COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0777-CR **Cir. Ct. No. 00-CF-634**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEVELAND R. BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cleveland R. Barnes appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the trial court erred when sentencing him by failing to consider the sentences imposed on two coactors and

by relying on inaccurate information. Because we conclude that the trial court did not err, we affirm.

¶2 Barnes pled no contest to delivery of cocaine within 1,000 feet of a school. The court sentenced him to eight years of initial confinement and four years of extended supervision. Barnes was convicted for selling cocaine to an undercover police officer. Two other people, Eleecia Jones and Beverly Fisher, were also charged. At the time the court sentenced Barnes, both Jones and Fisher had already been sentenced. The sentence Barnes received was longer than the sentences received by both Jones and Fisher. Barnes then brought a motion for postconviction relief alleging that the sentence he received was unduly harsh in light of the lesser sentences imposed on Jones and Fisher.[1] The court denied the motion stating that it had not been aware at the time of sentencing of the sentences imposed on Jones and Fisher. However, the court found that it had considered the appropriate factors when sentencing Barnes and was "satisfied that anything the defendant has raised as a new factor would not alter the Court's decision in this case."

¶3 On appeal, Barnes again argues that the sentence he received was unduly harsh in light of the sentences imposed on Jones and Fisher. The State first asserts that Barnes waived this issue because he did not raise the issue at sentencing. The State relies on the fact that Fisher and Jones were sentenced before Barnes. While the State is correct about the time line, Barnes did raise the

[1] Fisher received probation for one drug count and five years of initial confinement and five years of extended supervision for a second drug count. Jones received probation for one drug count and four years of initial confinement and four years of extended supervision for a second count.

issue pursuant to a motion for postconviction relief shortly after sentencing. This was appropriate.

¶4 The imposition of different sentences on persons convicted of the same offense does not, in and of itself, constitute an erroneous exercise of discretion. ***State v. McClanahan***, 54 Wis. 2d 751, 757, 196 N.W.2d 700 (1972). Further, mere disparity between the sentences of codefendants 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).

¶5 Barnes argues that all three of the defendants were not similarly situated because Jones and Fisher were convicted of more than one sale. Therefore, he asserts, any distinction in sentence should accrue to him. The presentence investigation report established, however, that Barnes was a larger level dealer and operated several "crack houses" in several Kenosha locations. The same was not true for Jones and Fisher. Further, Barnes denied his involvement during the investigation and lied to the writer of the presentence investigation report. All of these factors distinguish Barnes from the other two. Even if Barnes was similarly situated, however, the court's sentence was based upon his individual culpability and the need to protect the public. Under ***Toliver***, therefore, the sentence was proper. ***Id.***

¶6 Barnes also asserts that the court sentenced him based on inaccurate information in the presentence investigation report. Specifically, he claims that the court relied on the statements of one of the drug agents that Barnes was a large level dealer who ran crack houses all over Kenosha and preyed on the weakness of those addicted to crack to help him sell the drugs. He asserts that there is no

corroboration of the agent's statements, and that the information in his motion for postconviction relief directly refuted the agent's statements.

¶7 Barnes had adequate opportunity to refute the agent's statements but did not. He could have filed his own presentence investigation report or sought an evidentiary hearing in which evidence about his drug dealings could have been presented. Although counsel in his sentencing remarks briefly challenged the conclusions drawn in the presentence investigation report, the sentencing court rejected his assertions.

¶8 As to the claim that the report inaccurately stated that Barnes preyed on the addictions of others to get them to sell drugs for him, we agree with the State that Barnes reads that too narrowly. Barnes argues that it must refer to Jones and Fisher since they were the other two charged for the same incident. He further argues that evidence showed that neither Jones nor Fisher was addicted to crack cocaine. As the State argues, however, just because Jones and Fisher may not have been addicted to crack does not mean that other people at other crack houses were not addicted. When the agent made the comment he was referring to the widespread dealing by Barnes. We agree with the State that Barnes has not demonstrated that the court relied on inaccurate information when it sentenced him. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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