COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2581-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARLANDO PALMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., and JEFFREY A. KREMERS, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

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[1] The Honorable Laurence C. Gram, Jr., presided over the trial and entered the judgment of conviction; the Honorable Jeffrey A. Kremers entered the order denying the motion for postconviction relief.

PER CURIAM. Arlando Palmore appeals from a judgment of conviction entered after a jury found him guilty of delivery of a controlled substance—cocaine—second or subsequent offense, as a party to a crime. He also appeals from an order denying his motion for postconviction relief. Palmore claims: (1) the trial court erred in denying his motion to dismiss for precharging/prearrest delay; (2) the evidence was insufficient to support his conviction; and (3) the trial court erroneously exercised sentencing discretion. We affirm.

I. BACKGROUND

Trial testimony established that during the summer of 1995, Wisconsin Department of Justice Special Agent Robin Broeske was investigating drug activity on the north side of Milwaukee. Special Agent Broeske testified that, with the assistance of a female informant, she was introduced to a number of drug dealers. She testified that, as part of her investigation, she purchased drugs from a number of dealers, one of whom was Theodore Palmore, Arlando Palmore's older brother. She noted, however, that no arrests were made at that time because the investigation was continuing.

Special Agent Broeske stated that at approximately 1:30 p.m. on September 28, 1995, she met Theodore Palmore and inquired whether he had any cocaine. Theodore informed her that his cocaine was not very good quality but added that he could arrange for her to buy whatever she wanted from his brother. Special Agent Broeske then told Theodore that she wanted to buy a few "eight-balls"[2] of crack. Theodore told her to return at 3:30 p.m. to make the buy.

[2] An "eight-ball" is the slang term for an eighth of an ounce.

When Special Agent Broeske returned to the neighborhood, she met Theodore, who told her where to meet his brother. When she pulled up in front of the meeting place, a black male approached her car and, upon her invitation, entered the front passenger seat. Special Agent Broeske testified that the two had a brief conversation and that the man then took out three packages of crack cocaine. After the two discussed the price, Special Agent Broeske bought the drugs for $420. Special Agent Broeske also testified that the following day she reviewed photographs of the Palmore brothers at the Milwaukee Police Department's Bureau of Identification, and that she positively identified the picture of Arlando Palmore as the person from whom she purchased the cocaine.

On January 31, 1996, a complaint was filed charging Arlando and Theodore Palmore with the September 28 delivery of cocaine.[3] Warrants for their arrests were issued that same day. Police arrested Theodore Palmore on February 26, 1996. He pleaded guilty to three counts of delivery of cocaine on April 30, 1996, and was sentenced on June 27, 1996. Arlando Palmore was not arrested on the warrant until September 18, 1996.

II. ANALYSIS

Palmore first argues that the trial court erred in denying his motion to dismiss for precharging/prearrest delay. We disagree.

"Where a defendant seeks to avoid prosecution based upon prosecutorial delay, it is clear that it must be shown that the defendant has suffered actual prejudice arising from the delay and that the delay arose from an improper

[3] The State issued two additional charges against Theodore Palmore stemming from Special Agent Broeske's purchases of cocaine from him on June 16, and July 14, 1995.

motive or purpose such as to gain a tactical advantage over the accused." ***State v. Rivest***, 106 Wis.2d 406, 418, 316 N.W.2d 395, 401 (1982). If the defendant fails to demonstrate improper prosecutorial motive or purpose, this court may reject the claim of precharging or prearrest delay without addressing the prejudice prong of the two-part test. *See* ***State v. Hagen***, 181 Wis.2d 934, 945 n.4, 512 N.W.2d 180, 184 n.4 (Ct. App. 1994).

