COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP242-CR **Cir. Ct. No. 2007CF6024**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUINCY LASHAWN BAKER,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Quincy Lashawn Baker appeals the judgment of conviction, following a guilty plea, of felony murder. Baker also appeals from the final order denying his motion for resentencing. We affirm.

BACKGROUND

¶2 This case has a complicated procedural history. On December 12, 2007, Baker was charged with felony murder. The charges stemmed from the circumstances surrounding the death of Paul Schumann. Baker admitted that he shot and killed Schumann, a pizza deliveryman, while trying to rob Schumann during a pizza delivery. Baker pled guilty without a plea agreement. Multiple sentencing hearings and postconviction motions followed.

A. The First Sentencing Hearing and Baker's First Postconviction Motion.[1]

¶3 At Baker's first sentencing hearing, the sentencing court sentenced Baker to the maximum 35 years, divided as 27 years of initial confinement and eight years of extended supervision. Immediately after receiving his sentence, Baker yelled, "Everybody got what you want. Fuck you, bitch" at the sentencing court.

¶4 The court recalled the case later that same afternoon at the State's request to amend the extended supervision portion of Baker's sentence. The State informed the sentencing court that, pursuant to WIS. STAT. § 973.01 (2007-08),[2] the maximum term of extended supervision for Baker's particular offense was seven and a half years, not the eight years initially assigned by the sentencing court. The sentencing court maintained Baker's confinement term at 27 years, but changed the term of extended supervision to seven and a half years. Baker's total

[1] The Honorable Jeffrey A. Wagner presided over the sentencing hearing.

[2] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

sentence amounted to 34.5 years—six months less than the maximum penalty. The sentencing court did not address Baker's comment.

¶5 Following sentencing, Baker filed a postconviction motion challenging his sentence. The sentencing court did not address the arguments raised in Baker's motion, but granted Baker's motion for resentencing, stating that its initial sentence was in excess of the maximum penalty. Specifically, the sentencing court explained that while the maximum sentence was a total of 35 years, the maximum bifurcated sentence for felony murder/attempted armed robbery was a maximum initial confinement term of 26 years and three months, not 27.5 years, as stated in the criminal complaint. The sentencing court granted Baker's motion for resentencing, stating that it "cannot ignore the fact that it was provided with inaccurate information by the State about the maximum penalties for this crime." The sentencing court reassigned Baker's resentencing hearing to a different judge, due to judicial rotations.

B. The Resentencing Hearing.[3]

¶6 At the resentencing hearing, the State again sought the maximum sentence, this time accurately seeking 26 years and three months' initial confinement and eight years and nine months' extended supervision. The State based its recommendation on the facts of the case, Baker's prior record, and Baker's outburst at the close of his first sentencing hearing in which he yelled, "Fuck you, bitch" at the sentencing court. The State argued that Baker's outburst reflected of a lack of remorse.

[3] The Honorable Jeffrey A. Conen presided over the resentencing hearing

¶7 Defense counsel acknowledged the seriousness of the offense, but emphasized Baker's youth and immaturity, telling the resentencing court that Baker was developmentally delayed. Defense counsel presented information, through a private presentence investigation report (PSI), that Baker suffered from childhood meningitis, which affected his development, as well as scientific evidence about youth brain development. Defense counsel also vaguely referenced Baker's outburst at the close of the first sentencing hearing, telling the resentencing court: "[c]ertainly some of the conduct that's been referenced would at first blush appear to undercut [Baker's remorse] but on the other hand I do think you have to give some weight to the fact that he was a youth, 17 years of age, probably more chronologically at 14 or 15 years of age at the time of the original sentencing."

¶8 Baker also addressed the resentencing court, stating that he was "in full recognition of [the] errors of [his] ways." Baker apologized to both Schumann's family and his own family, and urged the court to believe that he was "not a bad person[]" but "just made some bad choices."

¶9 The resentencing court then imposed the maximum penalty, stating:

> [T]he interesting thing I found in this particular matter is that there are very few mitigating circumstances with regard to the offense itself.
>
> ….
>
> This is an ongoing set of circumstances over the course of a number of years where Mr. Quincy Baker thought it was appropriate to go out and rob people whether by force or by use of a weapon…. This has been going on for a period of time and … he had robbed a pizza delivery driver. So this, as far as felony murders are concerned, is one of the top in terms of seriousness. This is one of the most serious sets of felony murders that I have seen.

(Some formatting altered.)

