COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2383-CR **Cir. Ct. No. 2003CF219**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BELINDA JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Belinda Johnson appeals a judgment of conviction for two counts of misappropriation of personal identifying information or personal identification documents ("identity theft"), contrary to WIS. STAT. § 943.201(2)

(2001-02),[1] and one count of forgery, contrary to WIS. STAT. § 943.38(1)(a), and from a postconviction order denying her motion for modification of her twenty-year sentence. She contends the trial court erroneously exercised its sentencing discretion by giving too much weight to negative factors, relying on "immaterial speculation," and meting out a sentence so disparate from those given her co-actors as to shock the public conscience. We disagree and affirm.

¶2 Johnson and six codefendants each were charged with eight counts of identity theft and five counts of forgery as part of a multi-state counterfeit check operation.[2] Pursuant to a plea bargain, Johnson pled guilty to two counts of identity theft and one count of forgery. In exchange, the State agreed to dismiss and read in the remaining counts. Johnson faced a maximum sentence of thirty-five years and was sentenced to a total of twenty years, consecutive to her federal sentence, and no probation. The same trial court judge sentenced five of Johnson's six co-actors to prison sentences ranging from six to eleven months with an additional two years' probation each.

¶3 Postconviction, Johnson sought to modify her sentence. She claimed the trial court erroneously exercised its sentencing discretion because (1) the record did not support the court's rationale for the sentence imposed, and (2) the disparity between her sentence and her co-actors' constituted a new factor. The trial court denied the motion, finding no merit to Johnson's claim that the disparate sentences were unjustified or that a new factor existed. The court reiterated that

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The state charges followed Johnson's prosecution of similar federal charges for which she was sentenced to forty-eight months in prison followed by three years of supervised release.

the sentence aimed mainly to punish Johnson and protect the community, and that individual sentencing factors warranted a longer sentence for Johnson because her involvement as the "kingpin" of the counterfeit ring was substantially different than that of her codefendants. Johnson now appeals.[3]

¶4 Johnson argues that the trial court erroneously exercised its discretion because (1) it relied on "immaterial speculation" about a lengthy sentence's impact on her future computer expertise and gave the various sentencing factors too much negative weight without considering mitigating factors, and (2) the disparity between Johnson's and her codefendants' sentences is so disproportionate as to shock the public conscience.

¶5 A trial court is granted wide discretion in sentencing. ***State v. Spears***, 147 Wis. 2d 429, 446, 433 N.W.2d 595 (Ct. App. 1988). We generally afford the trial court's sentencing decisions a strong presumption of reasonability because it is best suited to consider the relevant factors and the convicted defendant's demeanor. ***State v. Borrell***, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992). To overcome that presumption, the defendant must show an unreasonable or unjustifiable basis for the sentence. ***Spears***, 147 Wis. 2d at 446. Appellate review is limited to determining if discretion was erroneously exercised. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Discretion is erroneously exercised if done on the basis of clearly irrelevant or improper factors. *See* ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).

[3] Johnson was sentenced in May 2004, her postconviction motion was denied in August 2005 and she filed a notice of appeal in September 2005. After briefing was complete in early 2006, Johnson sought a change of counsel. In May 2007 the public defender's office appointed successor counsel, who first indicated in October 2007 an intent to file a new brief.

¶6 The sentencing court must address three primary factors: the nature of the offense, the character of the offender and the need to protect the public, and also may consider any other relevant factors. ***Id.*** at 274. Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered, and the weight to be given any one factor is particularly within the court's discretion. ***State v. Lewandowski***, 122 Wis. 2d 759, 764, 364 N.W.2d 550 (Ct. App. 1985). The court must give a "rational and explainable basis" for the particular sentence it imposes, however, so that this court can ensure that discretion was in fact exercised. ***McCleary***, 49 Wis. 2d at 276.

¶7 Johnson does not contend that the sentencing court failed to consider the three primary factors. Rather, she argues that legitimate sentencing factors were overshadowed by the court's "unusual" rationale for the twenty-year confinement when it addressed the need to protect the public:

> Confinement in this matter is necessary in order to protect the public from further criminal activity. What she learned over a course of years is still implanted in her brain. Were she allowed to resume a place in society at this time, all of the expertise to commit criminal offense[s] that she has learned and gathered from experience over a long length of time could be immediately put back into use. The Court recognizes from common sources of information that our computer technology advances rapidly year to year. The Court notes that her crimes would have not been able to have been committed twenty years ago because copy machines were not as efficient nor were computers as efficient as they are at the current time. The Court takes this into consideration that technology moves forward rapidly in these areas. And, therefore, if she is deprived of knowledge of the changes in technology for some period of time what she has learned as a criminal career may well be history outdated and unusable.

Johnson criticizes this rationale as "immaterial speculation" and likens it to confining a defendant convicted of a crime involving a gun long enough that he or

she forgets how to pull a trigger. She also complains that the trial court gave too much weight to negative factors without considering either mitigating ones or the Presentence Investigation Report writer's recommendation for a lesser sentence than she received.

¶8 A review of the sentencing transcript demonstrates that the trial court did not erroneously exercise its discretion when it sentenced Johnson. As Johnson concedes, the court examined all three primary factors and numerous secondary factors, including Johnson's "horrendous" prior criminal record, "dismal" employment record, significant drug problem and total culpability in the crimes before the court. The trial court assigned each factor the weight it deemed appropriate, and explained its reasoning. Contrary to Johnson's claim, the court also expressly stated that it considered the entire PSI report, as well as letters written by Johnson or on her behalf. Her argument fails.

¶9 Johnson also contends that her sentence was so excessive and disproportionate to those her six codefendants received as to be unreasonable and to shock the public conscience. The trial court has the discretion to determine the length of sentence within the permissible range set by statute. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We will find an erroneous exercise of this discretion "only where the sentence 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." ***Id.*** Disparity among codefendants' sentences is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Moreover, even leniency in one case does not transform a reasonable

punishment in another case into a cruel one. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

¶10 Here, the court found that Johnson had a history of fraud, theft and forgery, led a criminal enterprise that seriously impacted the public, and that her crimes were aggravated, her culpability "100 percent," and her rehabilitative needs extensive. Johnson herself admits that she has a lengthier criminal history than her codefendants, that she was a "major player" in this endeavor, that the injury she caused was significant, and that some of her codefendants claim she trained them how to do identity theft.

¶11 Johnson's sentence is significantly longer than her co-actors' but less than the term to which she was exposed. The trial court thoroughly examined the primary factors and numerous others, and explained in detail how it arrived at the sentence it did. It explained how lengthy incarceration would protect the public from Johnson's technology-dependent choice of crime. Because the court reached a reasoned and reasonable conclusion, it was a proper exercise of discretion. *See* ***Spears***, 147 Wis. 2d at 447.

By the Court.—Judgment and order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).