COURT OF APPEALS DECISION DATED AND FILED

December 11, 2007

David R. Schanker
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. 2007AP235-CR

Cir. Ct. No. 2005CF6644

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERDALE D. ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH III, Judge. *Affirmed*.

Before Fine, Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Verdale D. Armstrong appeals from a judgment of conviction and from an order denying his motion for sentence modification. He claims that the circuit court erroneously exercised its sentencing discretion. We reject his contentions and affirm.

Background

¶2 Armstrong pled no-contest to one count of endangering safety by use of a dangerous weapon as party to a crime. *See* WIS. STAT. §§ 941.20(2)(a), 939.05 (2005–06).[1] Evidence at the preliminary hearing included Armstrong's confession that he fired a 9-millimeter pistol into a residential building. At sentencing and in his postconviction filings, Armstrong described the incident as retaliation for an earlier shooting into his own home by, among others, Kenneth Burns.

¶3 Burns, like Armstrong, was convicted of endangering safety by use of a dangerous weapon. By the time of Armstrong's sentencing, the circuit court had sentenced Burns to one year in the House of Corrections, stayed that sentence and placed Burns on probation for three years, with six months of confinement as a condition.[2]

¶4 Armstrong sought a disposition similar to Burns's during his own sentencing before a different branch of the Milwaukee County Circuit Court.[3] Armstrong argued that both he and Burns were young men without prior records

[1] All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

[2] We have assembled the facts surrounding Burns's conviction and sentence from various sources in the record, but we note that Burns's sentencing transcript was not before the circuit court and is not part of the appellate record.

[3] The Honorable David A. Hansher sentenced Burns. The Honorable William W. Brash III sentenced Armstrong.

who committed related offenses and who should receive comparable punishments. Armstrong asked the court to impose and stay a prison sentence of unspecified length and to place him on probation; to impose some period of confinement as a condition of probation in the event that the court felt incarceration necessary; and to permit release privileges during any probation confinement. The State, by contrast, recommended a thirty-six month term of imprisonment.

¶5 The circuit court adopted neither party's recommendation in full. It sentenced Armstrong to a four-year term of imprisonment, bifurcated as two years of initial confinement and two years of extended supervision. The court stayed the sentence and placed Armstrong on probation for a three-year term with various conditions, including five months of probation confinement without release privileges.

¶6 Armstrong moved for postconviction relief, asserting that the sentence imposed was unduly harsh and excessive, and that the circuit court erroneously exercised its sentencing discretion. He claimed that the court: (1) relied on inaccurate information by concluding that Armstrong had not fully accepted responsibility for the offense; (2) failed to properly consider and weigh relevant factors; (3) failed to explain its denial of release privileges during probation confinement; and (4) failed to explain the disparity between

Armstrong's and Burns's sentences. The court denied the motion and this appeal followed.[4]

Analysis

¶7 We begin with Armstrong's contention that the circuit court relied on inaccurate information when it found that "there really has not been an acceptance of responsibility with regard to this [offense]." Armstrong points to his in-court apology, his expressions of remorse, and his custodial confession as proof that he accepted responsibility and that the circuit court erred in finding otherwise.

¶8 A defendant has a due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. To establish a denial of this right, the defendant must show both that the disputed information was inaccurate and that the circuit court actually relied on the inaccurate information. *See* ***id.***, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7. Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional question that we review *de novo*. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

[4] The State suggests that Armstrong should not be heard to complain about his sentence because the circuit court largely imposed the terms he requested. *Cf.* ***State v. Magnuson***, 220 Wis. 2d 468, 471–472, 583 N.W.2d 843, 844 (Ct. App. 1998) (defendant who agrees to a sentence is judicially estopped from attacking that sentence on appeal). Although the State's position is not unreasonable, judicial estoppel is an equitable doctrine and should be invoked only when a party's positions are clearly inconsistent. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497–498, 523 N.W.2d 138, 141 (Ct. App. 1994). We do not apply judicial estoppel here because the circuit court rejected Armstrong's request for release privileges during probation confinement and it declined to impose a sentence as lenient as that imposed on Burns.

¶9 During the sentencing proceeding, Armstrong denied the core component of the charge against him, namely, shooting a gun into a building. While he admitted to being at the scene and breaking a window, he told the court, "I ain't shoot though." He further attempted to distance himself from the events by telling the court that "it was all [the co-defendant's] drama. I didn't know nothing about it." The circuit court drew a reasonable conclusion in finding that Armstrong had not fully accepted responsibility.

¶10 We next address Armstrong's claims that the court failed to give due consideration to relevant sentencing factors and that it inadequately explained its sentencing rationale. We are not persuaded.

¶11 This court will uphold a sentence unless the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. We presume that the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). Public policy strongly disfavors appellate court interference with the circuit court's sentencing discretion because the circuit court is best suited to consider the relevant factors and the defendant's demeanor. ***Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203.

