COURT OF APPEALS DECISION DATED AND FILED

December 23, 2014

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. 2013AP2655-CR **Cir. Ct. No. 2010CF79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. BABCOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY and JOHN R. RACE, Judges. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Paul Babcock appeals a judgment convicting him of possession of child pornography and an order denying his postconviction

motion seeking a suppression hearing and/or resentencing. For the reasons discussed below, we affirm.

BACKGROUND

¶2 The State filed an information charging Babcock with two counts of possession of child pornography based upon communications Babcock made in an online chat room with an undercover police officer posing as the mother of two young children. Babcock sent the officer five images of prepubescent children, at least two of which were sexually explicit, and also provided the officer with a telephone number and expressed interest in having a sexual encounter with the officer's fictitious children.

¶3 Police subsequently executed a search warrant based upon the affidavit of the undercover officer. In addition to describing the undercover operation, the officer included numerous general statements based upon his experience and training about the habits of people who collect pornography online, including that "individuals who have a sexual appetite for child pornography … often molest children as well," and "persons with an interest in the exploitation of children frequently have trophies from victims, items for the grooming of children as well as collections of clothing and toys related to the exploitation of children."

¶4 Police seized Babcock's computer and several hard drives pursuant to the warrant and, according to the information presented at sentencing, discovered about 16,000 images and videos, about forty-five percent of which the investigating officer estimated depicted minors, including "hundreds, if not thousands, of small, prepubescent females." Among those images, the officer estimated "close to a thousand" depicted obviously prepubescent females unclothed or in suggestive poses, while thousands of other images depicted either

teenagers or young-looking adults, and about fifty images depicted children engaged in intercourse or other sexually explicit conduct. No evidence was found that Babcock had personally groomed, or committed any physical offenses against, children.

¶5 Babcock subsequently entered into a plea agreement in which the State agreed to dismiss and read in one of the two counts and refrain from bringing any additional charges arising out of the incident, with a PSI to be ordered and both sides free to argue. Babcock obtained successor counsel for the sentencing hearing, who determined that Babcock was not interested in withdrawing his plea and going to trial due to the risk of increased sentence exposure. Neither the attorney who represented Babcock at the plea hearing nor the attorney who represented him at sentencing discussed filing a suppression motion, because neither saw any potential defect in the warrant.

¶6 The circuit court sentenced Babcock to ten years of initial confinement and twenty years of extended supervision. Because Babcock's challenges to his sentence are fact intensive, we will set forth additional facts from the sentencing hearing relevant to each issue in our discussion below.

STANDARDS OF REVIEW

¶7 We independently determine whether the facts set forth in a postconviction motion are sufficient to warrant a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶8 We afford discretionary sentence determinations a strong presumption of reasonableness because the circuit court is in the best position to evaluate the relevant factors and the demeanor of the defendant. ***State v.***

Klubertanz, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116. Furthermore, when a circuit court fails to adequately explain the reasons for the sentence it has imposed, we are obliged to search the record to determine whether the sentence could be sustained in the exercise of proper discretion. ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Therefore, in order to demonstrate a misuse of discretion, a defendant generally must show that the record contains an unreasonable or unjustifiable basis for the circuit court's action. ***State v. Schreiber***, 2002 WI App 75, ¶9, 251 Wis. 2d 690, 642 N.W.2d 621. However, we independently review the constitutional question whether a defendant has been denied due process by being sentenced on inaccurate information. ***State v. Groth***, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163, *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d.

DISCUSSION

Suppression Hearing

¶9 Babcock sought a postconviction suppression hearing regarding allegedly false statements in the search warrant about links between collecting child pornography and grooming and molesting children. The request was procedurally problematic in several regards. First, by entering a plea without first preserving the issue, Babcock forfeited any right to have the issue heard. "'Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses'" except for a narrowly crafted exception "'which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea.'" *See* ***State v. Popp***, 2014 WI App 100, ¶13, ___ Wis. 2d ___, 855 N.W.2d 471 (quoted source omitted). Although Babcock correctly points out that a court has discretion

to address waived or forfeited issues, his motion did not make such a request or provide any compelling grounds for doing so. Second, to the extent that Babcock's motion presented an alternate framework for reviewing his suppression claim in the context of ineffective assistance of counsel, Babcock did not make any accompanying request to withdraw his plea or allege that he would not have entered his plea if counsel had succeeded in suppressing evidence obtained pursuant to the warrant.[1] Even if we were to overlook these deficiencies in Babcock's motion, we conclude that Babcock's allegations regarding the alleged defects in the warrant were insufficient to warrant relief.

¶10 A defendant seeking to suppress evidence seized pursuant to a search warrant is entitled to an evidentiary hearing upon making a substantial preliminary showing that: (1) an affiant intentionally and recklessly included a false statement in an application for a search warrant, and (2) the allegedly false statement was necessary to a finding of probable cause. ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); ***State v. Mann***, 123 Wis. 2d 375, 384, 367 N.W.2d 209 (1985). No ***Franks-Mann*** hearing is required if the defendant fails to provide sworn or otherwise reliable witness statements to establish the falsity of the statement, or if there are sufficient other allegations in the application to support probable cause. ***Franks***, 438 U.S. at 171.

