COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP342-CR **Cir. Ct. No. 2006CF643**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARVELL MORGAN DAVIS,

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., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Jarvell Morgan Davis appeals from his judgment of conviction and the trial court's order denying his motion for postconviction relief. Davis argues that: (1) the trial court erroneously exercised its discretion in sentencing him when it failed to adequately consider mitigating factors; (2) his due

process rights were violated when he was sentenced based upon information in a presentence investigation report (PSI) that was prepared with only a telephonic interview of him by the writer; and (3) his equal protection rights were violated when the trial court failed to properly consider his culpability in the crime when it sentenced him to twelve years' imprisonment. Because we conclude that Davis's due process and equal protection rights were not violated and that the trial court did not erroneously exercise its discretion in sentencing Davis, we affirm.

BACKGROUND

¶2 Davis pled no contest[1] to armed robbery with threat of force, party to a crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05 (2005-06).[2] The conviction arose out of the armed robbery of two vehicles from Jeannette Hughes and her three children, which occurred on January 21, 2006, at approximately 10:30 p.m. outside their residence.

¶3 Earlier that evening, Davis either joined his co-actors (Tremell L. Anderson, Brandin D. Bemley, and a minor female), or Davis and the minor female joined the other two to ride around in a tan car that Davis had never seen before. Davis claims he believed at the time that the vehicle was obtained as a

[1] Although it is clear from the record that Davis pled no contest to armed robbery with threat of force, contrary to WIS. STAT. § 943.32(2), the judgment of conviction in this case states that Davis pled guilty. On remand, the trial court is directed to correct this error. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that the trial court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

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

"hype rental"[3] for payment of drugs. It had actually been stolen by Anderson, Bemley and a third adult prior to Davis joining the group. At approximately 10:30 p.m., Davis and the others drove into an alley in the 5000 block of North 66th Street where Anderson and Bemley exited the vehicle and confronted the Hugheses who had parked their car in their garage and were moving toward their residence. Anderson and Bemley demanded the keys from Hughes. Anderson displayed a gun during the robbery. Upon obtaining the keys, Anderson and Bemley noted that keys to a second vehicle were attached. Bemley then took one of Hughes's sons to show him where the vehicle was parked on the street in front of the residence. Hughes later told the PSI writer that she feared that the perpetrators would shoot her or her children.

¶4 Bemley got the second vehicle, a white Chevy Tahoe, and drove it into the alley where he let the Hughes boy out of the Tahoe and then left the scene with the vehicle. Upon seeing the Tahoe accelerate past him in the alley, Davis got out of the tan car and saw Anderson pointing a gun at Hughes. Davis then saw Anderson get into the other Hughes vehicle and leave the scene in the same direction as the Tahoe. Davis then got into the driver's seat of the tan car and drove from the scene, following the vehicles stolen by Anderson and Bemley.

¶5 Davis claimed that he was unaware of the robbery occurring until he saw the Tahoe accelerate past him in the alley and saw Anderson with the gun pointed at Hughes. However, in his third statement to police, Davis stated, "When we pulled into the alley … backed onto a concrete slab and Tremell Anderson and

[3] A "hype rental" appears to be a vehicle that a drug buyer gives to a drug seller to use as payment for drugs.

Brandon Bremley [sic] got out of the front seat of the car, [the minor female present] told me that [s]he thought that Brandon Bremley [sic] and Tremell Anderson were going to get somebody/rob somebody." At the preliminary hearing, Milwaukee Police Detective David Anderson testified that in Bemley's statement to police, he claimed that the robbery was Davis's idea.

¶6 Davis did not stop to help Hughes or her children. Davis did not call police about the robbery, either that night or later. Davis gave conflicting stories about how and when he got rid of the keys to the tan car after the armed robbery (either throwing them away in a tot lot that night or keeping them and throwing them away in Hampton Park sometime the next day).

¶7 While this charge was pending, Davis was adjudicated delinquent on charges that had been pending at the time of this robbery. Davis was thereafter placed in the custody of Ethan Allen School. Davis pled no contest to one count of armed robbery with threat of force, party to a crime and the court ordered a PSI report.

¶8 The PSI writer interviewed Davis telephonically and personally spoke with Davis's mother, Hughes and the victim of the first robbery in which the tan car was stolen. In the report, the PSI writer noted that the writer's impressions of Davis were based upon the telephonic interview. At the sentencing hearing, Davis's counsel objected to the PSI report because the writer's only contact with Davis was a telephonic interview and requested that a second PSI be completed, this time with Davis being interviewed in person. After argument by the defense and the State, the trial court denied the request.

