COURT OF APPEALS
DECISION
DATED AND RELEASED

January 14, 1997

NOTICE

No. 96-0199-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Anthony D. Williams,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Anthony D. Williams appeals from a judgment entered after a jury convicted him of one count of felon in possession of a firearm, contrary to §§ 941.29(1)(a)&(2), STATS. He also appeals from an order denying his postconviction motions. He claims: (1) the evidence is insufficient to support the verdict; and (2) the trial court erroneously exercised its sentencing discretion and imposed an unduly harsh sentence. Because there is

sufficient evidence to support the verdict, and because the trial court did not erroneously exercise its sentencing discretion, and because the sentence imposed was not unduly harsh, we affirm.

I. BACKGROUND

On January 3, 1993, Milwaukee Police Detective Dennis Kuchenreuther and his partner went to a house to investigate a shooting. They were met at the door by Melinda Purifoy who consented to their entry.

As they entered, they observed a man (later identified as Williams) sleeping on the dining room floor. Kuchenreuther observed Williams, who was lying face down. Williams appeared to be sleeping. Kuchenreuther testified that as he entered the dining room, Williams began "log rolling" with his hands concealed under his body towards a toy truck. The detective testified that Williams rolled two to three times until he was right next to the truck, which was the only object in the room besides a small cassette box. There was no furniture in the room.

Kuchenreuther asked to see Williams's hands or for Williams to stand up, which he did once he reached the truck. Williams was escorted from the room and when Kuchenreuther looked under the truck he found a .25 caliber semi-automatic handgun.

Williams moved to dismiss at the close of the State's case. The motion was denied. The jury convicted. Williams moved for judgment notwithstanding the verdict. The trial court denied the motion and judgment was entered. He was sentenced to fourteen months in prison.

Williams filed postconviction motions requesting the trial court to reconsider its decisions denying his motions to dismiss and requesting judgment notwithstanding the verdict, as well as a motion challenging the sentence. These motions were all denied. Williams now appeals.

II. DISCUSSION

A. Insufficient Evidence.

Although Williams argues that "the trial court erred in denying his motion to dismiss and his motion for judgment notwithstanding the verdict," both contentions are based on Williams's claim that there is insufficient evidence to convict. Accordingly, we address the issue in this fashion.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Where there are inconsistencies within a witness' or witnesses' testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis.2d 372, 382, 284 N.W.2d 917, 923 (1979). We will substitute our judgment for that of the trier of fact only when the fact finder relied on evidence that was "inherently or patently incredible" — that kind of evidence which conflicts with nature or with fully established or conceded facts. ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 589 (Ct. App. 1990).

Based on this standard, we must affirm. There was evidence that once the police entered the room, Williams concealed his hands, and rolled over to the only object in the room that could hide a gun before standing up.

Williams was the only person in the room. Kuchenreuther testified that he went to look under the truck because he thought Williams may have rolled over to it to discard something under it. Based on Detective Kuchenreuther's testimony, a jury could reasonably conclude that Williams had the ability and intent to exercise control over the weapon. The gun was discovered during a search of the area that Williams had dominion and control over. This is sufficient to establish constructive possession, *see* ***United States v. Pritchard***, 745 F.2d 1112, 1124 (7th Cir. 1984), which is all that is required to uphold the conviction.

Although Williams presented evidence to contradict Kuchenreuther's account, resolving the conflicting evidence is left to the jury, which apparently believed the detective's version of events. ***Thomas***, 92 Wis.2d at 382, 284 N.W.2d at 923.

B. Sentence.

Next, Williams claims the trial court erroneously exercised its sentencing discretion and imposed an unduly harsh sentence. We reject Williams's claims.

Our review is limited to a two-step inquiry. We first determine whether the trial court properly exercised its discretion in imposing the sentence. If so, we then consider whether that discretion was erroneously exercised by imposing an excessive sentence. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984).

The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. ***State v. Echols***, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41, *cert. denied*, 510 U.S. 889 (1993).

Although the sentencing decision by the trial court is brief, the order denying postconviction motion explains that the trial court had sentenced Williams on a homicide conviction six months before the sentencing in this case.

The trial court, therefore, had the benefit of a presentence report and additional information from that proceeding. Further, the sentencing transcript in the instant case does reference the trial court's consideration of Williams's record, the need to protect the community and the seriousness of the offense.

Based on the cumulative information, we are satisfied that the trial court did not erroneously exercise its sentencing discretion. The three primary factors were considered, together with additional information the trial court retained from the earlier proceeding.

Williams's claim that the trial court sentenced him based on erroneous information in the complaint is also without merit. Detective Kuchenreuther's trial testimony was substantially consistent with the information in the complaint.

Finally, we also reject Williams's claim that the sentence imposed was unduly harsh. This court will not find that the sentence imposed by the trial court was unduly harsh unless "the sentence 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." ***State v. Dietzen***, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991). A fourteen-month sentence for possession of a handgun in light of Williams's previous homicide conviction does not shock public sentiment. Therefore, the sentence was not unduly harsh. Moreover, the sentence was well within the statutory potential maximum for this crime, which also supports our conclusion that it was not unduly harsh. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d457, 461-62 (1975) (a sentence within the statutory maximum length is not unduly harsh).

By the Court. – Judgment and order affirmed.

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