¶11 In ¶48 of his postconviction motion, Babcock stated that he "cannot contend that without the contested information there would not have been

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[1] Babcock appears at times to suggest that he could use a suppression hearing to exclude evidence from consideration at sentencing without withdrawing his plea, but does not develop that argument.

probable cause for some warrant to issue, but the scope of the warrant would have been narrower." That admission negates the second element of the ***Franks-Mann*** test, *i.e.*, that the challenged statement was necessary to a finding of probable cause at least with respect to the seizure of the computer and hard drives. Moreover, since the actual evidence seized, computer and hard drives, was plainly within the scope of the more narrow warrant that Babcock contends should have been issued (i.e., related solely to child pornography, with no information regarding grooming or physical offenses), there would have been no additional evidence subject to suppression under the severability doctrine. *See* ***State v. Sveum***, 2009 WI App 81, ¶18, 319 Wis. 2d 498, 769 N.W.2d 53, *overruled on other grounds by* ***United States v. Jones***, 565 U.S. ___, 132 S. Ct. 945 (2012).

Resentencing

¶12 Babcock raises four distinct challenges to his sentence, claiming that: (1) the circuit court's explanation of its sentence was mechanical and inadequate; (2) the circuit court relied upon inaccurate information; (3) the circuit court considered an improper factor; and (4) the sentence was unduly harsh. We address each in turn.

Exercise of Sentencing Discretion

¶13 When imposing a sentence, the circuit court should discuss any facts relevant to the general factors of the severity of the offense and character of the offender and relate them to identified sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197 (describing the process of exercising sentencing discretion) and ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977)

(setting forth a list of potential considerations or sub-factors relevant to the severity of the offense and character of the offender). However, the circuit court may decide what weight to give each factor, ***Schreiber***, 251 Wis. 2d 690, ¶8, and it need not discuss potential factors that are not relevant to its decision. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). Moreover, while the court's discussion should provide an explanation for the general range of the sentence imposed, it need not employ "mathematical precision" detailing why the court imposed a particular number of years. ***Klubertanz***, 291 Wis. 2d 751, ¶¶17, 22.

¶14 Babcock contends that the circuit court erroneously exercised its sentencing discretion by treating "optional" sentencing factors as "mandatory," and mechanically going through them without adequately explaining how they related to sentencing objectives. We disagree with that characterization of the court's decision.

¶15 The court began its discussion by noting that ***Gallion*** and other cases had provided numerous criteria and "ways to apply" those criteria. The fact that the court then chose to go though the entire list of ***Harris*** factors explicitly cited in ***Gallion*** as a means of organizing its discussion does not mean that it was operating under the erroneous belief that it was required to give any weight to non-relevant criteria. To the contrary, the record shows that the court proceeded to explain why some of those factors had little or no application in this case. Moreover, the transcript shows that the circuit court modified its use of the only ***Harris*** factor that Babcock specifically identifies as non-applicable here—namely,

the defendant's demeanor at trial—by instead considering Babcock's demeanor during the sentencing hearing.[2]

¶16 Contrary to Babcock's assertions, the record also shows that the circuit court then went to some length to relate the factors it had just discussed to the sentencing objectives it deemed applicable in this case. The court repeatedly emphasized the severity of the offense, particularly with respect to the number of young girls revictimized by having images of them shared. The court stated that the time Babcock had served in jail during the pendency of the case was not enough for punishment "given the nature of this crime and the fact that there is this record also of so many pornographic images of young girls, all of whom have been victims by that, coupled with this outrageous stuff on the chat lines"; that it did not have "sufficient deterrent value;" that anything less than a lengthy prison sentence would unduly depreciate the offense; and that it was "too serious a crime" to impose fewer than ten years of initial incarceration. The court also explained that Babcock's chat room statements exploring the possibility of meeting children for sexual encounters, in conjunction with his minimization and lack of candor about his actions, as well as the free time that he had due to sporadic employment, showed an "extremely high need for close rehabilitative control" that could be most effectively provided in the prison system in order to protect the public.

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[2] The court noted that it was difficult to assess the sincerity of Babcock's remorse because Babcock chose to address the court with a written statement rather than an oral allocution.

¶17 Finally, the court did acknowledge that Babcock had no prior criminal history, that he had at least attempted to provide for himself through gainful employment, and that his involvement with child pornography had apparently only developed in recent years. The court relied upon those factors in "reluctan[tly]" deciding against imposing the maximum fifteen years of initial incarceration, which the seriousness of the crime and Babcock's potential danger to the public would otherwise warrant in the court's view. In sum, the court's discussion more than adequately explains why it imposed two-thirds of the available initial incarceration time, and all of the available extended supervision time.

Accuracy of Sentencing Information

¶18 A defendant has a due process right to be sentenced based upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. One category of "inaccurate" information is that which is so misleading that it invites inferences that are false. ***State v. Harris***, 2012 WI App 79, ¶¶1, 17, 343 Wis. 2d 479, 819 N.W.2d 350.

