COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1294-CR **Cir. Ct. No. 2014CF815**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID H. NINNEMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] David Ninnemann appeals from a judgment of conviction and order denying postconviction relief entered after he pled no contest

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to five counts of lewd and lascivious behavior under WIS. STAT. § 944.20(1)(b). He contends the circuit court erroneously exercised its discretion in requiring him to report as a sex offender and in sentencing him to thirty-six months in jail following the revocation of his probation. We disagree and affirm.

Background

¶2 Ninnemann was charged with forty felony counts of exposing his genitals or pubic area to a child and forty misdemeanor counts of lewd and lascivious behavior. He pled no contest to five of the lewd and lascivious behavior counts, and the remaining charges were dismissed and read in. The court withheld sentence, placed Ninnemann on three years of probation, and ordered him to register as a sex offender and comply with sex offender treatment. In ordering Ninnemann to register as a sex offender, the circuit court found Ninnemann's wrongful actions were "sexually motivated" and "happened over 40 times." The court also concluded that it was in the best interest of the public to require Ninnemann to register as a sex offender for deterrence purposes and so the public would be aware of "what kind of person" he is.

¶3 Approximately seven months into probation, Ninnemann was terminated from the sex offender program for "inadequate performance." As a result of his termination, his probation was revoked for failing to comply with a condition of his probation—compliance with sex offender treatment. At Ninnemann's sentencing after revocation hearing, the circuit court sentenced him to thirty-six months' incarceration.

Discussion

¶4 "Sentencing decisions are discretionary." ***State v. Owens***, 2006 WI 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187 (citation omitted). A circuit court's discretionary sentencing "will be affirmed if it is made upon the facts of record and in reliance on the appropriate law." ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a strong public policy against interfering with the circuit court's sentencing discretion, and we presume the circuit court acted reasonably. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

Reporting as a Sex Offender

¶5 Because Ninnemann was convicted of a violation under WIS. STAT. ch. 944,[2] the circuit court was authorized, pursuant to WIS. STAT. § 973.048, to require Ninnemann to comply with sex offender reporting requirements if the court determined that "the underlying conduct was sexually motivated, as defined in [WIS. STAT. §] 980.01(5), and that it would be in the interest of public protection to have the person report." Sec. 973.048(1m)(a). Section 980.01(5) defines "sexually motivated" as meaning "that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim."

¶6 Ninnemann argues "[t]here is no evidence that these acts, if they did in fact occur, were sexually motivated." We disagree.

[2] Ninnemann's conviction for lewd and lascivious behavior was under WIS. STAT. § 944.20(1)(b).

¶7 At his plea hearing, Ninnemann admitted the criminal complaint was "substantially true and correct." Among other allegations, the complaint indicates that Ninnemann's then-seventeen-year-old female neighbor reported to police that for approximately five months Ninnemann had repeatedly stood in his doorway completely naked, exposing his genitals to her, and that the number of times he would do this per week had been increasing in frequency. The victim indicated Ninnemann knew that she could see him while he was exposing himself. She reported to police that Ninnemann "would step out of his four seasons room onto the patio outside. He had a smirk on his face as if he was enjoying himself as he looked at her." The victim reported that the day before she reported the incidents to law enforcement, Ninnemann "saw her walk to her second garage to get her car. He then quickly ran through his four seasons room to open the door and then when she turned around he opened the door and he just stood there staring at her." The victim provided forty specific dates on which Ninnemann had exposed himself to her, and indicated there may have been other dates as well.

¶8 The complaint also details that when a law enforcement officer first discussed the matter with Ninnemann, Ninnemann became "very nervous," "denied exposing himself and stated at most he would let the dogs in and out of the house wearing his underwear," but then added, "[W]hatever she's saying I did will definitely stop. Whatever she thinks she saw, won't happen again." Ninnemann then provided a brief written statement denying he exposed himself. In a later interview with law enforcement, Ninnemann initially denied involvement in the incidents "but subsequently stated he was worried about his wife leaving him … [and] losing his house." When asked why he would say "whatever she is saying I did will definitely stop" and "whatever she thinks she saw won't happen again" if he had done nothing wrong, Ninnemann replied that

he did not know why and repeatedly stated, "[I]f I confess, I am going to lose everything." The complaint states: "From then on he didn't deny involvement…. He at one point did say he 'may have' urinated outside in the bushes at times and that is when 'maybe she saw something.'"