The chronological facts are undisputed. Four months passed between the crime and the issuance of the criminal complaint and eight more months passed between the issuance of the arrest warrants and Arlando Palmore's arrest. As the State explains, however, the first delay was due to the time needed to relocate the informant who had worked with Special Agent Broeske, and the second came about because "the authorities simply overlooked the outstanding arrest warrant." Palmore does not challenge the State's explanation. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

Moreover, Palmore offers nothing to show that the State delayed his arrest based on improper motive or to gain a tactical advantage. In his motion to the trial court, Palmore conceded that he had no evidence of any improper prosecutorial motive or purpose for the delay in his charging and arrest. Palmore merely repeated his argument regarding the alleged prejudice, stating "that even though there is no evidence of improper motive of the persons involved in his case or [that] it was done with the purpose to gain a tactical advantage over the accused, [the delay] is fundamentally unfair." Thus, Palmore conceded that no evidence establishes that the State had an improper motive or purpose to delay either the issuance of the complaint or his arrest. Accordingly, we, like the trial

court, conclude that Palmore failed to establish that the delay in his arrest was an intentional tactic to gain advantage.

Palmore next argues that the evidence was insufficient to support his conviction. He claims that the two special agents who testified at trial mistakenly identified him as the person who sold them the cocaine.[4] Palmore alleges: "The record is clear that [he, Palmore,] has six brothers. Therefore, it is [Palmore's] contention that the drug transaction was done by one of his brothers and that Special Agent Broeske was mistaken."

Our standard of review is clear:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). Further, the determination of the credibility of witnesses and the resolution of conflicting testimony are matters within the jury's province. *See* ***Wheeler v. State***, 87 Wis.2d 626, 634, 275 N.W.2d 651, 655 (1979).

[4] Special Agent Brian Kolar also testified at Palmore's trial. He testified that he was working as a surveillance officer, observing Special Agent Robin Broeske's drug buy from a distance. He testified only that he observed a black male enter and exit the car. He never testified that he positively identified Palmore as the person who entered and exited Special Agent Broeske's car.

Special Agent Broeske testified that on the afternoon of September 28, 1995, a man who said he was Theodore Palmore's brother got in the front seat of her car and after a brief conversation with her, sold her three separate packages of crack cocaine. Special Agent Broeske testified that the following day she examined photographs of the Palmore brothers and positively identified the photograph of Arlando Palmore as that of the person from whom she purchased the cocaine.

At the close of evidence, defense counsel made the same argument that Palmore presents on appeal—that Special Agent Broeske's identification was mistaken and that one of Palmore's brothers was the perpetrator. The jury rejected this theory and convicted Palmore. Clearly, the evidence was sufficient to support the jury's findings.

Finally, Palmore argues that the trial court erroneously exercised sentencing discretion. Palmore claims:

> [T]he basis for the fact that the Trial Court misused its discretion is based upon the sentence that Theodore Palmore received in his involvement. Theodore Palmore received a sentence of six years for the same case…. It is the contention of the appellant that taking into consideration the jury's verdict in this matter, the appellant should have received a lesser sentence than his brother, who was more culpable.

We reject his argument.

The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. *See* ***id.*** We will not reverse a sentence absent an erroneous exercise of discretion. *See* ***State v.***

Thompson, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider: (1) whether the trial court considered the appropriate sentencing factors; and (2) whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (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. *See* ***Larsen***, 141 Wis.2d at 427, 415 N.W.2d at 541. The weight to be given each factor is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). A trial court exceeds its discretion, however, when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732.

In imposing sentence, the trial court addressed each of the primary factors. The court commented extensively on the gravity of the offense, noting in particular "the quantity of the substance that was involved." The sentencing court also compared Palmore's circumstances to those of his brother who had already been convicted and sentenced for the offense. The court noted that Theodore faced three counts while Arlando faced only one; that Theodore had accepted responsibility for his crimes and pleaded guilty; and that Theodore had received a six-year prison term for the offense, with imposed and stayed four-year consecutive terms on the two other counts. Having compared the circumstances of the two brothers, and having noted the greater punishment imposed on Theodore and the additional stayed sentences, the sentencing court properly exercised discretion in sentencing Arlando to six years' imprisonment, which was one-fifth of the statutory maximum. *See* ***Drinkwater v. State***, 73 Wis.2d 674, 680, 245

N.W.2d 664, 667 (1976) (trial court need not impose equal sentences upon accomplices to a crime, as long as the disparity is based upon factors relevant to the sentencing procedure).

By the Court.—Judgment and order affirmed.

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