¶19 Babcock contends that the circuit court sentenced him based on inaccurate information by exaggerating the number of pornographic images he collected, the length and nature of his collecting and trading, and the time he devoted to such activity. Again, we disagree with Babcock's reading of the circuit court's decision.

¶20 We first note that the circuit court specifically interrupted counsel during the sentencing arguments in order to obtain clarification as to the breakdown of what types of images were found on Babcock's computer and when Babcock began viewing, collecting, and sharing the images. The court's

interaction with counsel on these topics demonstrates that the court was well aware that the images on Babcock's computer depicted girls from prepubescent to adult, with many of the images depicting the same girls multiple times; that—because most of the victims had not been identified—there were only estimates available as to what percentage of the images depicted minors and prepubescent girls; and that while Babcock had begun viewing child pornography at least two years earlier, he had apparently begun collecting and chatting about one year earlier, and sharing it with others for a few months.

¶21 Thus, the court's statements that Babcock's collection included "thousands of photographs of prepubescent females" and that Babcock victimized "huge numbers … literally hundreds and hundreds" of young women and young girls were supported by the only available information that had been provided to the court at sentencing. Although the investigating officer gave some revised estimates on the breakdowns of the images at the postconviction hearing, Babcock has not presented anything to this court that shows that the estimates given at the postconviction hearing were significantly more accurate than those given at the sentencing hearing, or that either estimates were so far off from the actual numbers (which it does not appear that Babcock has attempted to independently determine) so as to invite false inferences regarding the nature and extent of Babcock's collection.

¶22 Similarly, the court's remark that Babcock had been conducting himself in an undesirable way "for a number of years in connection to child pornography" reflects ambiguity in the evidence before the court as to when Babcock began *viewing* child pornography. The court was not required to accept Babcock's own assertions as to how long he had been viewing child pornography, particularly given Babcock's apparent minimizing and lack of candor with respect

to other aspects of his conduct. In any event, whatever length of time the court meant by the phrase "a number of years," it is apparent that the court did not exaggerate how long Babcock had been collecting child pornography, because the court used the relatively short duration of Babcock's involvement as a *mitigating* factor.

¶23 As to the amount of time Babcock spent on the internet, and the court's characterization of him as anti-social, again the court was not required to accept either Babcock's own assertions about his conduct or the psychologist's assessment. The court explained why it questioned the factual basis for some of the psychologist's conclusions, and properly drew its own conclusions based on the amount of pornography Babcock had collected in a year and his inability to maintain employment.

¶24 The bottom line is that the court deemed Babcock's collection to be a large one and further considered that obtaining and sharing pornographic images of minors perpetuated the ongoing harm to the victims. Those views resulted in the ultimate conclusion the court reached and relied upon as a sentencing factor—that even if the court did not know exactly how many different minors were depicted and thus victimized by Babcock's collection, "there's a large number of young women being victimized." The court's conclusion was not based upon inaccurate sentencing information, but rather upon the court's interpretation of the significance of the evidence before it.

Improper Factor

¶25 Third, Babcock contends the circuit court relied upon an improper factor when it "effectively treat[ed] the absence of additional criminal charges [as]

an aggravator." This argument is premised upon the following comments by the court:

> Can I rehabilitate him by placing him on long-term probation? Which by the way, the maximum there is 15 years. That means, in other words, I have 25 years potential, but if I choose probation, I'm down to 15 years time, considerably reduced in the probation I can give.
>
> … And I'm not sure if I had maybe 30 years of probation to put him on and could maybe divide it up into two cases, I might see a different way, a shorter term in prison followed by consecutive probation or something ….

Babcock construes the court's comments as indicating that he could have received "probation and a light prison term" if he had been sentenced on two offenses rather than on one. We disagree with that interpretation.

¶26 Babcock ignores the fact that the court was expressing a wish for the ability to impose a *consecutive* term of probation on one charge with a bifurcated sentence imposed on the other charge, resulting in an overall longer period of supervision than was possible when sentencing on one charge. When taken in conjunction with the court's other comments about how less than ten years of initial incarceration would unduly depreciate the offense, it is clear that the court would have imposed more than ten years of extended supervision and/or probation if it had been able to do so, but not that it would have imposed any shorter term of initial incarceration.

Harshness

¶27 Finally, Babcock contends that the circuit court imposed an unduly harsh sentence by ignoring mitigating information and penalizing him for "disgusting" thoughts. He proceeds to argue about why the court placed too much emphasis on aggravating factors and not enough on mitigating factors. That is

precisely the sort of balancing that lies solely within the circuit court's discretion. We will not reweigh the circuit court's view of the factors.

¶28 A sentence may be considered unduly harsh or unconscionable only 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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh. ***Id.***, ¶¶31-32 (quoted source omitted). A sentence that imposes only two-thirds of the available initial confinement is well within the maximum sentence, and is not disproportionate to an offense that involved multiple child victims.

By the Court.—Judgment and order affirmed.

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