¶9 At sentencing, counsel for the victim read a statement from her. In it, the victim explained that when Ninnemann first moved in, he would regularly come over to talk with the victim and her family about what was going on in their lives. He stopped coming over once he began exposing himself to her, except for one time when he came over, in approximately the middle of the five-month period of exposing himself, and began a conversation with her with her family present "as though he had been doing nothing to me." This incident significantly upset her. While Ninnemann was exposing himself, "he was usually smiling, and he looked like he was enjoying himself, and [the victim] felt like he was taunting" her. The victim expressed being "afraid that [Ninnemann] would come over to the house when he knew I was home alone, and I was afraid he would start doing the same thing to my younger sister when I went away to college." She further expressed confusion as to why Ninnemann would do this: "He knew when I started to drive, and he knew I was in high school. He had to know I was not yet 18 years old." She expressed how Ninnemann's behavior affected her family and the neighborhood. Ninnemann, who was fifty-five and fifty-six years old during the time period that he exposed himself, made no statement at sentencing.

¶10 In sentencing Ninnemann, the circuit court stated that Ninnemann was "not really fully accepting responsibility," but was only partially accepting it, "by pleading no contest," for which the court gave Ninnemann "credit." The court found it to be an aggravating factor that Ninnemann exposed himself to the victim "so many times" and did so "in a way that you were targeting her, following her

through so you would arrive at certain times and expose yourself in that way." The court also found it to be an aggravating factor that the victim was a minor, adding that "it goes directly to your sexual conduct or motivation in doing so. And whether you're actually getting some physical gratification out of it or just doing it to humiliate her and to taunt her makes no difference to me. In either respect, … it's sexually motivated." The court noted that Ninnemann continued his criminal conduct "for five months." The court emphasized again how Ninnemann exposed himself to the victim "over and over again to humiliate her to the point where she couldn't even go to somebody and tell them about it until she realized that this could happen to her sister or other people." The court indicated it was an "easy decision" to find that Ninnemann's actions were sexually motivated in light of the fact that "it happened over 40 times and it was targeted toward her."

¶11 On appeal, Ninnemann asserts that "the quantity of the read-in counts is irrelevant as to whether Ninnemann should be subject to register in this matter as read-in offenses may not be considered in determining whether a defendant should register pursuant to WIS. STAT. § 973.048." For legal support, he cites generally and conclusorily to ***State v. Martel***, 2003 WI 70, 262 Wis. 2d 483, 664 N.W.2d 69. ***Martel***, however, provides Ninnemann no support.

¶12 In ***Martel***, the defendant pled to bail jumping, with multiple counts of sexual assault of a child under sixteen being dismissed and read in. ***Id.***, ¶¶4-5. The circuit court placed the defendant on probation and ordered him to register as a sex offender. ***Id.***, ¶6. On appeal, the ***Martel*** court concluded the circuit court erred in ordering sex offender registration because the offense of which the defendant was actually convicted, bail jumping, was not one of the offenses "enumerated in the sex-offender registration statute or its counterpart in the

sentencing code, WIS. STAT. §§ 301.45 and 973.048 (2001-2002), respectively." ***Martel***, 262 Wis. 2d 483, ¶1. The court held that § 973.048

> limits the circuit court's discretion to order sex-offender registration to those persons who are sentenced or placed on probation *for an offense enumerated in the statute*. Because the defendant in this case was not sentenced or placed on probation for an offense enumerated in WIS. STAT. §§ 973.048 or 301.45, the circuit court's order of sex-offender registration as a condition of probation was error.

Martel, 262 Wis. 2d 483, ¶2 (emphasis added).

¶13 In the case now before us, Ninnemann was placed on probation for a violation of WIS. STAT. § 944.20(1)(b), which *is* one of the offenses enumerated in WIS. STAT. § 973.048. Further, the ***Martel*** court makes no suggestion that read-in offenses "may not be considered in determining whether a defendant should register pursuant to WIS. STAT. § 973.048," as Ninnemann asserts. Thus, ***Martel*** is inapplicable to the present case, with one exception—the ***Martel*** court reiterated the long-established rule that "offenses that are dismissed and read in are admitted by the defendant for purposes of consideration at sentencing on the crime or crimes for which the defendant is convicted." ***Martel***, 262 Wis. 2d 483, ¶21 (citing ***Austin v. State***, 49 Wis. 2d 727, 732, 183 N.W.2d 56 (1971)). Indeed, Ninnemann acknowledged at the plea hearing that he understood the read-in charges could be considered by the court in determining the appropriate sentence with regard to the five counts to which he pled. As the State points out, "[r]ead-in charges are 'charges that are expected to be considered in sentencing,' in exchange for the promise that the State will not prosecute those offenses." Quoting ***State v. Sulla***, 2016 WI 46, ¶33, 369 Wis. 2d 225, 880 N.W.2d 659. We conclude that to the extent the circuit court considered Ninnemann's offenses that were dismissed but read in, it properly did so.

