COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1087-CR **Cir. Ct. No. 2014CF1142**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS RICARDO MCGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Marcus Ricardo McGee appeals from a judgment of conviction, entered upon his guilty plea, for one count of third-degree sexual assault. McGee also appeals from an order denying his postconviction motion for resentencing on various grounds. We reject McGee's arguments and affirm.

BACKGROUND

¶2 Nineteen-year-old McGee was charged with one count of second-degree sexual assault of a child based on allegations he had sexual intercourse with fourteen-year-old E.J.S. on three separate occasions. The intercourse came to light because E.J.S.'s twelve-year-old brother began cutting himself after McGee had sex with E.J.S. in her residence while her brother was at home.

¶3 McGee agreed to plead guilty to an amended charge of third-degree sexual assault. The State recommended two years of initial confinement and two years of extended supervision, imposed and stayed in favor of three years' probation, explaining that McGee had no prior record, drugs and alcohol were not involved, and McGee had been cooperative. The circuit court sentenced McGee to the maximum five years' initial confinement and five years' extended supervision.

¶4 McGee subsequently retained the services of clinical and forensic psychologist Melissa Westendorf. She performed a "professional risk assessment" of McGee and concluded that his risk of sexual re-offense was low. McGee then filed a postconviction motion for resentencing, based on five grounds: (1) Westendorf's assessment was a new factor; (2) the lack of a presentence investigation report (PSI) warranted resentencing; (3) the sentence had been based on inaccurate information; (4) the circuit court failed to consider probation; and (5) the sentence was unduly harsh when compared to similarly situated defendants.

After briefing, the circuit court denied the postconviction motion without a hearing. McGee appeals, essentially renewing his five arguments.[1]

DISCUSSION

I. Risk Assessment as New Factor

¶5 McGee first contends that Westendorf's risk assessment, "and the factors on which it is based, constitute a 'new factor' which the Court may reconsider the sentence." The circuit court rejected this argument, noting that "the factual information contained within the current risk assessment report is not new to the court[.]"

¶6 A new factor is a fact or set of facts that is "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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *and see* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

[1] In his brief, McGee frames the five issues as questions of whether the circuit court abused its discretion. The supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" more than twenty years ago. *See* ***Brookfield v. Milwaukee Metro. Sewer. Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

¶7 McGee notes that Westendorf determined he was at low risk for sexual re-offense based on "the nature of the relationship and E.J.S.'s role in the illegal conduct." Specifically, McGee and E.J.S. met through mutual friends at the same high school, their relationship "turned into a sexually intimate relationship at E.J.S.'s suggestion,"[2] and there "was no evidence of force or coercion, the conduct was by mutual assent, and E.J.S. was a willing participant."

¶8 However, none of these factors were non-existent at the time of sentencing. *See* ***Rosado***, 70 Wis. 2d at 288. McGee does not establish that any of these factors were unknowingly overlooked; indeed, they were part of his sentencing argument. We therefore agree with the circuit court that the factors on which Westendorf relied are not new factors.

¶9 To the extent that Westendorf's determination of risk based on those factors might be said to fulfill the definition of a new factor, the circuit court determined that her "opinion about the type of risk the defendant presents based on his self-reporting to her does not cause the court to conclude that modification of his sentence is warranted." We discern no erroneous exercise of discretion in this conclusion, *see* ***Harbor***, 333 Wis. 2d 53, ¶37, and McGee demonstrates none.

II. Failure to Order a PSI

¶10 McGee next faults the circuit court for not ordering a PSI. Instead, the parties went straight from plea to sentencing. McGee argues that there "was

[2] McGee's assertion, repeated throughout his brief, that his fourteen-year-old victim is somehow responsible for their intercourse is unpersuasive and contrary to the law of this state.

no affirmative waiver of a PSI" and complains that the court "did not specifically find that it had sufficient information to negate the production of a PSI."

