COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1314-CR **Cir. Ct. No. 2007CF5484**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR VELOZ,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Victor Veloz appeals from a judgment of conviction for reckless injury and for recklessly endangering safety, and from a postconviction order summarily denying his motion for resentencing. The single issue is whether the trial court erroneously exercised its sentencing discretion by

mistakenly assessing Veloz's motive in that he did not realize that in two instances he was shooting at police officers. We conclude that the trial court's extensive and thoughtful sentencing remarks demonstrate its proper exercise of discretion and its specific awareness of Veloz's position that he did not realize that he was shooting at police officers; its sentence, as confirmed by its quotations from and rationale for its sentencing remarks in its postconviction order, expressly refutes Veloz's contention that it inaccurately assessed Veloz's motive and the facts. Therefore, we affirm.

¶2 Veloz pled guilty to four counts of first-degree reckless injury, and one count of first-degree recklessly endangering safety, each with the use of a dangerous weapon and as a party to each crime, in violation of WIS. STAT. §§ 940.23(1)(a), 941.30(1), 939.63(1)(b) and 939.05 (2007-08).[1] These offenses involved shootings: two of the reckless injury offenses were against two teenagers, the remaining offenses were against police officers. The trial court imposed an eighty-five-year aggregate sentence, comprised of sixty- and twenty-five-year respective aggregate periods of initial confinement and extended supervision. The trial court imposed two twenty-year consecutive sentences for the gunshot injuries against the two police officers, comprised of fifteen- and five-year respective periods of initial confinement and extended supervision; the remaining sentences were also consecutive, each fifteen years, each comprised of ten- and five-year respective periods of initial confinement and extended supervision.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

¶3 Veloz filed a postconviction motion for resentencing, contending that the trial court based its sentence on the mistaken premise that Veloz knew, in two of the instances, that he was firing at police officers, resulting in the trial court's inaccurate assessment of the facts and circumstances of these shootings. The trial court denied the motion, quoting from its sentencing remarks and explaining that it was not mistaken in its assessment of the facts or its basis for the sentence. Veloz appeals, pursuing that same issue for resentencing.

¶4

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted). The trial court's obligation is to consider the primary sentencing factors, which are 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). "'[A] good sentence is one which can be reasonably explained.'" ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971) (citation omitted). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Veloz limits his sentencing challenge on appeal to his claim that the trial court based its sentence on the mistaken premise that he knew that he was

shooting at police officers, and that this inaccurate view of the facts entitles Veloz to resentencing. Because Veloz pled guilty to these offenses, the trial court had to rely primarily on the preliminary hearing testimony of the shooting victims, including Milwaukee City Police Officers Jose Lopez and Alejandro Arce. Veloz did not testify at that hearing, nor did he offer his position on this particular circumstance during his allocution. During his sentencing presentation, however, Veloz's trial counsel emphasized that Veloz did not realize that two of the shooting victims were police officers.

¶6 Officers Lopez and Arce were dressed in plain clothes, and were in an unmarked squad car, although it was a Ford Crown Victoria, commonly recognized in that neighborhood as a squad car. They were responding to a "shots fired" dispatch and drove up behind Veloz, but Officer Lopez testified that when Veloz turned around and ran back toward the Crown Victoria:

> I kept driving behind them and it was pretty quick the way it unfolded but [Veloz's] arm came up and I saw a dark object in his hand, which I saw was a handgun; and at that point, the subject was turning in our direction of the squad car and that is when I drove directly at the subject in an effort to strike him with the vehicle hoping that the weapon would be knocked loose.

Officer Arce testified that:

> As I opened the door, he caught me off guard, I didn't expect him to be there; [he] comes running back westbound toward me. I had the door open, he kind of got stuck, he had nowhere to go, maybe run eastbound but got pinned by the hood of the – front of the vehicle. Tried going westbound, that's when I am opening my door and he crashed right into the door. At that point, he raises his hand I see a black semiautomatic pistol pointing right toward my head.

The prosecutor then asked Officer Arce, "[w]hat happened then after you saw the defendant draw the handgun?" Arce replied:

> I yelled police, police, police; the gun was already pointed over my head and at that point I had fear for my life. I hit him with the door, threw him up against the fence; and as he goes up against the fence he began shooting at me and he did shoot me.

¶7 Defense counsel told the trial court that Veloz had previously confessed to police that "he did not know that they were police officers when this second incident occurred."[2] According to his defense counsel, Veloz thought that the officers in the Crown Victoria were rival gang members, not police officers. Defense counsel did not challenge the officers' credibility, and emphasized that Veloz had taken responsibility for his conduct, but summarized Veloz's position by explaining, "[s]o whether Mr. Veloz actually heard what the police said is different [from] whether the police actually identified themselves."