¶14 We agree with the circuit court's determination that Ninnemann's acts were sexually motivated and warranted the court's order requiring him to comply with sex offender registration. At a minimum, "sexual humiliation or degradation of the victim" was one of the purposes for Ninnemann's conduct of exposing himself to the minor victim repeatedly, deliberately, and in a targeted manner. Also, the complaint, which Ninnemann acknowledged at the plea hearing was "substantially true and correct," included a statement from the victim that when he exposed himself to her, Ninnemann "had a smirk on his face as if he was enjoying himself as he looked at her." And in her uncontroverted statement at sentencing, the victim indicated Ninnemann would "smile" at her while exposing himself, "and he looked like he was enjoying himself, and I felt like he was taunting me."

¶15 Ninnemann also asserts that requiring him to report as a sex offender is not "in the best interests of the community." He points out that he "has no prior criminal record," there is no "indication he has engaged in similar conduct," a sex offender evaluation indicated he was a "very low risk for sexual recidivism," and he "displayed no conduct from the time of the charges that would indicate a likelihood to reoffend."

¶16 Specifically related to the public protection requirement for ordering Ninnemann to comply with sex offender reporting, the circuit court indicated it was "concerned" for the community and requiring Ninnemann to report would be in "the best interest of the public, for their protection to make sure this doesn't happen again." The court added, "[P]eople [should] know what kind of person you are."

¶17 For clarity, WIS. STAT. § 973.048 requires the circuit court to determine that reporting would be in "the interest of public protection." The statute does not say the "best interest." In light of Ninnemann's bold, repeated, long-term continuation of his sexually criminal conduct in this case, we agree it is in the interest of public protection for Ninnemann to report, for the very reasons the court indicated, to help ensure Ninnemann does not conduct himself in this manner again, which goal is aided by "people … know[ing] what kind of person" he is.

¶18 On this record, we have no difficulty concluding the court correctly determined Ninnemann's conduct was sexually motivated and that it was in the interest of public protection to require Ninnemann to report as a sex offender, as required by WIS. STAT. § 973.048.

Sentencing After Revocation

¶19 As Ninnemann acknowledges, we are to review a sentencing after revocation '"on a global basis treating the latter sentencing as a continuum of the' original sentencing hearing." Citing ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. As the State notes, "[w]hen the same judge presides over the original sentencing proceeding and the sentencing after revocation, 'the judge does not have to restate the reasons supporting the original sentencing; the court will consider the original sentencing reasons to be implicitly adopted.'" ***Id.***, ¶9. Here, the same judge presided over the original sentencing hearing and the sentencing after revocation hearing. We see no problems with the sentence ordered by the circuit court following revocation.

¶20 At the sentencing after revocation hearing, the State supported the recommendation of Ninnemann's probation agent of forty-five months in the

county jail, the maximum amount of incarceration possible. Because Ninnemann's probation had been revoked and the control and oversight that probation provided eliminated, the prosecutor argued, the maximum jail sentence was appropriate in order to provide the victim, whose home was next door to Ninnemann's, with "a sense of security" to which she was "entitled."

¶21 At the hearing, Ninnemann denied having committed the crimes to which he pled. He argued he never violated his signature bond conditions when he was on bond, and he "was living next door" to the victim from September 2015 until February 1, 2016, "with no problem." Ninnemann rejected a conclusion in the report of his probation agent that he was a higher risk to reoffend because of his failure to comply with sex offender counseling. He emphasized he had no prior criminal record, was not using drugs or alcohol, and was reporting to his agent, working at a job, and living at his house on "a strict curfew." Ninnemann asked for a "time served" disposition, or if he was sentenced to any "time" that it be with Huber privileges so he could continue working.

¶22 The circuit court expressed its concern about Ninnemann's "denials," noting that at the plea hearing he had responded, "Yes," when the court asked him if the criminal complaint was "substantially true and correct," had responded, "I'm not contesting that," when the court asked him, "did you commit indecent acts of sexual gratification with another" and "did it with knowledge that they were in the presence of others," and had indicated he was not disputing he "exposed [his genitals] publicly and open to view" and "did it indecently in a way that would not be tolerated by the community." The court indicated it just did not "buy" Ninnemann's denials, adding, "[a]nd it's not just your own words and what you admitted to be true in the Complaint but the fact that there were so many incidents." The court noted that Ninnemann pled to five counts "and it could have

been 80." The court indicated it thought the original disposition was "pretty fair," but then Ninnemann "just didn't comply" with probation and "blew … off" the sex offender treatment required by his agent. The court stated that "when a sex offender doesn't acknowledge what [he/she] did and doesn't acknowledge it was wrong, it increases the risk of [him/her] doing it again," specifically expressing the court's belief that Ninnemann was "putting people at risk" by not "tak[ing] advantage" of the court's original disposition placing him on probation. The court added that it gave Ninnemann

> a probationary sentence so you could demonstrate your ability to comply with the law and move forward to address your concerns and your issues ….
>
> And you didn't comply with it and that's why we're back here and you're putting the victims through this whole process once again where they thought they could close the book and move on.

