COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1996

No. 96-1194-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Eugene Nichols,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

WEDEMEYER, P.J.[1] Eugene Nichols appeals from a judgment entered after a jury convicted him of theft, entry into a locked vehicle, and criminal damage to property, all as party to a crime, contrary to §§ 943.20(1)(a), 943.20(3)(a), 943.11, 943.01 and 939.05, STATS. He claims that the trial court erroneously exercised its sentencing discretion when it imposed a twenty-one month jail term. Because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

Nichols was convicted for breaking into Tesa Santoro's parked car on May 26, 1994, and for stealing a CD player, a checkbook and some other miscellaneous items that were in the car. After the jury convicted him, the trial court sentenced him to twenty-one months in prison. Nichols now appeals.

II. DISCUSSION

Nichols claims that his sentence should be reversed because it violates the equal protection clause of the Constitution, because it constitutes cruel and unusual punishment and because it is unduly harsh.

Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. ***State v. Plymesser***, 172 Wis.2d 583, 585-86 n.1, 493 N.W.2d 367, 369 n.1 (1992). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination, and an appellate court must presume that the trial court acted reasonably. ***State v. Wickstrom***, 118 Wis.2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where 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." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Nichols's first argument is based in the fact that his co-conspirator, who pleaded guilty, only received thirty days in the House of Correction, twenty-five hours of community service and probation. He claims the equal protection clause was violated based on this disparity—the co-conspirator receiving only a one-month term, while he received a twenty-one-month term for the same crimes. This court is not persuaded by Nichols's argument.

We will not find a misuse of sentencing discretion simply because one trial court gave a defendant a sentence different than another trial court gave a co-defendant.

> By its very nature, the exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular case. As a result, a judge imposing a sentence in one case cannot be bound by the determination made by a judge in another case.

Ocanas, 70 Wis.2d at 187-88, 233 N.W.2d at 462 (citation omitted); *see also* ***State v. Perez***, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App.), *cert. denied*, 506 U.S. 957 (1992).

Further, there is no evidence that the trial court here imposed a longer sentence because Nichols exercised his right to a jury trial or that the co-conspirator received a shorter sentence because he entered a guilty plea. Nichols received a longer sentence based on the appropriate factors, which were considered by the trial court. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633, 639 (1984) (The sentencing court must consider three primary factors: (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public.).

Nichols's remaining two arguments are essentially the same: that the sentence imposed was too harsh in comparison to the crimes committed. This court rejects this argument as well. Nichols was sentence to seven months, consecutive for each of the three counts, for a total of twenty-one months. He faced a potential of nine months in prison on each count, plus additional fines. The trial court did not impose the maximum sentence which, according to some case law, automatically means that the sentence was not unduly harsh. *See* ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) ("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.").

Further, although at first glance a twenty-one month sentence for an auto break-in may seem excessive, a deeper examination indicates otherwise. Nichols was not a first-time offender in these crimes. He has a long history of similar offenses, where he was given lighter sentences. The lighter sentences, however, obviously did not rehabilitate Nichols. Once back on the street, he continued his criminal ways. Given his history, this court cannot say that the sentenced imposed is out of proportion to the crimes committed. Accordingly, the sentence was not harsh nor does it constitute cruel or unusual punishment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.