COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3168-CR
2006AP3169-CR

Cir. Ct. No. 2005CF3482
2006CF734

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. HUGHES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Wedemeyer, Fine, and Kessler, JJ.

¶1 FINE, J. In this consolidated appeal, Christopher D. Hughes appeals an order denying his motion for resentencing, following entry of judgments on his guilty pleas to operating a vehicle without the owner's consent,

as a party to the crime, removing vehicle parts without the owner's consent, as a party to the crime, and felony bail-jumping. *See* WIS. STAT. §§ 943.23(3), (5); 939.05; 946.49(1)(b). Hughes claims that: (1) he was sentenced on inaccurate information; (2) the prosecutor breached the plea bargain; (3) the circuit-court judge was biased; and (4) the circuit court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 Hughes was charged with committing the automobile offenses on June 11, 2005. According to a letter Hughes read at sentencing, Keith Hughes, to whom he is not related, brought a car to his house. Christopher Hughes, the defendant here, then drove the car to an alley near his house, and helped Keith Hughes and Ara Davis take the car's rims off and sell them. According to Christopher Hughes, he did not know that Keith Hughes had shot and killed the driver of the car, Maurice Olivier, until five or seven days after he helped remove the rims.

¶3 Christopher Hughes absconded before he could be sentenced, and a warrant was issued for his arrest. Once apprehended, the automobile charges were consolidated with the bail-jumping charge, which was based on his having absconded. The cases were plea bargained. In exchange for Hughes's guilty pleas to all the charges, the prosecutor agreed not to make a sentencing recommendation on the automobile counts, but was specifically permitted to argue the underlying

facts. The prosecutor also agreed to recommend a concurrent sentence on the bail-jumping count.[1]

¶4 At the sentencing hearing, the prosecutor explained:

> This involves Mr. Olivier (phonetic) and the fact that Keith Hughes, who is a relation to Christopher Hughes, killed Mr. Olivier at pointblank range, attempting to steal his vehicle along with a man named Ara Davis.[2]
>
> After obtaining Mr. Olivier's vehicle, it was Mr. Christopher Hughes who had agreed to sell that vehicle, that during the course of Mr. Hughes negotiating the sale of

[1] At sentencing, the State confirmed the circuit court's understanding of the plea bargain on the bail-jumping count and told the circuit court the agreement on the automobile counts:

> THE COURT: My file indicates that there was a plea taken to the bail jumping with an agreement that that time -- that there would be a recommendation for concurrent time with the charge in 3482 [the automobile counts]; is that correct?
>
> [The prosecutor]: Yes.
>
> THE COURT: And in 3482, my file doesn't indicate what the negotiations were. What is that?
>
> ….
>
> [The prosecutor]: Simply that the State would remain silent as to sentencing.
>
> THE COURT: Okay. And the plea was taken to two charges of operating auto without owner's consent?
>
> [The prosecutor]: Yes. The State is free to argue the facts.

The parties and the circuit court then clarified that Hughes pled guilty to one count of operating a vehicle without the owner's consent and one count of removing vehicle parts without the owner's consent.

[2] As we see below, Hughes's lawyer corrected the prosecutor's misstatement, and told the circuit court that the two Hugheses were *not* related.

> the vehicle, it was a -- at that point that Mr. Hughes was arrested by police.
>
> He -- without any qualms agreed to sell this vehicle. He knew the vehicle and the rims were stolen, and he was with Keith Hughes and Ara Davis, and he was literally the front man for this sale when he was arrested by police. He had also helped remove the rims from the vehicle.
>
> So, Judge, I -- I think that a -- this is a serious offense. I'm not making a recommendation on this matter. The Court knows the facts.

(Parenthetical in original; footnote added.) The prosecutor also told the circuit court that "what makes it worse" was that Hughes "willingly failed to appear [for a] court appearance, and the bail jumping charge was issued." The prosecutor opined that "the big question is whether Christopher Hughes knew that Keith Hughes had killed Mr. Olivier for the vehicle":

> I think that he must have known that something serious happened.
>
> As the Court knows, Keith Hughes was bragging after the homicide about what he had done, and though I can't specifically show that he bragged to Christopher Hughes, that I think there's a likelihood that Christopher Hughes knew that something very serious had happened in order [for] Keith Hughes to obtain that vehicle.

