COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP208-CR **Cir. Ct. No. 2006CF6027**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVITH MOUA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and WILLIAM SOSNAY, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Davith Moua appeals from a judgment of conviction for first-degree recklessly endangering safety while armed, and from a postconviction order denying his sentence modification motion.[1] The issues are whether the trial court imposed an unduly harsh sentence, and whether imposition of a significantly lesser sentence on Moua's co-actor, one month after Moua was sentenced, constituted a new factor warranting sentence modification to alleviate the alleged disparity. We conclude that the trial court properly exercised its discretion and imposed a sentence that was not unduly harsh, and that the sentence subsequently imposed on Moua's co-actor was not a new sentencing factor, nor did it result in disparate sentences. Therefore, we affirm.

¶2 Moua was charged with two counts of first-degree recklessly endangering safety while armed for repeatedly firing a sawed-off shotgun and, on another occasion, a .45-caliber handgun into a family's home. On one of the occasions at least four children, one of them a senior in high school, and the others, ages three, two and one, were in the house. One of the victims told police that he believed that his house was targeted because one of his family members was in a rival gang to that of Moua. Moua's co-actor, Bee Xiong, was also charged with and pled guilty to the same offense as a party to the crime for driving Moua to one of these shootings; Xiong however, did not fire at or into the victims' house.

[1] This case was assigned to the Honorable Timothy G. Dugan, who accepted Moua's guilty plea. Judge Dugan was presiding over a jury trial at the time scheduled for Moua's sentencing; consequently, the Honorable William Sosnay imposed sentence. Judge Sosnay also decided Moua's postconviction motion for sentence modification.

¶3 Incident to plea bargains, Moua and Xiong each pled guilty to one count of first-degree recklessly endangering safety while armed with a dangerous weapon, as a party to the crime, in violation of WIS. STAT. §§ 941.30(1), 939.63 and 939.05 (2005-06).[2] The State also agreed to dismiss and read-in an identical count of first-degree recklessly endangering safety while armed, and recommend a prison term of unspecified duration for Moua; for Xiong, the State agreed to recommend a six-year prison term, comprised of three-year periods of initial confinement and extended supervision. The trial court imposed a fifteen-year sentence on Moua, comprised of ten- and five-year respective periods of initial confinement and extended supervision. One month later, a different branch of the trial court imposed an eight-year sentence on Xiong. Moua moved for sentence modification, contending that the ten-year initial confinement component of his fifteen-year sentence was unduly harsh, and that Xiong's three-year initial confinement component of his eight-year sentence was a new factor warranting sentence modification. The trial court denied the motion, reiterating its consideration of the primary sentencing factors to demonstrate that the sentence was not unduly harsh, and explaining that it rejected Xiong's sentence as a new factor because Moua was far more culpable than Xiong. Moua appeals.

¶4 Moua challenges his sentence as unduly harsh and excessive, both as an erroneous exercise of sentencing discretion and as unconstitutional cruel and unusual punishment, violative of the United States and Wisconsin Constitutions. *See* U.S. CONST. amend. VIII; WIS. CONST. art. I, § 6. "The test for whether a sentence violates the Eighth Amendment and whether a sentence was excessive

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

are virtually identical." ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823. A sentence is unduly harsh, excessive and violative of the Eighth Amendment 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); *see* ***State v. Pratt***, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967). "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." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 The trial court explained why it imposed a ten-year period of initial confinement. The trial court's "prime concern" was "the protection of the community." It imposed a greater sentence, as it was authorized to do, because of the dangerous weapon enhancer pursuant to WIS. STAT. § 939.63. The weapon was central to Moua's commission of the offense while armed, increasing the risk to the victims specifically and to the community generally. The trial court explained in its postconviction order that "Moua's sentence is neither excessive nor unduly harsh given the extremely serious nature of the offense, the violent nature of his character, his continued association with members of the N-DUB gang, and the absolute need for community protection."

¶6 Moua fired at least four shots from a twelve-gauge shotgun "until it was unloaded." Moua admitted that he had driven a stolen vehicle to that same

house weeks earlier and fired the sawed-off shotgun into that house, but left because the gun "jammed." Moua also had Xiong drive him to the same house a third time when he repeatedly fired a .45-caliber handgun out the window of the stolen car. One of the bullet slugs was recovered from inside the house, lodged in a couch on which one of the victims had been sitting. Lengthening the sentence pursuant to the weapons enhancer because Moua used a sawed-off shotgun and a handgun was not an erroneous exercise of discretion. Imposing a fifteen-year sentence, with a ten-year period of initial confinement, on a man who repeatedly fired a sawed-off shotgun and then a handgun into a home occupied with a family and young children, for no apparent reason except possibly as retaliation for gang involvement is not "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.

¶7 First-degree recklessly endangering safety is a Class F felony with a twelve-year, six-month maximum potential penalty. *See* WIS. STAT. §§ 941.30(1); 939.50(3)(f). The penalty enhancer for committing this offense while armed with a dangerous weapon is an additional five years. *See* WIS. STAT. § 939.63(1)(b). A fifteen-year sentence is well within the seventeen-year, six-month maximum potential penalty for that offense and, as such, is not unduly harsh and excessive, nor does it constitute cruel and unusual punishment. *See* ***Daniels***, 117 Wis. 2d at 22.

¶8 Moua also contends that his sentence and that of his co-actor are disparate and that Xiong's three-year period of initial confinement imposed one month later constitutes a new factor warranting sentence modification. A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). "[An alleged] disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994) (citation omitted).

¶9 After Xiong had been sentenced, Moua moved for postconviction relief, raising the issue of a disparate sentence. The trial court did not consider Xiong's sentence "highly relevant" to Moua's sentence. ***Rosado***, 70 Wis. 2d at 288. The trial court also explained why it did not consider these sentences disparate. "Here, the defendant was the one in possession of the guns and the one who shot up the house." The trial court continued:

> This court rejects the defendant's claim that Bee Xiong's sentence constitutes a "new factor" – or the common denominator for both sentences – to warrant modification. Xiong's sentence is not the common denominator here. The defendant's sentence was based on his particular culpability, as well as the ***McCleary*** and ***Gallion*** factors which the court was required to consider when imposing its sentence. Here, the State recommended a six-year sentence in Xiong's case due to his minimal role in the offense. There was no dispute that Moua was the shooter and that Moua had been to the same house three separate times to shoot it up. It was Moua's idea to shoot up the house when he joined up with Xiong. Xiong was the

> driver and participated in the last shooting episode only; additionally, he did not fire a gun at the house.
>
> Each defendant had an entirely different degree of culpability in these cases, with Moua's being of much, much greater proportion. The defendant's acts of violence of shooting into a home with people present were simply outrageous. He easily could have killed someone, and the court took this into consideration when it imposed sentence.[3]

¶10 The trial court was mindful of Moua's culpability, which was far greater than that of Xiong, and imposed Moua's sentence accordingly.[4] The sentences are predicated on consideration of the sentencing factors, including each defendant's culpability; the sentences are not disparate, much less does Xiong's sentence frustrate the purpose of Moua's original sentence. *See* ***Toliver***, 187 Wis. 2d at 362-63; ***Michels***, 150 Wis. 2d at 99.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[3] We have not included the footnotes from the trial court's postconviction order. The citations to the ***Gallion*** and ***McCleary*** cases, to which the trial court refers are: ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

[4] The trial court also indicated that the prosecutor viewed the culpabilities of Moua and Xiong differently. As for Xiong, the prosecutor recommended a six-year sentence, comprised of three-year periods of initial confinement and extended supervision.