COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-1455-CR
03-1456-CR

Cir. Ct. Nos. 99CF004614
00CF003635

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO L. SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: ROBERT CRAWFORD and DAVID A. HANSHER, Judges. *Affirmed.*[1]

Before Fine, Schudson and Curley, JJ.

---

[1] Judge Crawford presided over the guilty plea, the jury trial, and the sentencing. Judge Hansher entered the order denying Simmons' motion for postconviction relief.

¶1 PER CURIAM. Antonio L. Simmons appeals from a judgment, following his guilty plea conviction for felon in possession of a dangerous weapon, and his jury convictions for first-degree recklessly endangering safety while armed, two counts, and second-degree recklessly endangering safety while armed, and from an order denying his motion for a new trial and for sentence modification.[2] He seeks a new trial in the interest of justice on the jury convictions but, on appeal, he specifically maintains only that the postconviction court erred in denying his request for an evidentiary hearing to determine whether a new trial is warranted, based on information from two newly discovered witnesses. Failing that, he also seeks resentencing based on what he maintains was the sentencing court's reliance on a factually unsupported assumption, its overemphasis on general deterrence, and its failure to sufficiently articulate the reasons for imposing maximum, consecutive sentences. We affirm.

I. BACKGROUND

¶2 As relevant to the issues on appeal, testimony from the recklessly-endangering-safety trial established that during the early morning hours of July 8, 2000, Simmons and James Gray were arguing in a tavern when Gray hit Simmons in the head with a glass, cutting him. Tyrone Ramsey, a bouncer at the tavern, testified that he told Gray and his sister, Precious Gray, to leave the tavern while security personnel kept Simmons inside for ten to fifteen minutes. Ramsey also stated that he believed a customer might have handed Simmons a .25-caliber pistol. Precious testified that as she and James were leaving the tavern, she saw

[2] This court consolidated the appeal for briefing and dispositional purposes on September 18, 2003.

Simmons lifting his shirt, reaching for the back of his pants as if he had a gun, and telling James to "meet [him] outside."

¶3 James, Precious, and her friend, Andrea Crawley, then got into Precious' car. Ramsey said that although he held Simmons for ten to fifteen minutes after Gray's group left, he noticed that the group remained in the car talking when Simmons exited the bar and entered a white, two-door Chevy. Ramsey stated that shortly thereafter, both cars left and he saw Simmons fire multiple times into Gray's car while he (Simmons) was standing outside the car in the well-lit intersection. Ramsey said Simmons jumped back into the white car and sped off. Ramsey subsequently alerted police to the shooting and described the vehicle; he testified, however, that he did not see anyone else in Simmons' car.

¶4 Precious testified that as she was waiting at an intersection near North 42nd Street and Capitol Drive, a white car pulled up on the passenger side of her car. Precious, Andrea and Gray each testified that Simmons, who was driving the white car, stuck his head out the window, and started shooting at them. Precious was struck by a bullet in the back of her right shoulder, and James suffered eight bullet wounds; Andrea was not physically injured.

¶5 James testified that the man in the white car said, "[W]hat's up now, motherfucker?" James also said the shooter then exited the car and fired multiple shots at him through a window on the rear passenger side of the car, while telling him to die.

¶6 Precious and Andrea testified that they managed to exit their vehicle and run back across the street to the tavern. Precious testified that as they were running across the street, Simmons circled around in the white car, stopped briefly, and said, "[Y]eah, that's how I do it."

¶7 John Lindsey, a close friend of Simmons, and the only defense witness at trial, testified that he left the tavern with Simmons who, he said, was bleeding profusely. Lindsey said that he and Simmons got in his Red Cutlass and were headed for a hospital, when he saw gunfire coming from another car. Lindsey explained that, ultimately, he and Simmons decided not to go to the hospital because of Simmons' fears about his outstanding warrants, so they returned to his (Lindsey's) residence. No other evidence corroborated Lindsey's account.