¶9 At sentencing, the trial court stated that it must consider various factors when determining a defendant's sentence, including "the nature of the

offense," the defendant "as an individual" and "the interest of society." The trial court specifically noted, relating to the nature and effect of the crime:

> Here you were a part of approaching a woman and her children. And they were – you may have been the driver of the car, you were there involved with it. And I'm fully convinced under the description you knew what was going on and you were a part of it.
>
> And although you didn't get out of the car, your co-actors approached a woman and her children. They pointed guns at her. And as she's described it, she was terrified for her children. She thought that they were going to die. At one point one of her children started to run and she told them to stop because she thought he'd get shot. And then she had to stand there and watch one of her sons be walked off with somebody with a gun not knowing whether or not he'd return.
>
> These people have guns. And one of them announces the phrase was "go into this, bitch," I believe the phrase was. And it has two connotations. Whether or not they should go in the residence and steal more or should they do something sexual to her under that circumstance.
>
> *And this wasn't a momentary event* where somebody ran up to this woman and snatched her purse and jumped back in the car. *They were there for a prolonged period of time*.… And so I'm not convinced at all that you were an innocent bystander not knowing what was happening.
>
> Best case scenario? You didn't plan it, it happened ….

(Emphasis added.) The trial court went on to note that Davis, even upon seeing what was happening, chose not to help the woman, chose not to contact police, but rather, left the scene and followed the other two co-actors.

¶10 The trial court then went on to consider Davis's character. It noted that all the letters sent to the court "say you're a wonderful person," "yet we have a juvenile background beginning at a young age." Specifically, the trial court

noted that "in 1997[,] there was a battery [hitting another boy in the head with a 'Club' steering wheel anti-theft device] for which there was a consent decree and an operating a motor vehicle without owner's consent in 2004 for which there was a deferred prosecution agreement." The court also noted that Davis had been expelled from Washington High School the previous fall for participation in a riot and that, most recently, Davis had been charged with taking his mother's vehicle without permission, being in possession of a dangerous weapon (a short-barreled shotgun) as a juvenile and with possession of marijuana. The court also noted that Davis was on supervision at the time of the offense at issue here. The court observed that Davis claimed use of marijuana for the past two years, one to three blunts per week, and that Davis considered this to not be "problematic." The court concluded that this pattern of behavior demonstrated that Davis "ha[s] rehabilitative needs … educational needs [and] drug issues that need to be addressed."

¶11 Finally, the trial court discussed the protection of the community. The court explained that Davis's conduct raised a need to protect the community from him and that the seriousness of the offense here required incarceration in "a prison setting." The trial court then sentenced Davis to twelve years' imprisonment, comprised of six years' initial confinement and six years' extended supervision.

¶12 Davis filed a postconviction motion for sentence modification alleging that: (1) mitigating factors support modification of his sentence; (2) his due process rights were violated because the PSI writer did not interview him in person; and (3) the trial court did not adequately consider Davis's culpability in the crime. The trial court denied the postconviction motion, and Davis appeals. Additional facts are provided in the discussion section as needed.

DISCUSSION

¶13 When a defendant challenges his or her sentence, "the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998); *see also* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483 (defendants have the burden of establishing that the trial court erroneously exercised its discretion in sentencing them). This burden is a heavy one, as "the trial court's sentence is presumptively reasonable," ***id.***, and there is a "consistent and strong [public] policy against interference with the discretion of the trial court in passing sentence," ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

¶14 Our review is limited to whether the trial court erroneously exercised its discretion and we will not substitute our "preference for a sentence merely because, had [we] been in the trial judge's position, [we] 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). "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (citation omitted). A court properly exercises its discretion when it relies "on facts that are of record or that are reasonably derived by inference from the record and [reaches] a conclusion based on a logical rationale founded upon proper legal standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

I. Consideration of mitigating factors in determining sentence

¶15 Davis argues that the trial court failed to "meaningfully consider and incorporate" several mitigating factors into its sentencing decision. Specifically,

Davis argues that the trial court failed to consider Davis's "minimal role in the robbery, [and] his cooperation, admission and initiative in turning himself in." Davis further argues that the court did not assess proper weight to the many letters provided to it by Davis's family and community.

