meet his burden, ***id.***, ¶35, Heroux had to offer "a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense," ***id.***, ¶33. "The mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault is insufficient." ***Id.*** A defendant must conduct "a reasonable investigation into the victim's background and counseling through other means first before the records will be made available." ***Id.*** Speculation or conjecture regarding the contents of the requested records is not sufficient. ***Id.***

¶7 Heroux did not establish that the victim's records were necessary to his defense. Heroux merely speculated that the victim had an intimate relationship with her therapist; there is no evidence or offer of proof to that effect. Heroux's

claim that the victim's therapist implanted false memories in 2001 or 2002 is not compelling given that the victim did not reveal the abuse until 2010 and only after Heroux admitted the abuse to his parents. Heroux did not meet his ***Green*** burden because he did not make a fact-specific showing free of speculation and conjecture.

¶8 Heroux next argues that he should have been convicted under the reduced felony version of the statute in effect at the time of his conviction and sentencing, rather than the higher level version that was in effect when he committed the crimes charged in the amended information. The September 2010 complaint and the May 2011 amended information alleged that Heroux committed the sexual assaults between January and July 2001. In 2001, under the statute prohibiting repeated sexual assault of a child, WIS. STAT. § 948.025 (2001-02), was a Class B felony. By 2010 and after, when Heroux was arrested, charged, tried, convicted and sentenced, the relevant conduct under WIS. STAT. § 948.025 had been reclassified as a Class C felony, with a lower potential sentence.

¶9 Heroux does not cite any authority for his claim that he was entitled to the benefit of the reduced felony. "A defendant has not committed an offense [and does not incur penalties] unless all the elements of that crime have been met." ***State v. Thums***, 2006 WI App 173, ¶10, 295 Wis. 2d 664, 721 N.W.2d 729. Heroux's crime of repeated sexual assault of a child was completed in 2001. Therefore, Heroux was appropriately charged with the Class B felony in effect at that time.

¶10 Heroux argues that he should be resentenced because the circuit court did not follow the WIS. STAT. § 973.01(8) (2001-02) sentencing procedures in effect when he committed the offense. Heroux argues: (1) the court did not

inform him in writing of his bifurcated sentence; (2) the court did not inform him that his time in confinement could be extended by his extended supervision time; and (3) the court did not inform him that he would be subject to certain conditions while on extended supervision and that a violation of those conditions could result in reconfinement.

¶11 Postconviction, the circuit court gave Heroux the information it failed to give him at sentencing. The court declined to resentence Heroux, relying upon ***State v. Silva***, 2003 WI App 191, ¶2, 266 Wis. 2d 906, 670 N.W.2d 385, in which the circuit court failed to give the WIS. STAT. § 973.01(8) information at sentencing but cured the error at the postconviction motion hearing. In addition, the court noted that because Heroux's sentence in this case was consecutive to previously imposed sentences, he had not yet started serving his sentence at the time the court heard his postconviction motion and gave him the § 973.01(8) information. Heroux's § 973.01(8) claim is not a basis for relief from the sentence.

¶12 Finally, Heroux argues that the circuit court misused its sentencing discretion because it did not offer a rational explanation for its fifty-year sentence. The circuit court rejected this claim, as do we.

¶13 At sentencing, the circuit court noted that it had reviewed the presentence investigation report and was considering the gravity of the offense, Heroux's character, and the need to protect the public. The court ruled out probation due to the seriousness of the offense. The court found the Heroux was not credible and lacked empathy and that the impact of Heroux's crimes on the

victim was immense and lifelong.[1] The court considered Heroux's prior convictions for sexual offenses against young people.[2] The court found that a lengthy sentence was required to protect the public and the victim from Heroux's propensity to victimize others. The court sentenced Heroux to fifty years comprised of thirty years of initial confinement and twenty years of extended supervision, consecutive to any other sentence.

¶14 Postconviction, Heroux sought resentencing because the fifty-year sentence was unduly harsh and excessive. He argued that the circuit court did not state adequate reasons for the lengthy sentence or consider the proper sentencing factors. He further argued that the court should have considered his rehabilitation needs as it determined the length of the sentence. Finally, he argued that his crimes could have been worse: he did not torture the victim and she suffered no physical injury from the repeated sexual abuse.[3]

¶15 The circuit court declined to resentence Heroux. The court noted that it heard all of the evidence at the jury trial, the jury did not find Heroux credible, and the court was not required to sentence with mathematical precision. The court stated that it was aware of Heroux's background, but the court placed greater weight on the gravity of the offense and the effect on the victim. The court

[1] At sentencing, Heroux and his counsel argued that he was wrongly convicted, he blamed others for his prosecution, and he took no responsibility for the crimes.

[2] In 2010 Heroux, a teacher, pled no contest to sexual assault of two students. He received two consecutive six-year sentences.

[3] The victim testified at trial that Heroux sexually abused her for years. A journal Heroux kept supported an inference that he sexually abused the victim for many years, although he denied that the abuse escalated to intercourse, as the victim testified.

also considered Heroux's other sexual assault convictions for crimes against other young people.

¶16 Heroux's appellate argument challenging the sentence is sparse. Nevertheless, we have reviewed the sentence, and we conclude that the sentence was a proper exercise of sentencing discretion and had a 'rational and explainable basis.'" ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted). The court considered the appropriate sentencing factors. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The primary sentencing factors are the gravity of the offense, the defendant's character and the need to protect the public. ***Id.*** The weight to be given the various factors is within the circuit court's discretion, ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977), and the court has discretion to discuss those factors it believes are relevant, ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. As long as the sentencing court "considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience." ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶17 Our review of the sentencing record indicates that the fifty-year sentence was a proper exercise of sentencing discretion. The circuit court did not impose the maximum possible period of confinement and stated sufficient reasons for the lengthy sentence. The court addressed the proper sentencing factors, and given the weight it ascribed to those factors, the court did not misuse its discretion in failing to address Heroux's need for rehabilitation. Heroux's attempts to minimize his criminal conduct were unavailing in the circuit court, and they are unavailing here. The sentence does not shock the public conscience.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).