¶10 The resentencing court also addressed Baker's character, stating that the PSI report explaining Baker's developmental delays was "nothing more than a pile of excuses." The resentencing court noted that the report did not "reflect anything about the fact that maybe Mr. Baker had some control over what went on here." In discussing Baker's character, the resentencing court also addressed Baker's outburst at the end of his first sentencing hearing:

> The other thing that, kind of quite disturbs me is the fact that Mr. Baker is all remorseful when it comes time to talk to the judge but when the final decision comes down, it's fuck you, bitch. And you know, that says volumes about what goes on and what is going on here. It's all about him, and if he doesn't get what he wants or it turns out to be what he doesn't believe is appropriate, then it's always somebody else's fault, fuck you bitch.

¶11 The resentencing court also noted that "the only way to protect the public … is to take him out of the community for as long as possible to insure that something like this never happens again."

C. Postconviction Proceedings Following the Resentencing Hearing.

¶12 Baker again filed a postconviction motion challenging his sentence. Baker argued that the resentencing court unfairly: (1) focused on Baker's outburst after his first sentencing hearing when rendering its decision; (2) dismissed the PSI report; and (3) acted with judicial vindictiveness. An amended postconviction motion added a claim of ineffective assistance of counsel, arguing that Baker's counsel at the resentencing hearing failed to address Baker's outburst, despite the State's emphasis on the outburst at the resentencing hearing.

¶13 The postconviction court denied the motion. This appeal follows.

DISCUSSION

¶14 On appeal, Baker argues that the resentencing court: (1) relied on inaccurate information, violating his due process rights; (2) erroneously exercised its discretion and failed to provide reasons to support imposing the maximum sentence; (3) acted vindictively when it increased Baker's sentence without explanation; and (4) rendered an unduly harsh and excessive sentence. Baker also argues that his defense counsel rendered ineffective assistance at the resentencing hearing. We address each argument.

I. The Resentencing Hearing.

A. Standard of Review.

¶15 "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted; brackets in ***Gallion***). The sentencing record must show the basis for the court's exercise of discretion. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). If the record shows "a process of reasoning based on legally relevant factors," the sentence will be upheld. *See* ***Anderson v. State***, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977). The primary factors to consider are the gravity of the offense, the offender's character, and the public's need for protection. *See* ***State v. Mosley***, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996).

B. The Resentencing Court Did Not Rely Upon Inaccurate Information.

¶16 "Defendants have a due process right to be sentenced on the basis of accurate information." ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352

(Ct. App. 1990), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. In order to prove a violation of due process, a defendant must prove by clear and convincing evidence both that the information was inaccurate, and that the court actually relied on the inaccurate information in sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Although sentencing is within the sentencing court's discretion, whether a defendant's due process right was violated is a question of law, which we review independently. *See* ***id.***, ¶41.

¶17 Baker argues that the resentencing court relied on inaccurate information when it concluded that Baker's "[f]uck you, bitch" comment demonstrated a lack of remorse. Baker argues that his comment did not reflect a lack of remorse, but rather was made out of frustration.

¶18 The sentencing court is charged with the responsibility of assessing the credibility of witnesses and the weight of their testimony. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). We defer to the sentencing court's assessment because of the court's "superior opportunity ... to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *See* ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

¶19 We agree with the resentencing court that Baker's argument is nothing more than his own subjective opinion. The court made a credibility determination when it determined that Baker's outburst was inappropriate and reflective of his overall character. The court assessed Baker's demeanor—something we will not second-guess. Moreover, as we discuss more below, the

resentencing court considered multiple factors when sentencing Baker—not merely his outburst.

C. The Resentencing Court Provided Reasons for Imposing the Maximum Sentence.

¶20 Next, Baker argues that the resentencing court failed to provide reasons for imposing the maximum sentence and erroneously rejected the defense PSI. We disagree.

¶21 The primary sentencing factors are the gravity of the offense, the need for public protection, and the character of the offender. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the court assigns to each factor, however, is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28. In doing so, the sentencing court should explain the linkage between the sentencing objectives and the component parts of the sentence it imposed. ***Gallion***, 270 Wis. 2d 535, ¶46. The sentencing court has an additional opportunity to explain its sentence when challenged by a postconviction motion. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶22 A review of the transcript in this case demonstrates that the resentencing court did sufficiently explain its reasons for imposing the maximum penalty. The resentencing court discussed Baker's prior robbery attempts and the seriousness of the offense, noting that Baker's offense was "one of the most serious sets of felony murders that I have seen." The court also noted a lack of mitigating circumstances, the need to protect the community, and Baker's

character, stating that Baker appeared apologetic until he received his sentence. We cannot conclude that the resentencing court failed to articulate its reasons for imposing the maximum sentence.

