COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1804-CR **Cir. Ct. No. 2007CF6049**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON DEAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. CONEN, Judges.[1] *Affirmed*.

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

[1] The Honorable Jeffrey A. Wagner presided over the trial and sentencing. The Honorable Jeffrey A. Conen presided over the postconviction proceedings.

¶1 KESSLER, J. Aaron Deal appeals a judgment of conviction in which he was found guilty by a jury of one count of first-degree intentional homicide by use of a dangerous weapon, and one count of armed robbery, both as a party to a crime. Deal also appeals from a postconviction order denying his motion for a new trial and resentencing, based on Deal's assertion that his trial counsel was ineffective. Deal's motion for a new trial argued that his trial counsel: (1) failed to adequately explain Deal's opportunity to plead to felony murder; and (2) failed to present a felony murder defense to the jury. Deal also sought a new sentence, arguing that his sentence was unduly harsh compared to that of his co-defendant who Deal claims shot the victim seven times while Deal shot only once. Because we agree with the trial court that Deal repeatedly rejected the opportunity to plead to felony murder and insisted on the very defense he now asserts is proof of his counsel's ineffective assistance, we conclude that his lawyer's performance was not deficient.[2] We also conclude that because Deal was convicted of a far more serious offense than his co-defendant, the disparity in sentences is reasonable under the circumstances. We affirm.

BACKGROUND

¶2 On the night of the events giving rise to this case, Deal, Ahyoh Cowans and Ronnell Hale were at a party at Deal's residence. According to a recorded statement Deal gave to police, the three men went into Deal's kitchen, where Cowans made a phone call to "some dude for some weed." However, Cowans's intent, which he disclosed to Deal and Hale, was instead to rob Christopher Roberson, who Cowans referred to as the "dope man." Cowans and

[2] We note that where the client has insisted on a specific approach to a criminal case, contrary to the attorney's specific advice, a claim that the attorney provided ineffective assistance may well be frivolous. It is certainly disingenuous.

Deal took guns with them when they went to meet Roberson, which came from a drawer in Deal's house. Hale was to be the lookout man. Deal stated that when Roberson arrived at the agreed location, Roberson established that he had marijuana with him, at which point Cowans unexpectedly started shooting Roberson, who was still in his car. As Roberson tried to escape through the passenger side of the car, Cowans continued firing multiple shots and Deal fired one shot at Roberson. Deal stated that he had never met Roberson before, but still fired the shot so Roberson "wouldn't think I was playin[']." With Roberson on the ground and wounded, Deal rifled Roberson's pockets and Cowans jumped in Roberson's car and fled. Deal ran away on foot. All three participants regrouped at Deal's house where each claimed he got nothing in the robbery. Cowans then led the others to Roberson's car parked a few blocks away. They looked around inside the car but found neither money nor marijuana.

¶3 Deal further told police that he "[didn't] think [he] shot [Roberson]," but also acknowledged that his "only one shot" "[p]robly [sic]" hit Roberson in the back. He told police he fired the shot as Roberson was attempting to crawl out of his car so as not to "look like no pretty pussy."

¶4 Deal was initially charged with felony murder; however, an amended information, charging one count of first-degree intentional homicide and one count of armed robbery, was filed after Deal refused to enter a plea on the felony murder charge. At trial, Deal elected not to testify and called no witnesses. Deal eventually agreed to a felony murder jury instruction, but was convicted by the jury of both first-degree intentional homicide and armed robbery. Deal was sentenced to a life sentence on the murder conviction, with eligibility for extended supervision in May 2056, and to twenty-five years of imprisonment and ten years of extended supervision on the armed robbery charge to be served concurrently

with the life sentence. Deal moved for a new trial, alleging ineffective assistance of counsel and for resentencing alleging the sentence was unduly harsh when compared with the sentence Cowans received.[3] Specifically, Deal argued that his trial counsel was ineffective for: (1) failing to adequately inform him of why he "needed" to plead to felony murder; and (2) failing to present a felony murder defense to the jury because it was a lesser-included offense to the first-degree intentional murder charge, among other things.

¶5 During the ***Machner***[4] hearing, the postconviction court found that "Mr. Deal was not interested in a conviction for felony murder…. [H]e viewed it as an all or nothing case. It was either guilty of first-degree intentional homicide or not guilty of first-degree intentional homicide." The postconviction court concluded that, given Deal's actions and mindset, counsel's performance was not deficient:

> I think there was some pressure from his client to avoid a conviction at all costs[,] to avoid even a conviction for the felony murder, so if [counsel] were to have argued the felony murder in closing arguments he would have in his own opinion, I guess, opened up the possibility of a felony conviction for the shooting for this client against [Deal's] wishes of how to handle the case.

