

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2015

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. 2015AP131-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF243

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE R. RADDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Dale Radder appeals a judgment convicting him of manufacturing/delivery of THC, maintaining a drug trafficking place, possession of THC, all as second or subsequent offenses, and 213 counts of possession of child pornography. He also appeals an order denying his postconviction motion to modify the sentences based on new factors. Radder identified two new factors:

(1) evidence that sentences in Shawano County are greater than sentences imposed in adjacent counties for child pornography charges; and (2) an evaluation by Diane Lytton, Ph.D., showing Radder was not likely to commit a sexual offense.¹ Because we conclude the circuit court properly exercised its discretion when it denied the motion to reduce Radder's sentences, we affirm the judgment and order.

BACKGROUND

¶2 After Radder entered no contest pleas to all of the charges in the Information, the circuit court ordered a presentence investigation report (PSI). The PSI quoted the "Hernandez Study" which stated most child pornographers had hands-on victims. The PSI indicated Radder's computers and storage disks contained at least 5,662 digital images and over 140 videos of child pornography. They depicted prepubescent children exposing their genitals, being penetrated with sex toys, having intercourse with adults, images of acts of bondage, voyeurism, and expelling of feces and urination on the victims. According to the PSI, Radder did not believe he has an addiction to pornography, but rather an addiction to the internet and downloading material. He initially refused to provide information about his sexual history. The PSI also noted Radder's videotaping of clothed

¹ In his brief on appeal, Radder prominently cites case law where the issue was whether the sentence was unduly harsh. That issue is not the same as a "new factor" claim. See *State v. Klubertanz*, 2006 WI App 71, ¶35, 291 Wis. 2d 751, 713 N.W.2d 116. Whether the sentences were unduly harsh was not raised in Radder's postconviction motion and cannot be raised for the first time on appeal. See *Spannuth v. State*, 70 Wis. 2d 362, 365-66, 234 N.W.2d 79 (1975). The issue also is not sufficiently developed to merit analysis. See *State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Finally, Radder's postconviction motion and brief on appeal cite an unpublished per curiam opinion. Although Radder claims to cite the case for its factual statements rather than legal precedent, the citation is not permitted under WIS. STAT. RULE 809.23(3)(a) (2013-14).

neighborhood children between the ages of six and eight, focusing on their buttocks and vaginas. The PSI recommended ninety years' initial confinement and ninety years' extended supervision. The State recommended concurrent and consecutive sentences totaling thirty years' initial confinement and twenty-five years' extended supervision.

¶3 Radder's attorney stressed Radder's cooperation and acceptance of responsibility. He noted a recent Shawano County case where the defendant was sentenced to five years' initial confinement and five years' extended supervision for possession of pornography and second-degree sexual assault of a child. Noting that sexual impulses decline with advanced age, Radder's counsel argued for ten to fifteen years' initial confinement.

¶4 In imposing sentence, the court noted the videos Radder made focused on the childrens' lower bodies. It faulted Radder for blaming the internet and technology for his behavior. The court acknowledged Radder had not engaged in hands-on behavior, but it noted Radder "could move into it." The court imposed concurrent and consecutive sentences totaling thirty years' initial confinement and twenty-five years' extended supervision.

¶5 In his postconviction motion, Radder presented a chart prepared by Mark Goerlinger, an investigator, regarding child pornography sentences since 2009 for Shawano and adjacent counties. The analysis included cases where there were charges in addition to child pornography. Radder's sentence was the highest imposed in any child pornography case. The next closest was seven years.

¶6 Radder also presented testimony from psychologist Diane Lytton, in which she faulted the Hernandez Study cited in the PSI because it used only federal prisoners, some of whom were producers and distributors of child

pornography, and relied on data accumulated before the internet made pornography readily available. She testified the likelihood of a child pornography offender reoffending was low, possibly as low as two to four percent over five years. She also testified Radder had obsessive compulsive personality traits, but not a sexual deviation disorder such as pedophilia. She concluded Radder had a low risk of re-offense by either another pornography offense or hands-on sexual offense.

¶7 Detective Chris Gamm testified for the State that Radder had produced videos of children in his neighborhood focused on their lower body parts and had set some of the pornographic videos to music. He also testified Radder had threatened the life of the PSI author and his cellmates during phone calls made from the jail.

¶8 The court discounted Lytton's testimony because she had not seen the evidence presented to the court. The court found Radder was sexually attracted to children. Although Radder describes the court's decision as a conclusion that Radder's evidence did not establish a new factor, the court's language suggests it accepted Radder's claim of new factors, but declined to modify the sentences despite the new evidence.

DISCUSSION

¶9 A new factor is a fact or set of facts highly relevant to the imposition of a 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. Whether the facts constitute a new factor is a question of law that this court decides independently. *Id.*, ¶33. If

the circuit court determines that a new factor exists, it must decide whether sentence modification is justified. *Id.*, ¶37. That question is committed to the circuit court's discretion and is reviewed by this court with deference. *Id.*, ¶33.

¶10 Even if we assume, without so holding, that Radder established both new factors,² the circuit court properly exercised its discretion when it denied the motion to reduce Radder's sentence. Radder's claim of disparate sentences does not persuasively establish a basis for reducing his sentences. As the circuit court noted, Goerlinger's study concerned average sentences without comparing how the cases differed. The volume and nature of Radder's pornographic images downloaded over a long period of time, the videos he created of neighborhood children, his setting pornographic discs to music, and the threats he made from the jail justify a longer than average sentence.

¶11 The circuit court acknowledged the studies Dr. Lytton relied upon in forming her opinion contradicted the Hernandez Study. However, based on the evidence presented in Radder's case, the court concluded the sentence was appropriate. The very young age of some of the children, as young as one year old, the large volume of materials, the nature of the sexual abuse depicted, Radder's role setting some of the videos to music, and his videotaping prepubescent clothed children in his neighborhood support the court's finding that Radder had a strong attraction to children. The court found it was not credible to believe Radder only had a hobby of downloading information and sometimes

² After briefing in this case was concluded we decided *State v. Sobonya*, 2015 WI App 86, ___ Wis. 2d ___, ___ N.W.2d ___ (No. 2014AP2392-CR), which provides an expert opinion that contradicts or differs from the sentencing court's opinion regarding the objectives of sentencing is not a new factor. Here, Dr. Lytton's conclusion Radder was at low risk to reoffend contradicts the circuit court's conclusion.

setting it to music. For these reasons, the court properly exercised its discretion when it discounted Lytton's opinion and declined Radder's request for a more lenient sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