¶8 Following the two-day trial, the jury convicted Simmons, and on June 14, 2001, the court sentenced him. On the day of sentencing, however, defense counsel filed a motion for a new trial, supported by an affidavit from Zekea Jones, Simmons' girlfriend. In her affidavit, Jones claimed to be responsible for the shooting. The court denied the motion and proceeded to sentencing. For the felon-in-possession-of-a-firearm conviction, the court imposed an indeterminate prison term not exceeding two years, consecutive to an existing sentence. On the three convictions for recklessly endangering safety, the court imposed total confinement of twenty-six years, and thirteen years of extended supervision, consecutive to the non-bifurcated sentence.

¶9 Simmons sought a new trial in the interest of justice, and resentencing. Attached to his motion, Simmons provided two affidavits from witnesses, Sheri Purifoy and Kina Jackson, who allegedly were at the tavern that night. Purifoy stated that she "saw Mr. Simmons leave the tavern and get into the passenger side of a red Cutlass driven by a male [she] recognized as someone named 'John.'" Jackson averred that she "saw Mr. Simmons leave the tavern and get into the passenger side of a car driven by an unknown male."

¶10 Additionally, as an alternative to a remand for an evidentiary hearing on his miscarriage-of-justice claim, Simmons sought resentencing on his recklessly endangering safety convictions and on his separate conviction for possession of a firearm by a felon. The postconviction court denied the motion without a hearing.

II. ANALYSIS

A. Motion for a New Trial in the Interest of Justice

¶11 Simmons maintains that the postconviction court erred in denying his motion for a new trial. He contends that Purifoy and Jackson could provide testimony corroborating Lindsey's account and, further, that if their testimony would be believed, the testimony of those three witnesses would preclude the possibility that Simmons was the shooter. Simmons recognizes on appeal, however, that affidavits generally "are not sufficiently probative to impel a court to conclude with any degree of probability that justice has miscarried or that a new trial would probably produce a different result." ***State v. McConnohie***, 113 Wis. 2d 362, 371, 334 N.W.2d 903 (1983). Consequently, the discrete issue here is whether the circuit court erred in denying Simmons' request for an evidentiary hearing on his motion for a new trial.

¶12 Whether the circuit court should have conducted an evidentiary hearing based on Simmons' motion and supporting affidavits is a mixed question of fact and law. *See* ***State v. Velez***, 224 Wis. 2d 1, 17-18, 589 N.W. 2d 9 (1999). A circuit court has discretion to deny a motion without holding an evidentiary if it finds: (1) the defendant failed to allege sufficient facts to raise a question of fact; (2) the defendant presented only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 17.

Whether a defendant alleged facts sufficient to require an evidentiary hearing is a question of law which we review de novo. ***Id.*** at 18. However, if a defendant's motion does not allege sufficient facts, the circuit court has the discretion to deny the motion without an evidentiary hearing. ***Id.*** "We use the deferential erroneous exercise of discretion standard in reviewing a circuit court's discretionary decision." ***Id.*** at 19.

¶13 Under WIS. STAT. § 805.15(1), a trial court has discretion to order a new trial in the interest of justice. *See* ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). Under WIS. STAT. § 752.35, we may reverse an order or judgment in the interest of justice. This court has authority to grant a new trial when the real controversy has not been fully tried or when it is probable that justice has miscarried. ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

¶14 Here, Simmons argues that his affidavits warrant a new trial because justice has miscarried. To meet this standard, Simmons must establish a "substantial degree of probability that a new trial would produce a different result." ***State v. Chu***, 2002 WI App 98, ¶55, 253 Wis. 2d 666, 643 N.W.2d 878. Although Simmons seeks a new trial on the ground that justice has miscarried, the underlying basis for his claim is his allegedly new evidence—two putative eye-witnesses who did not testify at trial. As this court has recognized, when a defendant seeks to present "new" evidence, certain criteria must be met. ***State v. Joyner***, 2002 WI App 250, ¶22, 258 Wis. 2d 249, 653 N.W.2d 290. Specifically,

> (1) the evidence must have come to the moving party's knowledge after trial; (2) the moving party must not have been negligent in seeking to discover the evidence; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to that which was

> introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

Id. Further, "[i]f the new evidence fails to meet any one of these criteria, the moving party is not entitled to a new trial." ***Id.*** The defendant bears the burden of establishing each of these five criteria by clear and convincing evidence. ***State v. Shanks***, 2002 WI App 93, ¶13, 253 Wis. 2d 600, 644 N.W.2d 275.