¶5 The prosecutor reminded the circuit court that it had sentenced Keith Hughes: "it is my recollection that you gave Keith Hughes a -- twenty years of initial confinement for his participation in this matter." The circuit court also had sentenced Davis to eight years of initial confinement for those crimes. The prosecutor added: "Only other thing I would note is, as the Court knows, Keith Hughes received consecutive time on the Terrance Thomas case also, which I think amounted to approximately eight years." The prosecutor asked the circuit court to "consider all of those matters."

¶6 Hughes's lawyer told the circuit court that although Hughes took the rims from the car, he "had nothing to do with the [Olivier] homicide." He also explained that Christopher Hughes was not related to Keith Hughes, and that the lawyer did not believe that "Keith Hughes would have told him that that car was taken in a robbery or a homicide." Hughes's lawyer asked the circuit court to put Hughes on probation. In response, the prosecutor told the circuit court that Christopher Hughes had admitted (in his letter that he read to the circuit court) that he, Hughes, as phrased by the prosecutor, had "overheard Keith Hughes saying that he had -- had killed a person whose rims they were trying to sell and whose rims they took off the vehicle."

¶7 According to the prosecutor, Christopher Hughes did not tell the police what he had heard and, a few months later, Keith Hughes shot and killed Terrance Thomas. The prosecutor argued that had Christopher Hughes reported what he heard to the police, he "may have saved [a] life":

> if Christopher Hughes would have told police that Keith Hughes had made that admission and he heard that admission, Keith Hughes would have been arrested on that homicide. And quite frankly, it may have saved Terr[a]nce Thomas's life in August because Keith Hughes would have been in custody and charged with that homicide.

¶8 Olivier's father, Dennis Grey, who also spoke at the sentencing hearing, asked the circuit court to impose "no less than fifteen years on this matter, because a promising young man lost his life over some[thing] very stupid and inexpensive." Grey "plead[ed]" with the circuit court "to weigh this with a very heavy heart. These young men acted like vultures around a car that they knew was taken …. We have to make a stand."

¶9 The circuit court sentenced Hughes to consecutive sentences on the car crimes to an initial confinement of one year and six months, and two years of extended supervision, and to nine months in the Milwaukee County House of Correction. On the bail-jumping charge, the circuit court sentenced Hughes to a consecutive initial confinement of one year and six months, and three years of extended supervision.

II.

A. *Alleged reliance on inaccurate information.*

¶10 Hughes argues that the circuit court sentenced him based on inaccurate information. A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. We review *de novo* whether a defendant has been denied the right to be sentenced on accurate information. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶11 Hughes was interviewed by the police on June 15 and 16, 2005. He argues that the prosecutor's argument that he did not share with the police information that could have "saved [a] life" was incorrect because he told the police during the June interviews that Keith Hughes shot Olivier. Christopher Hughes contends that the circuit court relied on the prosecutor's allegedly incorrect remark when at sentencing it commented: "It's a valid point that the State makes, that, you know, you had information that could have made a difference, that could have saved a life." Hughes's claim is belied by the Record.

¶12 The Record of Hughes's statements from the June interviews refutes his claim that he told the police that Keith Hughes shot Olivier during those sessions. In the statements, Christopher Hughes told the police that Keith Hughes and Davis brought a car to his house, but that he, Christopher Hughes, "had no idea that anyone had been killed over this vehicle [or] any information about how they obtained this vehicle."

¶13 Moreover, at the sentencing hearing, Christopher Hughes's lawyer told the circuit court that Christopher Hughes heard Keith Hughes admit to the shooting *after* the June interviews and did not report this to the police:

> [Hughes's lawyer]: Christopher Hughes is advising that he only learned of Keith Hughes bragging about the homicide after he had -- after Christopher Hughes had talked to Detective Heier.
>
> [The prosecutor]: And my point is that this was shortly after Christopher Hughes had talked to Detective Heier, and Christopher Hughes never contacted the police to say, look, now I know who did the murder, it's Keith Hughes. Christopher Hughes never did that.
>
> And then Keith Hughes was not charged with this offense until after the other murder.
>
> And if Christopher Hughes would have come forward after Keith Hughes told 'em that he murdered Mr. Olivier, that other murder perhaps could have been prevented, because the police would have arrested Mr. Hughes and interrogated 'em on Mr. Olivier's murder prior to the other murder.
>
> That's the whole point I'm making.
>
> THE COURT: And the second murder was when?
>
> [The prosecutor]: In September or late August.
>
> THE COURT: Okay. Does your client understand what the State is saying?
>
> [Hughes's lawyer]: Yeah, he understands the point.