¶11 Production of a PSI is not required prior to sentencing, either by statute or the constitution. *See* ***Bruneau v. State***, 77 Wis. 2d 166, 174, 252 N.W.2d 347 (1977). Rather, the circuit court is vested with the discretion to order a PSI. *See* WIS. STAT. § 972.15(1) (2013-14)[3] ("After a conviction the court *may* order a presentence investigation[.]" (Emphasis added.)). Thus, there is nothing for which the circuit court must obtain an "affirmative waiver."[4]

¶12 Further, the PSI should contain information about the present offense, the defendant's prior criminal record, the defendant's prior institutional record, any statements by the victim, and the defendant's family information and personal history. *See* ***State v. Melton***, 2013 WI 65, ¶28, 349 Wis. 2d 48, 834 N.W.2d 345. McGee does not establish what information the PSI could have provided on those factors that the circuit court did not already have at the time of sentencing.[5]

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[4] The State contends that McGee forfeited the chance to request a PSI. McGee counters that the circuit court did not give him a chance to request a PSI at the end of the plea hearing. However, at the start of the plea hearing, the State recited its charge concession, then stated, "If the Court accepts this at sentencing, which if the Court is available the parties would like to proceed this afternoon," before detailing the State's proposed sentencing recommendation. McGee did not object at that or any other point in the hearing. We therefore agree that McGee has forfeited any challenge to the lack of a PSI. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

[5] In his reply brief, McGee points for the first time to WIS. STAT. § 972.15(1m), which allows the circuit court in certain circumstances to request that the PSI evaluate the defendant's risk of sexual re-offense. McGee claims that the circuit court erroneously exercised its discretion because the circuit court did not even consider a PSI in this case. However, even under § 972.15(1m), the decision to order a PSI is discretionary.

III. "Accurate Information"

¶13 McGee captions his next argument as one of "accurate information," but he actually attacks the sentence imposed on two different points. First, he complains that the circuit court erroneously exercised its discretion by overemphasizing certain factors. Second, he complains about being sentenced on inaccurate information.

A. Weight of Factors

¶14 Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In its exercise of discretion, the circuit court should consider the three principle sentencing objectives of protecting the community, punishment and rehabilitation of the defendant, and deterrence to others. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. There are several factors that should, and several subfactors that may, be considered in fulfilling the sentencing objectives. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. "[T]he weight that is attached to any particular factor in sentencing is within the wide discretion of the sentencing court." ***State v. Perez***, 170 Wis. 2d 130, 143, 487 N.W.2d 630 (Ct. App. 1992). However, there may be an erroneous exercise of discretion if there is "too much weight given to one factor on the face of other contravening considerations." ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

¶15 McGee complains that the circuit court, in determining that a probation sentence was not appropriate, "appears to emphasize [his] failure on JusticePoint without considering why he failed to meet his appointments." McGee further complains that the circuit court's reference to a need for punishment

"deemphasizes the fact that this was a peer relationship" and "relies heavily on its assessment that his victim was innocent" but the victim "was more than a willing participant, who initiated the sexual activity[.]"

¶16 We are not persuaded that the circuit court improperly weighed any factors in its exercise of sentencing discretion. *See* ***Perez***, 170 Wis. 2d at 143. McGee does not develop an argument on appeal to explain why he failed on JusticePoint supervision or why the circuit court should have considered that a mitigating factor. In addition, while McGee may view it as a "peer relationship" in which E.J.S. willingly participated, we note that children lack the legal capacity to consent to sexual intercourse. *See* ***State v. Taylor***, 2006 WI 22, ¶41, 289 Wis. 2d 34, 710 N.W.2d 466. The circuit court's sentencing decision, viewed as a whole, reflects the consideration of no improperly weighed factors.

B. Accurate Information

¶17 "[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, or that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

¶18 McGee complains that he was sentenced based on statements from E.J.S.'s mother that he had advised E.J.S. to keep quiet and was "somehow

directly or indirectly responsible for E.J.S. being bullied, harassed, and intimidated at school via social media."[6] McGee notes that in imposing sentence, the circuit court "felt it needed to send a message to 'those other young men in the community who think this is appropriate conduct and it is just the girl's problem.'" He complains that the circuit court "appears to intimate that Mr. McGee is part of a larger community of predators, who blame E.J.S. for what happened to them." McGee contends that "[t]his reasoning is unfounded" because, as he again asserts, "this was a peer, high school romance, where the female was a willing participant of sexual conduct which she initiated."

¶19 It appears that the circuit court's comments were not directed to a "larger community of predators" but, rather, to the individuals harassing E.J.S. for McGee being in trouble. However, even if McGee's interpretation of the sentencing comments is accurate, we discern no error. Under either interpretation, it is evident that the circuit court, with those particular comments, was focused on deterrence to others, particularly those who would blame a victim for the consequences of the offender's choices. Deterrence is a wholly appropriate sentencing consideration.

[6] In his reply brief, McGee asserts that the circuit court inaccurately concluded that he had influence over his peers. However, McGee clearly thought that there was harassment and that his words did carry some weight: he insisted at sentencing that "regarding the bullying at school, he said that he has told his friends that it was his fault and told them not to tease [E.J.S.] or go any further." In his main brief on appeal, McGee does not demonstrate that E.J.S.'s mother's information was inaccurate. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant must show information was inaccurate).