¶15 Simmons seeks to establish "a substantial degree of probability that a new trial would produce a different result." As noted, however, he asks only for an evidentiary hearing recognizing that, under ***McConnohie***, relief in the interests of justice ordinarily must be based on live testimony rather than on mere affidavits. ***McConnohie***, 113 Wis. 2d at 371.

¶16 In response, the State, dissecting the affidavits and the pleadings, maintains that they fail to merit a hearing. The State is correct. The pleadings fall short for several reasons, but most obviously they fail because they do not establish "a substantial degree of probability that a new trial would produce" not guilty verdicts. *See* ***Chu***, 253 Wis. 2d 666, ¶55.

¶17 Even if Purifoy and Jackson testified in accordance with their affidavits, their testimony would not undermine the evidence that Simmons went on a rampage of revenge following a bar fight. The evidence—testimony from the three occupants of Gray's car and from Ramsey; Simmons' obvious motive for retaliation; Simmons' "telling [James Gray] to die as he was shooting [him]," followed by Simmons circling of the car and taunting Gray's sister, "yeah, that's how I do it"—is substantial and compelling. Thus, at most, Simmons has established a *possibility* that a new trial could produce a different result, not a

"substantial degree of probability" that it would do so. *See* ***id.*** Consequently, the circuit court did not err in denying his motion for a hearing.

B. Sentencing

¶18 Simmons challenges his sentences on three distinct grounds. First, he maintains that the sentencing court lacked a sufficient factual basis to conclude that he manipulated his girlfriend, Zakea Jones, into submitting an affidavit in which she claimed to have been the shooter. Second, he argues that the court gave too much weight to "general deterrence." And third, he contends that the court failed to adequately explain why it imposed maximum consecutive sentences. We disagree.

¶19 The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Gallion***, 2004 WI 42, ¶8, 270 Wis. 2d 535, 678 N.W.2d 197 (reaffirming ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. ***Larsen***, 141 Wis. 2d at 427. The weight to be given each factor, however, is

within the sentencing court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

Zakea Jones' Affidavit

¶20 Challenging his maximum consecutive sentences, Simmons argues that the court erred in stating that "one of the most distressing things about the case," and what it found "especially reprehensible," was that he "attempted to shift the blame for the shooting … to Zakea Jones." The court emphasized that Simmons had "found somebody who was vulnerable and easy to manipulate, and he has proceeded to manipulate her to the tune of getting her to file a statement regarding her alleged responsibility for the shooting."

¶21 Simmons argues that nothing in the record establishes that he had anything to do with inducing Jones to make her statement. We disagree; the record provides a sufficient basis for the sentencing court to have inferred that Simmons influenced Jones' affidavit.

¶22 A defendant has a due process right to be sentenced based on accurate information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing ***United States v. Tucker***, 404 U.S. 443, 447 (1972)). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a "constitutional issue" presenting "a question of law which we review *de novo*." ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993).

¶23 A defendant who asks for resentencing because the court relied on inaccurate information must show both that the information was inaccurate and that the court relied on it. ***Id.*** The defendant carries the burden of proving both

prongs—inaccuracy of the information and prejudicial reliance by the sentencing court—by clear and convincing evidence. ***Id.***; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Once a defendant does so, the burden shifts to the State to show that the error was harmless. ***State v. Anderson***, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). An error is harmless if there is no reasonable probability that it contributed to the outcome. ***Id.*** at 411.

¶24 Moreover, as we have explained, "the integrity of the sentencing process" depends on certain "safeguards" to assure the opportunity to address and correct any possible inaccuracies. *See* ***State v. Mosley***, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996).