¶16 The State argues that the trial court "acknowledged the letters that spoke highly of Davis [but] found that Davis had 'a juvenile background beginning at a young age,'" and that the trial court acknowledged, in denying Davis's postconviction motion, that "while Davis may have played a more minimal role in the offense compared to the co-actors," the court "sentenced Davis 'based on his particular character, background, and involvement, and culpability.'"

¶17 The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***McCleary***, 49 Wis. 2d at 276. It is within the trial court's exercise of its discretion to determine those factors it believes are relevant and to determine what weight to give each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶18 During the sentencing hearing, the trial court noted that while all the letters sent to the court "say you're a wonderful person," Davis had a significant juvenile record which included battery, possession of a dangerous weapon, operating his mother's car without permission and possession of marijuana. The trial court also noted that Davis had recently been expelled from high school because of his participation in a riot and was also on supervision at the time of this offense. Based upon our review of the record, we determine that the trial court

addressed those mitigating factors presented by Davis and, accordingly, did not erroneously exercise its discretion in sentencing him.

II. PSI

¶19 Davis argues that he was denied due process when the PSI writer failed to interview him in person and the resulting PSI report, therefore, "reflected [a] lack of objectivity and thoroughness." Davis argues that the PSI "report is a cornerstone to the sentencing procedure" and that a telephonic interview is not sufficient for the writer to accurately assess Davis's attitude or credibility. Finally, Davis argues that because the sentence the trial court ultimately gave him "parallel[ed] the PSI recommendation … [i]t cannot be said that the PSI author's conclusions did not influence the court or the court's rationale and to the extent that it did, the sentence cannot be upheld."

¶20 The State argues that "Davis has failed to show that the PSI was flawed or that the [writer] was biased against him" and further, that the writer met the requirements under WIS. ADMIN. CODE § DOC 328.29(4), which require only that an attempt should be made to interview the offender, and here, the writer did interview Davis, albeit by telephone. The State argues that because Davis points to no inaccuracies in the facts set forth in the PSI, and because the writer followed the statutory requirements, Davis was not denied due process by the trial court's consideration of the PSI.

¶21 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." ***Id.*** The United States Supreme Court has developed a test, the ***Townsend/Tucker*** test,

to determine whether a defendant has been denied due process in sentencing by the sentencing court's use of a PSI report. ***United States v. Tucker***, 404 U.S. 443 (1972); ***Townsend v. Burke***, 334 U.S. 736 (1948). This test was reconfirmed as applicable to Wisconsin courts in ***Tiepelman***. ***Id.***, 291 Wis. 2d 179, ¶14. The ***Townsend/Tucker*** test requires that a defendant demonstrate that the sentencing court used "false information [as] part of the basis for the sentence. The two elements of that showing are, first, that information before the sentencing court was inaccurate, and second, that the sentencing court relied on the misinformation in passing sentence." ***Id.*** (citation and internal quotation marks omitted). "Whether the court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.*** (citation omitted).

¶22 Davis, however, does not claim that any of the factual information in the report was inaccurate. Rather, Davis argues that the PSI writer's credibility determination, upon which the writer based the recommendations, was flawed because the writer did not meet with Davis in person. However, in-person interviews are not required. *See* WIS. STAT. § 972.15; WIS. ADMIN. CODE § DOC 328.29(4). Additionally, in its decision on Davis's postconviction motion, the court noted that it "made its own determination as to [Davis's] claim that he did not know what was going on during the armed robbery and, hence, the court was not reliant on the agent's assessment of [Davis's] credibility in this regard." A trial court may, but is not required to, use a PSI in making its sentencing determination. *See* ***Krebs v. State***, 64 Wis. 2d 407, 421, 219 N.W.2d 355 (1974).

¶23 The trial court also presided over the cases involving Anderson, Bemley and the third defendant in count one, Marquis Prescott. Accordingly, the

trial court had available to it a more complete picture of what occurred on the night of January 21, 2006, than is reflected in the record in this case. The trial court is permitted to use information that would not be admissible at trial in making its sentencing decisions. *See* WIS. STAT. § 911.01(4)(c). Additionally, a trial court should attempt to ascertain all aspects of an individual's character and actions in determining the appropriate sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶36, 270 Wis. 2d 535, 678 N.W.2d 197 (To be a proper exercise of discretion, sentence should be based upon "complete and accurate information."); ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) ("Evidence of unproven offenses involving the defendant may be considered by the court" in "determining the character of the defendant and the need for his incarceration and rehabilitation."). To that end, a sentencing court may properly consider unproven offenses and uncorroborated hearsay in determining an appropriate sentence. ***State v. Marhal***, 172 Wis. 2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992); *see also* ***United States v. Lawrence***, 934 F.2d 868, 874 (7th Cir. 1991) ("[A] sentencing court may consider uncorroborated hearsay that the defendant has had an opportunity to rebut, illegally obtained evidence, and evidence for which the defendant has not been prosecuted."), *cert. denied*, 502 U.S. 938.

