COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1700-CR **Cir. Ct. No. 2004CF6035**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGEL MORENO A/K/A ISRAEL VALENCIA,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler, J. and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Angel Moreno (also known as Israel Valencia) appeals from a judgment of conviction for possessing over forty grams of cocaine with intent to deliver, and from a postconviction order denying his motion for

resentencing. The issues are whether the trial court actually relied on inaccurate information when it sentenced Moreno, and whether Moreno's sentence was unduly harsh and excessive when compared to the relatively lenient disposition Moreno's co-defendant received. We conclude that the trial court did not sentence Moreno on inaccurate information, and that his sentence was not unduly harsh, excessive or disparate compared to that of his co-defendant. Therefore, we affirm.

¶2 Moreno and his co-defendant, Juan Beserra, were each charged with possessing with intent to sell more than forty grams of cocaine as a party to the crime, in violation of WIS. STAT. § 961.41(1m)(cm)4. (amended Feb. 1, 2003) and 939.05 (2003-04).[1] Police found approximately 5.4 grams of cocaine on Moreno, approximately .64 grams of cocaine powder on a dollar bill recovered from Beserra, and approximately 365.28 grams in Beserra's pickup truck, in which he and Moreno were driving. Moreno pled guilty and Beserra entered a no-contest plea to the charge.[2] The same trial court judge sentenced both Beserra and Moreno; Beserra was sentenced six months before Moreno. Beserra was given a seven-year sentence, which was imposed and stayed, in favor of a four-year probationary term conditioned upon serving one year in the House of Correction ("condition time"), which was later reduced to six months.[3] Moreno was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] By entering a no-contest plea, the defendant does not claim innocence, but implicitly acknowledges the sufficiency of the State's evidence to establish guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970).

[3] As previously noted, the trial court had reduced Beserra's condition time from one year to six months. Moreno's focus is on the condition time generally, not whether it was one year or six months in duration. Consequently, we do not repeatedly refer to the reduction in condition time.

sentenced to twenty years, comprised of ten-year periods of initial confinement and extended supervision. Moreno moved for resentencing, which the trial court denied. Moreno appeals.

¶3 The crux of Moreno's challenge is his claim that the trial court inaccurately recalled that it had sentenced Beserra to a seven-year sentence, rather than having imposed and stayed that sentence in favor of a probationary term that included condition time of one year. Moreno claims that had the trial court correctly recalled Beserra's sentence, and that it had imposed a four-year probationary term with one year of condition time, it would not have imposed a twenty-year sentence on Moreno for the exact same offense. This claim underlies Moreno's inaccurate information and his disparate and unduly harsh challenges.

¶4 We first address Moreno's contention that the trial court actually relied on inaccurate information when it imposed his sentence.

> "A defendant who requests resentencing due to the [trial] court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.

State v. Tiepelman, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted).

¶5 Moreno contends that the trial court incorrectly recalled that it had imposed a seven-year sentence on Beserra for committing the exact same offense, when the trial court actually imposed and stayed that sentence in favor of probation that included one year of condition time. Moreno claims that the trial court viewed Beserra more favorably than it viewed him (Moreno), and considered

the seven-year sentence as less than the minimum sentence it would impose on the more culpable Moreno. Had the trial court correctly recalled that Beserra was actually serving one year of condition time, according to Moreno, that one year condition time or the probationary term would have been the starting point to determine Moreno's sentence, rather than starting its analysis at a seven-year sentence.

¶6 The trial court held a hearing on Moreno's postconviction motion, and in its oral ruling, it insisted that it "had no misunderstanding whatsoever and did not rely on inaccurate information." The trial court continued that it "certainly was aware of the fact that Mr. Beserra was given probation with condition time because I made such a point of it before I imposed that sentence that I was satisfied that that was the appropriate sentence under those circumstances."