> To protect the integrity of the sentencing process, the court must base its decision on reliable information. Several safeguards have been developed which effectively protect the due process right of a defendant to be sentenced on the basis of true and correct information. The defendant and defense counsel are allowed access to the presentence investigation report and are given the opportunity to refute what they allege to be inaccurate information.

Id. (citations omitted). A defendant's right to be sentenced based on accurate information includes not only the opportunity to challenge information in a presentence investigation report, *see* ***State v. Perez***, 170 Wis. 2d 130, 141-42, 487 N.W.2d 630 (Ct. App. 1992), but also, through the right of allocution, the "opportunity to make a statement with respect to any matter relevant to the sentence," WIS. STAT. § 972.14(2). Where, however, a defendant fails to object to allegedly erroneous information presented at sentencing, and fails to challenge the information when exercising the right of allocution, we determine whether the sentencing court erroneously exercised discretion in considering the information. *See* ***Mosley***, 201 Wis. 2d at 45-46.

¶25 While the record supports Simmons' argument that the court relied in part on its perception that he had a role in causing Jones to submit an affidavit in which she claimed to have been the shooter, it does not support his argument that the information on which the court based its perception was inaccurate. The court reasonably could have inferred that Simmons had a hand in Jones' attempt to take the blame because of the nature of his relationship with her, and Simmons' own failure to challenge the court's perception.

¶26 Prior to imposing sentence, the court directly addressed Simmons' brother, Aaron, who had spoken on Simmons' behalf, and had expressed its dismay that the defendant had talked Jones into taking the fall for the shooting. Simmons did not object. Moments later, when Simmons addressed the court, he failed to challenge the court's perception. *See* ***State v. Groth***, 2002 WI App 299, ¶24, 258 Wis. 2d 889, 655 N.W.2d 163 (defendant's failure to object to allegedly erroneous information presented at sentencing is tacit acknowledgment that the information is true).

¶27 To gain resentencing on the grounds of inaccurate information, Simmons has to show by clear and convincing evidence that the information was inaccurate. Although he has established that the court had only a limited factual basis for its conclusion, he did not object to it at sentencing, and he has not demonstrated its inaccuracy.

General Deterrence

¶28 Simmons also argues that he is entitled to resentencing because the court overemphasized general deterrence and failed to articulate the basis for maximum, consecutive sentences. While conceding that "general deterrence" is a

proper sentencing factor, he argues that the sentencing court "elevated [this factor], virtually to the exclusion of all else." We disagree.

¶29 General deterrence is widely recognized as a proper sentencing factor. *See* ***United States v. Barker***, 771 F.2d 1362, 1368 (9th Cir. 1985); 18 U.S.C. § 3553(a)(2)(B). Indeed, "[c]ourts are entitled—even encouraged—to consider the rights and interests of the public in imposing sentence in a particular case." ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990). Clearly, however, general deterrence should not be the "*sole* aim in imposing sentence." ***Barker***, 771 F.2d at 1369. This court will find error, however, only if the court gives too much weight to one factor in the face of other contravening factors. ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.

¶30 In sentencing Simmons, the court properly considered "general deterrence" as one of several sentencing factors. First, the court addressed Simmons' character, noting that he had a history of gun offenses, including armed robbery, carrying a concealed weapon, and the present offense, possessing a firearm as a felon.

¶31 Next, the court addressed the nature of Simmons' crimes. In particular, the court observed that Simmons had ambushed Gray and his companions, firing at them at close range as they sat helplessly in a stopped car. Given these circumstances, the court concluded that Simmons had intended to commit "a cold-blooded assassination" as a result of a bar fight.

¶32 When the court addressed the need to protect the public, it applied the concept of general deterrence with specific and individualized attention to Simmons' crimes. Specifically, the court emphasized that this type of crime,

involving a convicted felon unlawfully possessing a gun, getting into a senseless bar fight, and resorting to the use of a gun to save face, was reprehensible. Consequently, the court concluded that the public needed to be protected from Simmons' conduct and from others who might do the same. The court did not err.

