**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 13, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2003AP3461-CR** **Cir. Ct. No. 2002CF5109**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KIONTA L. CROCKETT,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Kionta L. Crockett appeals from a corrected judgment of conviction for second-degree intentional homicide, and from a postconviction order denying his motion for resentencing. The issue is whether the trial court imposed an unduly and disparately harsh sentence, and relied on

inaccurate information at sentencing. We conclude that the trial court properly exercised its sentencing discretion. Therefore, we affirm.

¶2 David Crowley and Kristopher Beason had allegedly threatened Crockett both verbally and by brandishing a gun. Nevertheless, when Crowley and Beason invited Crockett and Robert Lee Patterson to join them to smoke some marijuana the next day, Crockett obliged because he thought, "everything was supposed to have been cool." The four men were smoking marijuana while "driving around" in a minivan driven by Crowley. Beason was the passenger in the front seat; Crockett was in the middle bench seat, and Patterson was in the backseat. Crockett claimed he was concerned when Crowley stopped the van; he became alarmed when, as Beason reclined in his seat, Crockett saw a gun on Beason's lap. Crockett, who was also armed, then fired five shots at close range, hitting Crowley; Patterson, who was also armed, fired five shots at close range, hitting Beason. Police found Crowley and Beason dead in the front seat of the minivan.

¶3 Crockett and Patterson were each charged with two counts of first-degree intentional homicide while armed and using a dangerous weapon, as a party to the crime. In exchange for the State reducing one of the homicide charges from first- to second-degree, and agreeing to dismiss the other, Crockett pled guilty to a reduced charge of second-degree intentional homicide, contrary to WIS. STAT. § 940.05(1) (2001-02). Incident to the plea bargain, the State also left sentencing to the trial court's discretion. The trial court imposed a fifty-six-year sentence, comprised of thirty-six- and twenty-year respective periods of confinement and extended supervision. Crockett sought resentencing, which the trial court denied.

¶4 On appeal, Crockett seeks resentencing, claiming that the trial court erroneously exercised its discretion.

> 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 primary sentencing factors are the gravity of the offenses, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***State v. Spears***, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Crockett claims that the trial court erroneously exercised its discretion in: (1) imposing an unduly harsh sentence; (2) imposing a disparately harsh sentence as compared to Patterson's forty-five-year sentence, including a twenty-seven-year period of confinement; and (3) relying on inaccurate information. Crockett fails to show an erroneous exercise of sentencing discretion.

¶6 Crockett contends that his fifty-six-year sentence, thirty-six years of which are in confinement, was unduly harsh because the trial court failed to consider his claimed self-defense. Crockett claimed that he preemptively shot

Crowley, in reaction to both his surprise, when Crowley unexpectedly stopped the van, and in reaction to his realization that Beason was armed, suddenly recalling their threats several days earlier. Crockett claimed that had he not done so, he believed that Crowley and Beason would have murdered him.

¶7 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). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶8 At sentencing and in its postconviction order, the trial court acknowledged Crockett's arguable fear, which may have supported his claim of self-defense. It then extensively explained the different versions of what may have occurred, and how Crockett received substantial consideration for his claimed self-defense because the State reduced the two first-degree intentional homicide charges to one second-degree charge. The trial court ultimately decided that

> to the extent that fear and other factors of arguable mitigation played a role here … that has been taken into account in assigning a label [charge] to this case. Is it worthy of something more o[r] some further consideration? [The trial court has] decided that it is but not much.

¶9 The trial court considered the primary sentencing factors, and gave substantial consideration to Crockett's claimed although not established defense, ultimately deciding that Crockett was not entitled to considerably more sentencing consideration, beyond the reduced charge, for that same claimed defense. The

trial court's sentence of fifty-six years, thirty-six of which were in confinement, for the reduced single charge of second-degree intentional homicide did not "shock public sentiment and violate the judgment of reasonable people." ***Ocanas***, 70 Wis. 2d at 185.

¶10 Crockett also contends that his sentence was disparately harsh as compared to that of Patterson, whom he claimed was sentenced to forty-five years, comprised of twenty-seven- and eighteen-year respective periods of confinement and extended supervision.

> Disparity alone does not amount to a denial of equal protection. The sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court. The sentence was not excessive. "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

***Id.*** at 189 (footnote omitted).

¶11 At sentencing, the trial court acknowledged that it considered Patterson's sentencing, and the remarks by Crockett's counsel about Patterson's sentence. It did not, however, elaborate on Patterson's sentencing or compare it to Crockett's. In its postconviction order, the trial court declined to review both sentencing transcripts because Crockett had failed to demonstrate "that other material sentencing considerations were highly similar." On appeal, Crockett contends that the trial court's postconviction statement, that the gravity of the offense and the defendants' culpability were "quite similar," was sufficient to compel review of this claim.

¶12 Crockett acknowledges that each co-defendant is not entitled "to the same exact sentence." He fails to acknowledge, however, that the trial court is not

obliged to consider the sentence imposed on a co-defendant. *See* ***id.*** at 188-89. The trial court's sentencing 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. We conclude that it has done so.

¶13 Crockett's remaining challenge is to the accuracy of the information on which the trial court allegedly relied in imposing sentence. A defendant who claims to have been sentenced on inaccurate information must clearly and convincingly establish that the information was inaccurate and prejudicial. *See* ***State v. Coolidge***, 173 Wis. 2d 783, 788-89, 496 N.W.2d 701 (Ct. App. 1993).

¶14 Crockett's criticism is that the trial court considered the shootings as executions, rather than self-defense. As the trial court repeatedly recognized, the facts supported various versions of what occurred, from preemptive shootings in self-defense, to executions. It explained that Crockett received substantial consideration for his self-defense version of the incident when the State reduced the two first-degree intentional homicide charges to a single second-degree charge. Consequently, Crockett's challenge is not to the accuracy of the information, but to the trial court's refusal to accept Crockett's characterization of the shootings. The trial court, however, addressed the plausibility of the various versions of the incident, not the conclusiveness of a particular version. Crockett has not clearly and convincingly (or even marginally) shown that he was sentenced on inaccurate information.

¶15 Crockett has failed to show that the trial court erroneously exercised its sentencing discretion. Crockett has not shown that his sentence was unduly or disparately harsh, or predicated on inaccurate information. Crockett has not shown that his sentence was predicated on some unreasonable or unjustifiable

basis, only that the trial court exercised its discretion differently than he had hoped it would. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

*By the Court.*—Corrected judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).