¶23 The circuit court pointed out that it had permitted Ninnemann to return to residing at his home during his probation period, even though it was next to the victim's, but did so believing he was "going to comply with probation.… But you didn't do that." The court indicated it had given Ninnemann "a break" by placing him on probation and did so due to his lack of a prior criminal record, which "spoke to [Ninnemann's] character and rehabilitation needs." "[B]ut the fact you didn't comply with the probation sentence," the court added, "undermines that." The court noted Ninnemann's crimes were "serious," pointing out that there were "80 counts that you admitted [were] substantially true and correct in the Complaint. And I already found that I believe that your conduct was targeting for your own sexual gratification." The court added, "[W]hat is it going to take to protect [the public] from you, who doesn't seem to realize the inappropriateness of your conduct." The court then sentenced Ninnemann to eight months on one

count, and seven months on each of the other four counts, all consecutive, for a total of "three years." The court ordered "straight time" on the eight-month sentence, but applied Ninnemann's 108 days of prior confinement credit against that sentence, and ordered that he be allowed to serve the remainder of his sentence with Huber work-release privileges, as Ninnemann had requested.

¶24 In his appellate briefing, Ninnemann states his denial of having committed these crimes and apparent "buyer's remorse" for entering his pleas "does not … prove that he is a higher risk to the community and that he deserves three years of county jail time for one probation violation." He complains that the court did not give sufficient consideration to a host of positive attributes and asserts the record "since the charges were filed against him, prove[s] that Ninnemann is *not* a risk to the public."

¶25 The States acknowledges that "Ninnemann's lewd and lascivious conduct did not continue throughout probation," but points out that he "was subject to strict supervision." The State also notes that at the sentencing after revocation hearing, Ninnemann argued for "a time-served disposition, which would have relieved Ninnemann from any additional supervision" and eliminated the protection that probation oversight afforded the victim. "Thus, after his probation was revoked for non-compliance with treatment and refusals to admit he committed the offenses," the State asserted, "the victim would have been denied any further protection."

¶26 We note that at the original sentencing hearing the circuit court recognized Ninnemann had "accepted some responsibility here by pleading no contest and not putting" the victim and the community "through a trial." The court stated it had read the letters submitted on Ninnemann's behalf, noting

Ninnemann "seem[ed] to be a good guy" and his indecent exposure appeared to be "completely out of character." The court recognized Ninnemann had no prior record, even stating that was "in large part" the reason it was willing to go along with a recommendation to place him on probation.

¶27 At the sentencing after revocation hearing, however, Ninnemann stood before the circuit court in a different posture, having been revoked for refusing to properly comply with sex offender treatment as ordered by his probation agent and very clearly denying he committed any crimes. With his refusal to comply with treatment and his denials, the court reasonably viewed Ninnemann at the sentencing after revocation hearing as a greater risk to the community. Also lost was character "credit" the court gave Ninnemann at the sentencing hearing for pleading instead of putting the victim and community through a trial—at the sentencing after revocation hearing, the court understandably was troubled that Ninnemann's decision to not comply with his probation requirement[3] caused the victim and her parents, who were present at the hearing, to have to go "through this whole process once again where they thought they could close the book and move on." Even with that, the court did not sentence Ninnemann to the forty-five months requested by his agent and the State, but instead to thirty-six months, most of which the court agreed to permit Ninnemann to serve with Huber work-release privileges, as he requested. With regard to the court's failure to mention certain attributes of Ninnemann that he

[3] Ninnemann asserts the circuit court inaccurately stated Ninnemann "just didn't comply" with his probation. There is nothing inaccurate about this statement in that Ninnemann's probation was revoked because he did not comply with the sex offender treatment requirement of his probation, he did not even challenge the revocation, and he acknowledged at the sentencing after revocation hearing that he failed to comply with the treatment requirement.

views as mitigating, we note that a court is not required to "enumerate all of the factors that might have been considered in reaching the decision." ***State v. Grady***, 2007 WI 81, ¶41, 302 Wis. 2d 80, 734 N.W.2d 364 ("It 'remains within the discretion of the circuit court to discuss only those factors it believes are relevant.'" (quoting ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20)).

¶28 For the foregoing reasons, we conclude the circuit court properly exercised its discretion in sentencing Ninnemann after revocation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.