This appeal follows. We discuss additional facts as they are pertinent to the separate issues on appeal.

DISCUSSION

¶6 On appeal, Deal argues that his trial counsel was ineffective for failing to explain to the jury why Deal should have been convicted on the lesser-

[3] Cowans pled guilty to felony murder and received a sentence of thirty-five years of imprisonment and twelve years of extended supervision.

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

included felony murder instruction, particularly during closing argument. Deal argues that he was prejudiced because the jury did not hear how Deal's version of events mitigated the specific intent required to prove first-degree intentional homicide, nor did the jury hear how Deal's conduct differed from that of Cowans, who Deal contends, did have the intent to kill. We are not persuaded.

Ineffective assistance of counsel.

¶7 To establish ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components if a party makes an insufficient showing as to one. *See* ***id.*** at 697. "'[T]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" ***State v. Leighton***, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126 (citation omitted).

¶8 At the ***Machner*** hearing, Deal's trial attorney, Theodore Nanz, testified that Deal's position throughout his entire representation was that Deal did not want *any* conviction. Deal was therefore unwilling to plead to *any* reduced charge. Because Deal wanted an acquittal, he did not want his counsel to pursue a felony murder jury instruction or a felony murder defense. Attorney Nanz testified that although he explained the sentencing differences between the murder charges, Deal wanted to "walk on this whole thing. He didn't want a conviction." Attorney Nanz explained:

> I told him all the way along … that he faced a high probability of being convicted.
>
> ….

> I do recall … that a lot of the time [Deal] wasn't terribly realistic about his position, and it was sort of like he wanted me to wave a magic wand and make this go away … [and] I told him on more than one occasion it wasn't going away; it just wasn't.

¶9 Attorney Nanz further testified that he advised Deal to plead to felony murder, but that Attorney Nanz's practice was "not to force people into pleas that they don't want to take." Attorney Nanz also told Deal that his was a "tough case" and that it would be "very likely" that Deal would be convicted of a homicide. Deal rejected the option to plead, telling Attorney Nanz that even if he pled to felony murder, he (Deal) would still go away for a lengthy period of time, which he did not want.

¶10 Attorney Nanz testified that throughout the entirety of his representation, Deal consistently gave the impression that Deal "wanted out" altogether. Attorney Nanz stated that Deal even conveyed that he did not want a felony murder jury instruction. Deal eventually agreed to the instruction after having a colloquy with the court, but still never asked Attorney Nanz to argue felony murder. Even as late as closing arguments, Attorney Nanz believed that his client did not want him to argue felony murder. At one point, Deal told Attorney Nanz that he was not present at the crime, thus leaving his attorney with no viable defense strategy other than to attempt to discredit the State's case and argue that Deal was not present at the crime.

¶11 Deal now attempts to argue a position that he vehemently rejected before the trial court throughout the entirety of his trial. As the State argues here, "[t]his kind of 'fast and loose' game-playing is exactly what judicial estoppel is intended to prevent." "The purpose of judicial estoppel is to preserve the integrity of the judicial system." ***State v. English-Lancaster***, 2002 WI App 74, ¶18, 252

Wis. 2d 388, 642 N.W.2d 627. That integrity of our judicial system is unquestionably perverted if a defendant is allowed to insist that his attorney pursue one strategy during all proceedings before the trial court, but then complain on appeal that the strategy he insisted upon amounts to ineffective assistance of counsel.

¶12 Deal's attorney advised him to reduce his exposure and to plead to the lesser offense rather than risk life in prison in a gamble for an acquittal that was objectively unlikely because: (1) of Deal's recorded statement to police; (2) Deal provided the guns both for himself and Cowans; and (3) Deal shot a man he did not know as the man tried to escape. Deal rejected legal advice that was clearly sound, and as a result lost his gamble. Deal, not his attorney, bears the responsibility for the choices made.

Erroneous exercise of sentencing discretion.

¶13 Deal contends that the trial court erroneously exercised its discretion in sentencing Deal to a longer sentence than Cowans because Deal only shot Roberson once, as opposed to Cowans's seven shots, making Deal less culpable for Roberson's death. Deal also contends that the disparity between sentences was unduly harsh and that he was punished for exercising his right to a jury trial. Deal was tried for, and found guilty of, first-degree intentional homicide which carries a mandatory life sentence. *See* WIS. STAT. §§ 940.01, 939.50(3) (2007-08).[5] However, Cowans pled guilty to the less serious offense of felony murder which carries a lesser maximum sentence. *See* WIS. STAT. §§ 940.03, 943.32 (2007-08). We are not persuaded by Deal's arguments.