¶12 "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207. The court must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***, 2004 WI 42, ¶41, 270 Wis. 2d at 557, 678

N.W.2d at 207. Similarly, the court "must [] identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the [sentencing] decision." ***Id.***, 2004 WI 42, ¶43, 270 Wis. 2d at 558, 678 N.W.2d at 207.

¶13 "The primary [sentencing] factors are the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). The circuit court may also consider a wide variety of additional related factors. *See* ***State v. Harris***, 119 Wis. 2d 612, 623–624, 350 N.W.2d 633, 639 (1984). The court need discuss only the relevant factors in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631, 641 (1993). The weight given to each factor is within the court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶14 Here, the circuit court emphasized the gravity of the offense and the need to protect the public. It pointed out that while no one was injured during the offense, the gunfire could have ended with a murder. The court described the community as "besieged" by such incidents and stated that the behavior was "simply unacceptable."

¶15 We reject Armstrong's claim that the circuit court failed to give meaningful consideration to his character. On the contrary, the court expressed concern about "a certain nonchalance" and "a certain cavalier approach to this …. [Y]ou shot up my house, I think I'll just go shoot up their [*sic*] house." At the same time, the court recognized as positive that Armstrong had finished high school and enrolled in a post-secondary education program. The court considered

additional mitigating factors as well, including Armstrong's lack of a prior record, his relative youth, and his support from family, school, and church.

¶16 The court prioritized its sentencing objectives. It identified deterrence as a matter of particular importance, stating that it "want[ed] to send a message that your kind of behavior is simply not acceptable period." It further stated that "there is a punishment component to this." We reject as meritless Armstrong's contention that the circuit court erroneously exercised its discretion because it did not explain exactly why its objectives warranted a sentence that differed from both parties' recommendations. The court is not required to provide such an explanation. ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990).

¶17 Armstrong asserts that the circuit court's sentencing remarks inadequately explained its denial of release privileges during probation confinement. We observe that the court had the opportunity to clarify its sentence further in its postconviction order. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994). Specifically, the court clarified that it denied release privileges due to the seriousness of the underlying offense. This decision was a proper exercise of sentencing discretion. *See* ***Harris v. State***, 75 Wis. 2d 513, 521, 250 N.W.2d 7, 12 (1977) (court may impose a substantial sentence for the purpose of emphasizing the seriousness of the offense).

¶18 In sum, the court discussed appropriate factors and then fashioned a sentence to meet its objectives of deterrence and punishment while imposing the least amount of confinement consistent with the factors enumerated. Armstrong complains that the court's explanation for its sentence was insufficiently precise, but defendants are not entitled to a mathematical analysis of how each factor

considered by the court resulted in a specific term of confinement. *See* ***State v. Fisher***, 2005 WI App 175, ¶¶21–22, 285 Wis. 2d 433, 447–448, 702 N.W.2d 56, 63.

¶19 We next consider whether the circuit court erroneously exercised its discretion when it imposed a harsher penalty on Armstrong than a different branch of the circuit court imposed on Burns. We hold that it did not. Mere differences in sentences, even between co-defendants, will not support a finding of undue disparity. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992). The defendant "bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing." ***Ibid.*** Here, the court relied on proper factors in sentencing Armstrong, and imposed a sentence to meet appropriate goals. Leniency shown to Burns does not transform Armstrong's reasonable sentence into an unreasonable one. *See* ***ibid.***

¶20 Moreover, the record reflects that Burns and Armstrong were differently situated. First, Burns was a juvenile, barely seventeen at the time he was charged, while Armstrong was an adult. Second, the court observed that Burns's actions posed a lesser threat of fatal injury than Armstrong's because Burns used buckshot while Armstrong discharged a 9-millimeter pistol. Third, the court noted with concern that Armstrong's offense involved retaliation. A court's conclusion that vigilantism heightened the danger of the offender and the offense may justify a harsher sentence than that imposed on an otherwise similarly-situated defendant. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220–221, 541 N.W.2d 815, 820 (Ct. App. 1995).

¶21 We turn to Armstrong's claim that the circuit court erroneously resolved his postconviction motion for sentence modification. He contends that he is entitled to sentence modification because the court based its original sentence on "unjustifiable factors and [] unjustifiable reasoning" and did not "adhere to established sentencing principles." Because we hold that the court properly exercised its sentencing discretion, we reject these arguments.

¶22 Armstrong further contends that the circuit court should have modified the original sentence because it was unduly harsh or unconscionable. We disagree. "As long as the trial court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience." ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50, 60 (Ct. App. 1996).

¶23 Armstrong faced ten years in prison. *See* WIS. STAT. §§ 941.20(2)(a), 939.50(3)(g). The circuit court considered appropriate factors and imposed a four-year prison term, which it stayed in favor of probation. This sentence is well within the maximum and is not harsh. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456. The circuit court committed no error here.

By the Court.—Judgment and order affirmed.

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