¶23 We also disagree with Baker's argument that the resentencing court erroneously disregarded the defense PSI. "The court has discretion to order a PSI and to determine the extent to which it will rely upon the information in the PSI." ***State v. Suchocki***, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***Tiepelman***, 291 Wis. 2d 179. Although the PSI here was prepared by the defense, rather than by a neutral court-ordered party, the resentencing court still had the discretion to determine how much weight, if any, to give it. The court addressed the PSI, noting that it failed to consider the possibility that Baker had some control over his actions, and focused instead on all of the circumstances that may have affected Baker's brain development. The court addressed what it considered fatal flaws in the PSI, and, as stated, discussed its rationale for imposing the maximum sentence. The court did not erroneously exercise its discretion.

D. The Resentencing Court Did Not Act Vindictively In Imposing Baker's Sentence.

¶24 Baker also contends that the resentencing court acted vindictively when it increased Baker's original sentence without explanation. Baker contends that at the original sentencing hearing, the sentencing court imposed a sentence six months shorter than the maximum penalty as credit for Baker's acceptance of responsibility, but that the resentencing court rejected all of Baker's arguments and focused instead on Baker's outburst, resulting in an imposition of the maximum sentence. Baker is mistaken.

¶25 In ***State v. Naydihor***, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, the Wisconsin Supreme Court, relying on the United States Supreme Court in ***North Carolina v. Pearce***, 395 U.S. 711 (1969), explained judicial vindictiveness as it pertained to increased sentences as follows:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Naydihor, 270 Wis. 2d 585, ¶33 (quoting ***Pearce***, 395 U.S. at 725-26). The ***Naydihor*** court went on to explain that:

> Subsequent cases have interpreted ***Pearce*** as applying "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." The Court has recognized that where the presumption is inapplicable, a defendant is required to demonstrate actual vindictiveness in order to prevail. This court has expressly adopted the approach of ***Pearce*** and its progeny, noting "[t]he constitutionality of an increased sentence upon resentencing is determined by reference to ***Pearce*** and the Supreme Court cases elaborating on the ***Pearce*** presumption."

Naydihor, 270 Wis. 2d 585, ¶33 (internal citations and quoted sources omitted; brackets in ***Naydihor***).

¶26 Following ***Pearce***, the United States Supreme Court limited the rebuttable presumption of vindictiveness to "'circumstances … in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual

vindictiveness on the part of the sentencing authority.'" *See* ***Naydihor***, 270 Wis. 2d 585, ¶36 (citation omitted). The Wisconsin Supreme Court recognized this limitation when it held that the presumption applied to "those contexts where '[i]nherent in the[] circumstances is the 'reasonable likelihood of vindictiveness.'" ***Id.*** (citation and one set of quotation marks omitted; brackets in ***Naydihor***). "[A] reasonable likelihood of vindictiveness exists only if there is a realistic possibility that the sentencing court, after being reversed, may engage in self-vindication and retaliate against the defendant for having successfully pursued appellate relief." ***Id.***, ¶37. "The concern over actual vindictiveness and self-vindication is premised on the notion that 'the institutional bias inherent in the judicial system against the retrial of issues that have already been decided ... might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.'" ***Id.*** (citation omitted; ellipses in ***Naydihor***).

¶27 Applying these principles, we conclude that a presumption of vindictiveness did not exist when the resentencing court imposed the maximum sentence. First, both the sentencing court and the resentencing court imposed the maximum penalty—though the bifurcation configurations differed. At Baker's original sentencing hearing, the sentencing court imposed the maximum 35 years—divided as 27 years of initial confinement and eight years of extended supervision. That same day, the sentencing court revised Baker's sentence based on an error. It maintained Baker's confinement term at 27 years, but reduced his term of extended supervision to seven and a half years, for a total sentence of 34.5 years. The sentencing court granted Baker's motion for resentencing after identifying an error in the criminal complaint. At the resentencing hearing, the court again imposed the maximum 35 years, this time broken down as 26 years

and three months' initial confinement and eight years and nine months' extended supervision. Two out of the three times Baker was sentenced, the court imposed what it thought was the maximum penalty. Baker's sentence was reduced once, only because the sentencing court thought its original sentence was in error. In essence, both the sentencing and resentencing courts intended to sentence Baker to the maximum 35 years. In the context of all of Baker's hearings, Baker's sentence did not actually increase.