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶14 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). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987).

¶15 This court reviews a trial court's conclusion that a sentence was not unduly harsh and unconscionable using an erroneous exercise of discretion standard. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). The weight given to each of these factors lies within the trial court's discretion, and the court may base the sentence on any or all of them. ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). A sentence within the statutory maximum is presumed not to be unduly harsh. ***Ocanas***, 70 Wis. 2d at 185. A sentencing court is not required to base a sentencing decision on the sentences of other defendants. ***State v. Tappa***, 2002 WI App 303, ¶20, 259 Wis. 2d 402, 655 N.W.2d 223. Nor is a mere disparity among sentences improper if the individual sentence is based on the three main sentencing factors. ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994).

¶16 The trial court set Deal's eligibility for extended supervision in 2056, which is forty-eight years after he was sentenced. It is apparently this exercise of discretion about which Deal complains, because the court had no discretion about whether to impose the life sentence. A trial court has the discretion to set the date on which a person subject to a life sentence is eligible to

apply for extended supervision. *See* WIS. STAT. § 973.014(1g)(a).[6] At a minimum, eligibility may begin at twenty years of incarceration. WIS. STAT. § 973.014(1g)(a)1. The court may also set a longer period of incarceration before eligibility, or may totally deny extended supervision. WIS. STAT. § 973.014(1g)(a)2., 3. The trial court exercised its discretion within the parameters of § 973.014(1g)(a); thus, the sentencing decision is presumptively reasonable. *See* ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197.

¶17 The trial court also considered all of the relevant sentencing factors. First, the trial court considered Deal's character. Deal was eighteen years old at the time of the offense and had prior misdemeanor convictions for possessing a dangerous weapon by a person under eighteen and receiving stolen property. Deal had no employment history and an "extremely poor" school record. Further, the trial court was not impressed by Deal's statement during his allocution in which he

[6] WISCONSIN STAT. § 973.014(1g)(a) provides:

> Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after December 31, 1999, the court shall make an extended supervision eligibility date determination regarding the person and choose one of the following options:
>
> 1. The person is eligible for release to extended supervision after serving 20 years.
>
> 2. The person is eligible for release to extended supervision on a date set by the court. Under this subdivision, the court may set any later date than that provided in subd. 1., but may not set a date that occurs before the earliest possible date under subd. 1.
>
> 3. The person is not eligible for release to extended supervision.

said "I was just caught in the wrong place at the wrong time doing something that I didn't have no business doing." The court commented on that attitude:

> You were caught in the wrong place at the wrong time? You put yourself there by your choice. You are at least responsible for carrying one of the weapons of destruction, and it … took another young man's life.
>
> For what? For what? Was it horrific? Yes. Senseless? Obviously. Look what you created or helped create.

¶18 The court also considered the nature of the offense and Deal's involvement.

> You were part of the offense. Whether … you shot one or seven of the shots the culpability lies for both you and Mr. [Cowans]. You were apparently responsible for helping to hide one of the guns.
>
> ….
>
> [Y]ou said, "I never saw this victim before" ... I mean what does that say of yourself? I mean a mindless act that would completely destroy another person's life and family and the community.
>
> Because if it didn't happen to this young man, perhaps it would have happened to someone else. That's what you're saying to the court because you never knew the person.

¶19 The trial court clearly considered the seriousness of the offense and Deal's record and character, including his failure to recognize the extent of his personal culpability. The trial court considered both punishment and deterrence, stating that "[t]he objective of the sentence would be certainly to punish you for what you've done, act as a deterrent to others, to yourself." The overall context of the trial court's remarks also demonstrate that the court was seriously concerned about protecting the community from Deal. We conclude that the trial court

properly exercised its discretion when it ensured that Deal would be a senior citizen before he could possibly return to the community.

¶20 The trial court did not impose the maximum period of time in prison available. Deal was not totally denied eligibility for extended supervision. The trial court has left the door open for Deal to have a second chance, albeit when he is older and presumably more mature. Based on the nature of the crime and the record in this case, we conclude that Deal's sentence was fully justified. It was not a result of his decision to go to trial, but rather was a result of the serious crime of which he was convicted, his character, the need for both punishment and deterrence, and the need to protect the public.

¶21 For all the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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