> THE COURT: Does he dispute that point?
>
> [Hughes's lawyer]: Well, I -- it all comes down to what --
>
> You know, it's basically proximate cause. It's -- had a lot of things happened or not happened, something terrible wouldn't have happened. But how much is the fault of Mr. Hughes?
>
> THE COURT: And nobody is saying that the second murder happened because of anything that he did.
>
> But his point is that if he had done something, things could have changed.
>
> There could have been some action, because they would have been focused on someone that was involved in the second murder, and that might have made a difference.
>
> That's all, I think, the point is.
>
> [Hughes's lawyer]: I realize that, and I think Mr. Hughes realizes that also.

¶14 Hughes also complains that the prosecutor told the circuit court that he was related to Keith Hughes and, also, that he helped to try to sell the car. As we have seen, Hughes's trial lawyer corrected the prosecutor's misstatement about the two Hugheses being related. Neither Hughes nor his lawyer, however, objected when the prosecutor told the circuit court that Hughes had helped to try to sell the car. Thus, we analyze the sell-the-car statement in the context of whether the trial lawyer gave Hughes ineffective representation by not objecting. *See* ***State v. Ellington***, 2005 WI App 243, ¶14, 288 Wis. 2d 264, 278, 707 N.W.2d 907, 914 (a trial lawyer's failure to object "must be analyzed in an ineffective-assistance-of-counsel context").

¶15 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove

prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Ibid.*** That is, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he 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.***, 466 U.S. at 694. We need not look at the deficient-performance aspect unless the defendant has shown ***Strickland*** prejudice. ***Id.***, 466 U.S. at 697.

¶16 Hughes has not shown how he was prejudiced by the prosecutor's comment that he helped to try to sell the car. He does not allege, let alone show, that the circuit court relied on the comment. Further, as we have seen, Hughes and his lawyer *did* object to comments by the prosecutor that they believed were inaccurate. That neither of them objected to the helped-to-try-sell-the-car assertion is thus circumstantial evidence that the comment was true—although there is no evidence in the Record one way or the other. *See* ***State v. Marshall***, 113 Wis. 2d 643, 652, 335 N.W.2d 612, 616 (1983) (statement made in person's presence that would ordinarily be denied if not true is evidence of its truth if person does not deny it) (in the context of WIS. STAT. RULE 908.01(4)(b)).

B. *Alleged breach of plea bargain.*

¶17 Hughes claims that the comments by the prosecutor implicitly breached the plea bargain. Hughes's lawyer did not object to the comments at the sentencing hearing.

¶18 The plea bargain and what the prosecutor told the circuit court are not disputed. Thus, our inquiry is whether, as a matter of law, the prosecutor's comments "materially and substantially" breached the plea bargain. ***State v.***

Williams, 2002 WI 1, ¶20, 249 Wis. 2d 492, 509, 637 N.W.2d 733, 740 (whether State's conduct materially and substantially breached plea bargain is a question of law).

> A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach …. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained.

Id., 2002 WI 1, ¶38, 249 Wis. 2d at 517, 637 N.W.2d at 744 (footnotes omitted). Accordingly, while a prosecutor need not enthusiastically recommend a plea-bargained agreement, *see* ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986), a prosecutor may not covertly convey to the circuit court that a more severe sentence is warranted than what the prosecutor bargained to recommend, ***Williams***, 2002 WI 1, ¶42, 249 Wis. 2d at 518, 637 N.W.2d at 745.

¶19 Hughes claims that the prosecutor's comments "as a whole" breached the plea bargain by suggesting to the circuit court that a severe sentence was warranted. Specifically, Hughes points to several observations made by the prosecutor, arguing that they "undercut" the plea bargain:

- The prosecutor twice told the circuit court that the case was "serious," and that while Christopher Hughes may not have initially known that Keith Hughes shot Olivier, Christopher Hughes "must have known that something serious happened."