¶7 At Moreno's sentencing hearing, the prosecutor and defense counsel each discussed the facts of the case, referred to Beserra's involvement as general factual background, and explained how Beserra's degree of involvement compared to that of Moreno: the prosecutor argued that Moreno was more culpable than Beserra, defense counsel argued that Moreno was less culpable than Beserra. The trial court then asked the prosecutor whether he also prosecuted Beserra because the trial court recalled that "[t]he story that I heard regarding Mr. Beserra was quite different than what [defense counsel] described." The prosecutor confirmed the correctness of the trial court's recollection. Then the trial court stated: "And Mr. Beserra actually got seven years. Three years of initial confinement and four years of extended supervision. If I recall correctly, he was an older gentleman. He was from Ohio and he was coming through Chicago, correct?" The prosecutor again confirmed the correctness of the trial court's recollection. The prosecutor

then told the trial court that Beserra "did receive one year up front condition time as well to the sentence that the court just [al]luded [to]."

¶8 The trial court's remarks, recalling Beserra as an "older gentleman …. from Ohio," corroborated its postconviction remarks that

> more particularly, and specifically with respect to the sentencing of this defendant, let me say from the outset that this Court had no misunderstanding whatsoever and did not rely on inaccurate information as to anything that I relied upon in sentencing Mr. Moreno, also known as Mr. Valencia, and I believe that is the name that he has.

¶9 Our review of the sentencing transcript shows that the trial court referred to Beserra in recalling the facts of the crime and Moreno's involvement, and that the prosecutor reminded the trial court that Beserra "receive[d] one year up front condition time." One year condition time referred to the duration of the time imposed as a condition of probation; a prison term would not be referred to as "condition time." Consequently, the trial court's insistence that it accurately recalled Beserra's disposition, coupled with the prosecutor's reference to "one year up front condition time" persuades us that the trial court did not sentence Moreno on inaccurate information.

¶10 Moreno's second challenge is that his sentence was disparately harsh as compared to that of Beserra.

> Disparity alone does not amount to a denial of equal protection. The sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court. The sentence was not excessive. "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

Ocanas v. State, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975) (footnote omitted). The trial court is not obliged, however, to consider the sentence imposed on an accomplice. *See* ***id.*** at 188-89. The trial court's sentencing obligation is to consider the primary sentencing factors (the gravity of the offense, the character of the offender, and the need for public protection), 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).

¶11 The trial court considered the primary sentencing factors. It considered this offense "extremely serious" because it involved a large amount of cocaine, which is an "extremely addictive" drug that crossed state lines. It also considered Moreno's character, and its consideration of this primary sentencing factor was what accounted for much of the disparity in sentences. It was troubled by Moreno's prior drug conviction, which resulted in his deportation. Moreno, however, returned to this country illegally to again sell drugs. Moreno's actions jeopardized the safety of the community because the public does not "want people coming in from out of state selling drugs or delivering them to be sold." The trial court continued that "[t]his is a situation that deserves the type of penalty that the legislature obviously had in mind when they crafted this penalty section for the amount of drugs involved here." The trial court properly exercised its sentencing discretion.

¶12 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***, 70 Wis. 2d at 185. "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). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶13 The trial court imposed a harsher sentence on Moreno because of his prior drug conviction, and his return to this country illegally (after he was deported for his prior conviction) to again engage in drug-trafficking. Beserra had no prior record, and from the sentencing presentation of the prosecutor and Beserra's counsel at Beserra's sentencing, Beserra's character was far different from that of Moreno. According to their sentencing presentations, Beserra was seemingly tricked into doing this with Moreno, who was portrayed by all except Moreno's defense counsel, as the more culpable party. The trial court was very concerned about the risk Moreno posed to the community, whereas it did not view Beserra, an older, stable family man with grandchildren, as a community risk. While the trial court need not explain its reasons for imposing seemingly disparate sentences, the reasons for the court's different sentences for Moreno and Beserra were reasoned and reasonable. We consequently conclude that the trial court had valid reasons for imposing different sentences on Moreno and Beserra.

¶14 A twenty-year sentence, comprised of ten-year periods of initial confinement and extended supervision, was within the maximum potential penalty for this offense that was forty years, including a twenty-five-year maximum potential period of initial confinement. *See* WIS. STAT. §§ 961.41(1m)(cm)4. (amended Feb. 1, 2003); 939.50(3)(c) (amended Feb. 1, 2003); 973.01(2)(b)3. & (d)2. (amended Feb. 1, 2003). *See* ***Daniels***, 117 Wis. 2d at 22. We also do not view a twenty-year sentence with a ten-year period of initial confinement as shocking the conscience of reasonable people, when imposed on a repeat drug

offender who re-entered this country illegally to again sell drugs, and transport them across state lines.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).