IV. Consideration of Probation

¶20 McGee appears to complain that the circuit court failed to adequately consider a probationary sentence for him. He argues:

> The Court states that strong punishment component was necessary for rehabilitative needs. However, the Court fails to deliberate on what those needs exactly are. An objective assessment of Mr. McGee's rehabilitative needs would have determined that he had a very low risk of reoffending, and that his treatment needs were minimal. Instead, the Court placed significant weight on Mr. McGee's failure on JusticePoint, as to why he was not suitable for community supervision. That reliance appears to lend no credibility to Mr. McGee's explanation as to why he failed JusticePoint, that he had missed appointments due to employment, and that he had attempted to contact his JusticePoint worker by phone and E-mail, leaving messages on both.

¶21 An imposed sentence shall call for the minimum amount of custody or confinement consistent with the main sentencing objectives. *See* ***State v. Trigueros***, 2005 WI App 112, ¶8, 282 Wis. 2d 445, 701 N.W.2d 54. Thus, "circuit courts should consider probation as the first alternative … [unless] confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense." ***Gallion***, 270 Wis. 2d 535, ¶44.

¶22 The circuit court rejected probation because, as McGee notes, he was noncompliant with his pretrial supervision provided by JusticePoint.[7] The circuit court noted that McGee's noncompliance "raises the significant concern

[7] McGee's sentencing argument implied that he had missed a single phone contact because he was at work. However, the record indicates that McGee had missed two scheduled contacts, which he told JusticePoint was because of his job. McGee then offered to make up the contacts on a date of his own choosing, which he then missed. After the *three* missed contacts, McGee was terminated from the supervision program.

that [he] can be supervised in the community," and that if McGee was "not willing to comply with a mere, simple JusticePoint supervision, [probation] is inappropriate." But it also noted that probation "would unduly depreciate the seriousness of the offense" because "there is a need to protect the community" from McGee's conduct. These determinations are appropriate under ***Gallion***. The circuit court was not required to weigh the factors in the way that McGee would have preferred, *see* ***State v. Schreiber***, 2002 WI App 75, ¶15, 251 Wis. 2d 690, 642 N.W.2d 621, nor was it required to accept McGee's characterization of his rehabilitative needs, *see* ***Trigueros***, 282 Wis. 2d 445, ¶9.

V. Similarly Situated Defendants

¶23 Finally, McGee complains that his maximum ten-year sentence is unduly harsh compared to other defendants sentenced by the same circuit court. The first case he references involved a defendant, charged with second-degree sexual assault of a child, who pled guilty to third-degree sexual assault and received a sentence of probation with six months' condition time. The second case involved a defendant, charged with first-degree sexual assault of a child younger than thirteen, who pled guilty to three counts of fourth-degree sexual assault and received probation. McGee asserts he is similarly situated to these defendants "in the nature of the original and amended charges" and that the circumstances in his case are less aggravated than in the other two cases.

¶24 The circuit court rejected this argument. It explained that "[e]very case is unique" and that the other cases "involved different sets of facts and circumstances, and each defendant presented with different backgrounds." It specifically rejected the claim that the sentence was unduly harsh, then went on to list the variety of factors it considered when imposing McGee's sentence.

¶25 We review a circuit court's conclusion that a sentence it imposed was not unduly harsh for an exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). Sentencing in Wisconsin is individualized. *See* ***Gallion***, 270 Wis. 2d 535, ¶48. A sentence given to a similarly situated defendant is relevant but not controlling. *See* ***Giebel***, 198 Wis. 2d at 220-21.

¶26 Due process "requires substantially the same sentence for substantially the same case histories," but "does not preclude different sentences for persons convicted of the same crime based upon their individual culpability and need for rehabilitation." ***Ocanas***, 70 Wis. 2d at 186. "[A] finding that there has been a denial of equal protection must rest upon a conclusion that the disparity was arbitrary or based upon considerations not pertinent to proper sentencing discretion." *See* ***id.*** at 187. As noted, the circuit court explained the factors it considered in setting McGee's sentence; none were improper. "'Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one.'" ***Id.*** at 189 (quoting ***Howard v. Fleming***, 191 U.S. 126, 136 (1903)).

¶27 In short, we are not persuaded that the circuit court erroneously exercised its sentencing discretion, and that ends our inquiry: "'[a]ppellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence.'" ***State v. Brown***, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

By the Court.—Judgment and order affirmed.

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