- The prosecutor allegedly made inaccurate statements, including that Christopher Hughes was related to Keith Hughes and that Christopher Hughes tried to sell the car.

- The prosecutor did not "disavow" Olivier's father's request for fifteen years in prison. Instead, Hughes contends that the prosecutor "tied [Christopher Hughes] to the murders" by requesting restitution and telling the circuit court that Keith Hughes had received a consecutive sentence for killing Terrance Thomas, whose murder the prosecutor argued Christopher Hughes may have been able to prevent.

- The prosecutor "paint[ed Hughes with] a picture of bad character."

- The prosecutor asked the circuit court to "consider all of those matters."

We disagree. Looking at the prosecutor's comments in the context of the entire sentencing proceeding, we conclude that they did not undermine the plea bargain.

¶20 As we have seen, and this is significant, the prosecutor was free to argue the facts of the case. That is exactly what he did. As Hughes points out, the prosecutor described the serious nature of the crimes and gave his assessment of Hughes's character, including his failure to tell the police that Keith Hughes was the shooter. Not only were these permissible sentencing considerations, *see* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984) (primary sentencing factors are the gravity of the offense, the character of the defendant, and the need to protect the public), but the prosecutor had an obligation to tell the circuit court about them, *see* ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 241, 244 (Ct. App. 1991) ("At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot 'be immunized by a plea agreement between the defendant and the state.'") (quoted source omitted). Thus, the prosecutor had a duty to answer the circuit court's questions, including its request to "[o]utline for me, if you will, the people that you charged in regard to this particular case, this one incident, and if you can, tell me what the outcome for each

was." *See* ***State v. McQuay***, 154 Wis. 2d 116, 125, 452 N.W.2d 377, 381 (1990) (A plea bargain that does not allow the sentencing court to be told relevant information is void as against public policy.). The prosecutor's comments to the circuit court were well within what the plea bargain permitted him to do. There was no breach. *See* ***State v. Bangert***, 131 Wis. 2d 246, 289, 389 N.W.2d 12, 32 (1986) (burden is on the party arguing a breach of the plea bargain to show by clear and convincing evidence that a breach occurred).

C. *Alleged judicial bias.*

¶21 Hughes contends that his due-process right to an impartial judge at sentencing was violated. *See* WIS. STAT. § 757.19(2). In analyzing whether a judge is impartial:

> We begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced. In determining the question, we apply both a subjective and an objective test. We first look to the challenged judge's own determination of whether the judge will be able to act impartially. Next, we look to whether there are objective facts demonstrating that the judge was actually biased. This requires that the judge actually treated the defendant unfairly.

State v. Neuaone, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 485, 700 N.W.2d 298, 304 (citations omitted). We assume that by presiding over Hughes's sentencing, the judge believed that she was impartial. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 684, 683 N.W.2d 31, 45. We thus turn to whether there are objective facts demonstrating that the judge was actually biased.

¶22 Hughes argues that the judge was biased because she had, during sentencing, "developed a personal interest in the outcome of this case due to [her] acquaintance with the victim's father." We disagree. First, the alleged

"aquaintance[ship]" was solely as a result of the father appearing in court as a result of his son's murder. Second, the judge appropriately considered the father's feelings and immense loss in assessing an appropriate sentence. She explained:

> the Court has listened to the father of the victim, who I have great respect for, and I'm very sorry to have to see you again under these circumstances. I've seen you so many times in this court, it's a very, very sad statement for you and your family.
>
> And I hope that a -- that this is the end for you. I hope that the -- this is the end of all your court appearances.
>
> And I understand, when you spoke to the Court, you know, you indicated that you wanted the Court to -- to give a significant sentence to show and to give a message to Mr. Hughes and to other people involved in these activities, how important it is that you can't be involved at all.
>
> And actually, I -- the sentence you asked for is not even -- is not available to me. I can't sentence that much.
>
> But I think if I was in your shoes, I would be asking for the same thing, and probably triple that. I understand entirely how you must feel. I don't understand entirely how you must feel, but I'm very sorry for what you've gone through. I haven't gone through it, so I can't understand it entirely.