¶24 Davis argues that because the PSI writer acknowledged difficulty in making credibility determinations due to the fact that the interview with Davis was conducted telephonically, that this created a bias by the writer. We do not agree. A simple acknowledgement that recommendations are conditioned upon only a telephonic interview with Davis does not lead to the conclusion that the writer's observations were not "accurate, reliable and … objective." *See* ***State v. Suchocki***, 208 Wis. 2d 509, 518, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***Tiepelman***, 291 Wis. 2d 179, ¶31. Davis has not identified any

facts in the PSI report that he claims are inaccurate. Davis's conclusion that a telephonic-only interview led to a lack of objectivity and even bias by the PSI writer constitutes mere speculation unsupported by any facts in the record. Accordingly, Davis has failed to meet his burden of showing that the PSI report was inaccurate or biased, or that even if the recommendations were based upon only a telephonic interview, that the court based its credibility and culpability determinations on the PSI report, which the trial court, in its decision on Davis's postconviction motion, denies.

III. Disparate sentences between co-actors

¶25 Davis next argues that the trial court erroneously exercised its discretion when it failed to "adequately factor in differing levels of culpability" between the co-actors. Davis argues that his role in the armed robbery was much more diminished than the other two individuals, but that his "sentence is not commensurate with the differing levels of culpability, harm and intent." The State argues that, in fact, Davis received a shorter sentence than Anderson and that "Davis has failed to establish that the [trial] court erroneously exercised its discretion in fashioning his sentence compared with the sentences his co-actors received."

¶26 Individuals have an equal protection right to receive "substantially the same sentence for substantially the same case histories." ***Ocanas v. State***, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). "A mere disparity between the sentences of co-defendants 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).

¶27 Davis directs this court to compare the twelve-year sentence he received for count two of the information, armed robbery with threat of force, a class C felony with a maximum possible imprisonment of forty years, to the ten-year sentence Anderson, a co-actor, received on count one, robbery, a class E felony, with a maximum imprisonment of fifteen years. *See* WIS. STAT. § 939.50(c) and (e). This is an apples and oranges comparison. When comparing the sentences received on the same count, for the same armed robbery, Anderson actually received twenty years' imprisonment (ten years' initial confinement and ten years' extended supervision), eight years more than Davis received. Accordingly, contrary to Davis's assertion that Davis received more time for the same crime than an allegedly more culpable co-actor, Davis actually received a shorter sentence for the same crime.

¶28 The mere fact that Davis's sentence was longer than one component of another co-actor's sentence is not enough to support a conclusion that Davis's sentence is unduly disparate. *See* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Davis "bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing." ***Id.*** As noted above, the trial court considered all of the ***McCleary*** factors in determining the appropriate sentence for Davis, including "his particular character, background, and involvement, and culpability." Because Davis did not receive a longer sentence for the same crime, as he asserts, and because the trial court's reasoning as set forth in the record demonstrates that it relied "on facts that are of record or that are reasonably derived by inference from the record and [reached] a conclusion based on a logical rationale founded upon proper legal standards," *see* ***Id.***, 49 Wis. 2d at 277, we determine that the trial

court did not erroneously exercise its discretion in sentencing Davis to twelve years' imprisonment.

IV. Denial of postconviction motion

¶29 Finally, Davis argues that the trial court erroneously exercised its discretion in denying his postconviction motion for modification of sentence. Because we have determined that the trial court did not erroneously exercise its discretion in sentencing Davis, it did not err in refusing to modify the sentence where no inaccurate information was relied upon initially and no subsequent new factors have been shown. *See* ***State v. Norton***, 2001 WI App 245, ¶13, 248 Wis. 2d 162, 635 N.W.2d 656 (circumstances that constitute a *new factor* or trial court reliance upon *inaccurate information* which frustrates the purpose of the sentence are proper grounds for sentence modification).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.