¶8 The trial court was obviously mindful of Veloz's position. In a thoughtful, thorough analysis of the sentencing factors, the trial court not only explained its reasoning, but also used its sentencing remarks as a rehabilitative opportunity to explain to Veloz the consequences of his actions and the impending choices that would shape his future. In so doing, the trial court directly addressed what would later become Veloz's challenge in seeking resentencing. The trial court said:

[2] Veloz shot the two teenagers first. Lopez and Arce responded to the "shots fired" dispatch and their shootings were referenced as the "second incident."

> And the sad reality is that your aggressive, violent, dangerous conduct continued. Now, I wasn't there for the prelim[inary hearing]. It's very hard for me to make assessments. You know, we can do it by way of argument and offers of proof. But, you know, I don't know what was, quite frankly, your thought process when Officer Arce apparently first opened that door and confronted you. I do find and I believe it very clear in my view that Officer Arce did identify himself as a police officer and indicated they were police.
>
> Now, what you heard I don't know. And it's impossible for me to draw any conclusions about that, at least not with the more extensive type of testimony presentation. So as far as making a fact finding, I simply don't feel I can make any determination specifically that you heard what he said. Again, I don't know what was in your – sort of your head or your ears at that time.
>
> But I do know what was in your heart. And that was to eliminate someone that you viewed as being a threat to you. And I say you viewed him that way or it's not a justifiable view, it's simply your desire to get away and take whatever means are necessary for you to do that.
>
> Your officer did not have a firearm brandished. He did not have it pointed toward you. None of them did. Yet, you still saw … fit to immediately open fire.

¶9 The trial court clearly acknowledged that Veloz may not have recognized that he was about to shoot at police officers. However, Veloz had no right to shoot at anyone in that car, whether they were police officers, rival gang members, or anyone else. Moreover, the trial court found that Arce had identified himself as a police officer based on his testimony that he yelled, "police, police, police." The trial court explained the arguable discrepancy between what Arce said and what Veloz may not have heard, but determined that: (1) Arce had yelled

"police"; and (2) regardless, Veloz had no right to shoot the individuals in that car even if he thought they were rival gang members.[3]

¶10 Notwithstanding the extensiveness of the trial court's sentencing remarks generally, and on this particular point specifically, the trial court recited its specific remarks again in its postconviction order to demonstrate its awareness of Veloz's position that he had not realized that he was shooting at police officers. The trial court further explained in its postconviction order that the criminal complaint indicated that Veloz "claim[ed] he threw his gun to the ground when he heard someone inside the vehicle say 'Milwaukee Police Department. Drop your gun.'" As the trial court concluded,

> This court was satisfied that the officers in the vehicle had identified themselves as police and made that finding. It acknowledged that it did not know what the defendant had heard or what was in his head at the time, but it is clear from the complaint that the defendant did hear the police in the vehicle identify themselves. Although he claims he dropped the gun at that point – and the police claim he fired the gun – the bottom line is that he was determined to eliminate the threat that was facing him at the time. This type of behavior makes him a very dangerous individual in the community, and it was this *behavior* which caused the court to conclude that he posed a very significant risk to society. It was this *behavior* which caused the court to impose the sentences it did.
>
> The court read the preliminary hearing prior to the sentencing proceeding as well as the complaint. It was familiar with the defendant's position with respect to what had happened with the officers. The defendant's claim that he did not know they were police officers is merely his position; it is not "an inaccuracy" requiring resentencing. The court was entitled to place more weight on one position over the other, and it believed that the officers had

[3] Veloz did not argue self-defense; in fact, his appellate counsel admitted that the shootings were, at best, disproportional responses to the threat.

> identified themselves. The shots came seconds afterwards, and whether the defendant heard the officer yell "Police!" before he shot does not alter the court's sentencing rationale. The sentence would have been exactly the same based on the defendant's character, his gang philosophy, his dangerousness, his enormous rehabilitation goals, and the need to protect the community.

¶11 The trial court clearly recognized Veloz's position at sentencing. It reiterated and further explained its consideration of his position in denying Veloz's postconviction motion for resentencing. The trial court's sentencing remarks were insightful and complete; any arguable doubt about the trial court's accurate assessment of Veloz's position was removed by its postconviction order. There was no mistaken premise or inaccurate assessment. Moreover, the trial court explained why its sentence was based on a combination of factors that supported its exercise of sentencing discretion independently of Veloz's challenge. The trial court properly exercised its sentencing discretion; the fact that it did so differently than Veloz had hoped does not constitute a misuse of that discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

By the Court.—Judgment and order affirmed.

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