Maximum Consecutive Sentences

¶33 Simmons also argues that the court erred in imposing maximum consecutive sentences. We disagree.

¶34 As noted, for each of the four crimes, the court imposed maximum terms of confinement, consecutive. As this court has reiterated, "the imposition of consecutive sentences of total confinement, where such sentences are permitted, should be accompanied by a statement of reasons for the selection of consecutive terms." ***State v. Hall***, 2002 WI App 108, ¶14, 255 Wis. 2d 662, 648 N.W.2d 41 (internal quotation marks and quoted source omitted); *see also* ***Gallion***, 270 Wis. 2d 535, ¶46. Nevertheless, if a sentencing court fails to set forth the reasons for the sentences imposed, a reviewing court must search the record to determine whether, in the exercise of proper discretion, the sentences can be sustained. ***State v. Leighton***, 2000 WI App 156, ¶52, 237 Wis. 2d 709, 616 N.W.2d 126.

¶35 Here, the record reflects the sentencing court's detailed explanation of the sentences. Struck by the heinous nature of the crimes, the court stated:

> Mr. Antonio Simmons laid in wait for James Gray when Mr. Gray left the Cap Tap Tavern. …. Mr. Antonio Simmons drove a white automobile next to the automobile in which Mr. James Gray was a passenger in the back seat, and Antonio Simmons opened fire at close range.
>
> ….
>
> … James Gray was struck with eight bullets. It is remarkable that he lived to testify about the incidents.

> While Antonio Simmons was shooting James Gray, repeatedly he told [Gray] to … "Die, motherfucker, die." This was a cold-blooded assassination [attempt].

In addition, the court deemed Simmons' criminal history and lack of remorse to be key factors. Commenting on his character, the court observed:

> Mr. Simmons is a convicted felon. He was convicted of participating in an armed robbery in 1991. It was just one of two convictions on his adult record involving misuse of a weapon…. [H]e was arrested [and later convicted of] carrying a concealed weapon just two-and-a-half months before he was arrested for participating in an armed robbery.

Moreover, the record establishes that the court was also aware that Simmons' record included convictions for sexual assault, battery, illegal drug possession and bail jumping. In light of these facts, the court concluded:

> I think it is important to protect the community from future misconduct by [Simmons], and I think it is important that there be a strong deterrent message se[n]t by the sentences….
>
> ….
>
> I reject probation on the four convictions. I conclude that given the level of violence in this case that probation would unduly depreciate the seriousness of the assaults against James Gray, Precious Gray, and Andrea Crawley. I also conclude that there is an important societal interest in protecting our community from felons [who] go out and arm themselves with guns.

¶36 Simmons contends that the court nevertheless failed to provide adequate reasons for sentencing him to the maximum terms of incarceration and extended supervision. We disagree.

¶37 The Wisconsin Supreme Court recently reiterated that a sentence should be the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative

needs of the offender, ***Gallion***, 270 Wis. 2d 535, ¶44. Indeed, the court held that probation should be considered as the first alternative, unless confinement is deemed necessary. ***Id.*** Further, the court noted that when a circuit court imposes a bifurcated sentence, it must, by reference to the relevant facts and factors, explain how the sentence's component parts advance the sentencing objectives. ***Id.***, ¶¶45-46.

¶38 The court acknowledged, however, that while a meaningful, on-the-record explanation of a sentence is required, a sentencing court's exercise of discretion does not lend itself to mathematical precision. ***Id.***, ¶¶49-50. Further, contrary to Simmons' argument on appeal, the sentencing court need not clarify why it did not impose a lesser sentence. ***Id.***, ¶¶54-55.

¶39 As explained, the record reflects the sentencing court's adequate explanation of the imposed maximum consecutive sentences. Simmons has failed to establish otherwise; hence, he has not met the high burden of showing some "unreasonable or unjustifiable basis in the record for the sentence" imposed. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Consequently, we conclude that no basis exists to disturb his sentence.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)5.