COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP320-CR **Cir. Ct. No. 2006CF6721**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK JAMES O'BRIEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Fine, Kessler, JJ. and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Patrick James O'Brien appeals from a judgment of conviction for theft as a party to the crime, and from a postconviction order denying his motion for sentence modification. The issues are whether the trial court imposed an unduly harsh and excessive sentence, and whether the

subsequent imposition of the same sentence on O'Brien's more culpable co-actor constituted a new factor warranting sentence modification to correct the alleged disparity. We conclude that the trial court properly exercised its discretion and imposed a sentence that was not unduly harsh and excessive, and that the sentence imposed by this same trial court judge on O'Brien's co-actor two weeks later was not a new sentencing factor nor did it result in disparate sentences. Therefore, we affirm.

¶2 O'Brien and his co-actor, Nicholas G. Karolczak, were each charged with robbery with the use of force for stealing a purse from an elderly woman in a Wal-Mart parking lot. O'Brien was the driver of the vehicle. The two men saw the victim and evidently decided that she would be an easy target. O'Brien stopped the car near the victim, then Karolczak got out of the car and stole the victim's purse, pulling her to the ground in the process. It was undisputed that O'Brien was the driver; factually, he did not directly commit the robbery.

¶3 O'Brien pled guilty to the reduced charge of theft of movable property from a person as a party to the crime, in violation of WIS. STAT. §§ 943.20(1)(a) (2005-06) and 939.05 (2005-06).[1] The trial court imposed a seven-year sentence to run consecutive to any other sentence, comprised of three- and four-year respective periods of initial confinement and extended supervision. O'Brien moved for sentence modification, which the trial court denied.

¶4 O'Brien challenges his sentence as unduly harsh and excessive, and seeks modification, contending that imposition of the identical sentence on his

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

more culpable co-actor shortly after he was sentenced constitutes a new factor. The trial court disagreed, and refuted O'Brien's challenges in its postconviction order, explaining most particularly why its imposition of the same sentence on O'Brien's co-defendant did not constitute a new sentencing factor.

¶5 A sentence is unduly harsh when it 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶6 O'Brien contends that his sentence was unduly harsh and excessive because he was merely the driver of the vehicle, not the person who actually stole the purse. The trial court was mindful of O'Brien's lesser role, which was reflected in his guilty plea to the lesser offense of theft as a party to the crime. The trial court was aware of O'Brien's degree of involvement, explaining that O'Brien helped Karolczak target this particular victim, and was "right there – look[ing] out the window," watching what was happening; the trial court told O'Brien, "you had to know what was going on." It told O'Brien,

> you had a chance to stop….You had to see that [the victim] fell to the ground. And what did you do[?] Did you stop[?] Did you tell [Karolczak] no[?] Did you prevent it from happening at that point, maybe help [the victim], give her back her purse[?] You didn't. You drove away.

The trial court acknowledged at sentencing and in its postconviction order that O'Brien was less culpable than his co-actor. Although he was less culpable factually than his co-actor, his legal liability for this offense was not reduced because he was convicted as a party to the crime. *See* WIS. STAT. § 939.05. During the plea hearing, the trial court explained to O'Brien that a party to the crime is not a bystander or a spectator, but one who intentionally assists in the commission of a crime. A seven-year consecutive sentence, including a three-year period of initial confinement, for a repeat offender who facilitated the theft of an elderly woman, is not unduly harsh or excessive.

¶7 Theft of movable property is a Class G felony with a ten-year maximum potential penalty. *See* WIS. STAT. §§ 943.20(1)(a) & (3)(e); 939.50(3)(g). A seven-year sentence is well within the maximum potential penalty for that offense and, as such, is not unduly harsh and excessive. *See* ***Daniels***, 117 Wis. 2d at 22. Imposing a seven-year sentence, with a three-year period of initial confinement, on a man with a significant longstanding criminal history who drove a vehicle to facilitate stealing a purse from an elderly woman, is not "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." ***Ocanas***, 70 Wis. 2d at 185.

¶8 O'Brien also claims that the trial court's imposition of an identical seven-year sentence on the principal two weeks later constituted a new factor warranting sentence modification. A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in

> existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶9 "[An alleged] 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) (citation omitted). The same trial court judge imposed sentence on both O'Brien and Karolczak. It addressed their respective roles in this incident. As the trial court emphasized in its postconviction order,

> [t]he court sentenced O'Brien first. When it sentenced Karolczak two weeks later, it specifically elicited information about the sentence O'Brien had received. In addition, it was apprised by counsels during Karolczak's sentencing of the difference between the defendants' past criminal history. The court took this into consideration when it sentenced Karolczak in its attempt to balance its sentence with the one imposed in O'Brien's case. Although the sentence in Karolczak's case could not have been known to the court when it sentenced O'Brien, it does not become a "new factor" under circumstances where the court utilizes O'Brien's sentence as a guideline for sentencing Karolczak.

The trial court also explained that it imposed the same sentence on both men because O'Brien, albeit the less culpable party, had a more serious criminal record, whereas Karolczak, the more culpable party, had a less serious criminal record.

¶10 The trial court was aware that it had sentenced O'Brien before Karolczak and considered O'Brien's sentence "as a guideline for sentencing Karolczak." The trial court was mindful of the men's respective culpabilities and criminal records, and imposed their sentences accordingly. Karolczak's subsequently imposed sentence did not constitute a new factor warranting modification of O'Brien's sentence, nor did Karolczak's sentence frustrate the purpose of O'Brien's sentence. *See* ***id.*** at 362-63; ***Michels***, 150 Wis. 2d at 99. These identical sentences, albeit imposed for different reasons (culpability versus prior criminal record/rehabilitation) are not disparate, much less new factors warranting sentence modification. *See* ***Toliver***, 187 Wis. 2d at 362-63.

By the Court.—Judgment and order affirmed.

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