¶28 Second, "[t]he ***Pearce*** presumption of vindictiveness can be overcome if 'affirmative reasons' justifying the longer sentence appear in the record and if those reasons are 'based upon objective information' regarding events or 'identifiable conduct on the part of the defendant' subsequent to the original sentencing proceeding." ***State v. Church***, 2003 WI 74, ¶55, 262 Wis. 2d 678, 665 N.W.2d 141 (citing ***Pearce***, 395 U.S. at 726); *see also* ***State v. Schordie***, 214 Wis. 2d 229, 234, 570 N.W.2d 881 (Ct. App. 1997) (information concerning events that occurred after the initial sentence is relevant and a resentencing court can consider it at resentencing). Here, the resentencing court properly considered Baker's outburst—which appeared in the record—when issuing his sentence. The resentencing court found that Baker's outburst was reflective of his character, and went on to address all of the relevant sentencing factors outlined by ***Gallion***, 270 Wis. 2d 535, ¶¶23, 59-61. The resentencing court found Baker's outburst relevant to its decision and accordingly, acted within its discretion when considering Baker's inappropriate behavior.

¶29 Finally, "'[w]here a different judge presides over the later trial and imposes the second sentence, the possibilities of vindictiveness are greatly reduced.'" ***State v. Tarwid***, 147 Wis. 2d 95, 104, 433 N.W.2d 255 (Ct. App. 1988) (citation omitted). Two different judges sentenced Baker. As stated, the

resentencing court attempted to do exactly what the original sentencing court did—impose the maximum sentence. Although the bifurcation configurations differed, both courts attempted to do the same thing. This significantly undermines the possibility of judicial vindictiveness.

E. Baker's Sentence Was Not Unduly Harsh or Excessive.

¶30 Baker contends that his sentence was harsh and excessive, in violation of the Eighth Amendment's prohibition against cruel and unusual punishments. Specifically, Baker contends that the resentencing court's "categorical[] reject[ion]" of the defense's PSI report resulted in the court's "harsh and indifferent evaluation of Baker, as a person."

¶31 A sentence is deemed to be unduly harsh or unconscionable if 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. However, a sentence well within the limits of the maximum sentence is presumptively not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶32 The resentencing court sentenced Baker to the maximum 35 years, however the sentence was within the limits authorized by law. The sentence is within the maximum limits and appropriate for a crime involving a homicide, thus, it is not presumptively unduly harsh. *See* ***id.***

¶33 Moreover, we have already stated that the resentencing court acted within its discretion when dismissing the PSI. The court's comments regarding the PSI did not dehumanize Baker, as Baker argues. Rather, the resentencing

court reasoned that the PSI was a "pile of excuses" because it failed to attribute any responsibility to Baker, instead blaming Baker's behavior on a series of unfortunate life circumstances and delayed brain development. The court's comments also reflected the lack of objectivity present in the defense's PSI report. The court's rejection of the PSI was not an erroneous exercise of discretion, and the sentence was within the limits authorized by law.

II. Ineffective Assistance of Counsel.

¶34 Lastly, Baker argues that his defense counsel was ineffective for failing to address Baker's "[f]uck you, bitch" comment at the resentencing hearing, despite the "[S]tate put[ting] Baker's comments front and center during its argument." Baker contends that counsel's error was prejudicial because the resentencing court relied on those comments and the State's interpretation of the comments when imposing the maximum sentence. We disagree.

¶35 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to prove that the performance of counsel was deficient, the defendant must show that serious errors were made such that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Id.*** This requires the defendant to show that counsel's representation fell below an objective standard of reasonableness. ***Id.*** Even if a defendant can show that counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, the defendant must demonstrate that "counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy

the prejudice-prong, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not address both the deficient performance and prejudice components if the defendant cannot make a sufficient showing on one. *See* ***id.*** at 697.

¶36 The standard of review for both components of the ***Strickland*** test involves a mixed question of law and fact. ***Id.*** at 698. We may not reverse a lower court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). "The questions of whether counsel's performance was deficient and whether the deficient performance prejudiced the defendant, thereby violating his federal constitutional right to effective counsel, are questions of law." ***State v. Moffett***, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989). We decide questions of law independently. *See* ***id.***

¶37 Assuming, without deciding, that the lack of an argument by counsel was deficient performance, Baker has not shown that the deficiency caused him any prejudice. Baker has not shown that an attempt by defense counsel to rebut the State's reference to the outburst probably would have resulted in a lower sentence. The resentencing court discussed, at length, its multitude of reasons for imposing the maximum sentence. The court did not focus exclusively on Baker's outburst, nor did the court state that its sentence was based primarily on the outburst. Baker's argument is based on speculation. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation is insufficient to satisfy the prejudice prong of ***Strickland***). Therefore, we cannot conclude that any deficiency by defense counsel prejudiced Baker. Accordingly, defense counsel did not render ineffective assistance.

¶38 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.