The impact of the crime on the victim's family is a relevant sentencing factor. *See* ***State v. Gallion***, 2004 WI 42, ¶¶65, 68, 270 Wis. 2d 535, 568, 569, 678 N.W.2d 197, 212–213 ("Indeed, it is unrealistic to expect judges to listen to friends and family of the victim and to not consider their testimony."). Hughes has not shown bias. As we will see in the next section, the judge also considered the appropriate sentencing factors.

D. *Sentencing.*

¶23 Hughes claims that the circuit court erroneously exercised its sentencing discretion, pointing to ***Gallion***, which requires that circuit courts, "by

reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Id.***, 2004 WI 42, ¶46, 270 Wis. 2d at 560, 678 N.W.2d at 208. He argues that the circuit court placed too much weight on what he alleges are improper and irrelevant factors, including: (1) the "wishes" of the victim's father; and (2) the prosecutor's argument that Hughes could have "saved [a] life." We disagree.

¶24 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d at 569, 678 N.W.2d at 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). A sentencing court erroneously exercises its discretion if it relies on "clearly irrelevant or improper factors." ***McCleary***, 49 Wis. 2d at 278, 182 N.W.2d at 520.

¶25 As we have seen, the three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***Harris***, 119 Wis. 2d at 623, 350 N.W.2d at 639. The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d 639; *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is also within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶26 The circuit court considered the appropriate factors when it sentenced Hughes. It recognized that the crimes were serious, noting that Hughes removed the rims from a car that was "involved in a … tragic incident … where the … operator of that vehicle … was killed by people that you … were in association with." As we have seen, it also recognized how Olivier's family was affected by the crimes; while acknowledging that Hughes did not kill Olivier, the circuit court opined that Hughes was part of a larger criminal network that enabled such crimes:

> You're making it possible for people to carjack cars to steal rims, because there's always somebody down on the street like you that will take the rims off and help 'em deal with the car once they have it.
>
> So it's a stream of commercial activities and criminal activities, and you're part of that stream.
>
> And as long as you're involved with these people, there's a reason for them to keep doing what they're doing, because [they] have a way to make money through you.

The circuit court also considered that while waiting to be sentenced for these crimes, Hughes absconded for approximately one month, which led to the bail-jumping conviction.

¶27 The circuit court also assessed Hughes's character and rehabilitative needs: it recognized that Hughes did not contact the police after he learned that

Keith Hughes shot and killed Olivier; it noted that Hughes was twenty-eight years old, had not completed high school, did not have a "sustained work experience," and had five children to support; it considered Hughes's prior juvenile conviction for operating a vehicle without the owner's consent; and it considered Hughes's prior adult convictions for second-degree sexual assault of a child, operating a vehicle without the owner's consent, possession of cocaine, and resisting and obstructing an officer. It concluded that Hughes needed to be punished, and further observed that he would get the help he needed to turn his life around while in prison:

> You've got a lot to make up for, here, to your children, to your family, to your mother, to everybody in the community. You have got to change your life.
>
> Now, first of all, you've got to be punished. You'll be given opportunities to work towards changing your life.
>
> You'll get help in getting job placement. You'll get help in getting your high school education. You'll get help in getting your vocational skills, and you'll get whatever help you need.
>
> But you need to do first the punishment for these acts, because these are serious crimes that led to even more serious crimes.

Finally, in its written decision denying Hughes's postconviction motion, the circuit court explained that the community needed "protection" from the "type of activit[ies]" Hughes was engaged in. The circuit court fully explained Hughes's sentence and the reasons for it.

¶28 Hughes also contends that the circuit court erroneously exercised its discretion because it did not say during the sentencing hearing that it considered

probation as an option, or explain why maximum, consecutive sentences were warranted.[3] Again, we disagree. In each case, the sentence imposed shall "'call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***McCleary***, 49 Wis. 2d at 276, 182 N.W.2d at 519 (quoted source omitted). In denying Hughes's postconviction motion, the circuit court commented that "[p]robation was not a viable alternative in these cases, particularly under circumstances where [Hughes] picked up a felony bail jumping charge while awaiting sentencing." Further, as the circuit court recognized, the crimes were serious and Hughes was basically lawless. The circuit court properly exercised its sentencing discretion.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[3] Although the circuit court imposed the maximum sentences for the car crimes, it did not impose the maximum sentence on the bail-jumping charge.