COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2842-CR **Cir. Ct. No. 2007CF761**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL L. SCHMELTZER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mitchell Schmeltzer appeals from a judgment of conviction and an order denying his motion for postconviction relief. Schmeltzer argues a new factor warrants sentence modification and his sentence was harsh. We affirm.

¶2 This case arises from the armed robbery of Young's Drug Store in Wausau. Schmeltzer was a nurse who abused prescription medications. In the midst of withdrawal, Schmeltzer entered the pharmacy with a tote bag on his head, armed with a shotgun. Four female employees were in the store at the time. Schmeltzer demanded morphine and Vicodin. Schmeltzer ordered three of the females into a different area and pointed the shotgun at one of the females and forced her to walk to the cabinets where the narcotics were kept as he followed with the gun pointed at her back. He then ordered the employee to put the drugs into a bag. Schmeltzer occasionally needed to lift the tote bag in order to see, which allowed employees to identify him. On his way out the door, Schmeltzer tore the telephone cords out of the wall. A witness who saw Schmeltzer leave the pharmacy and get into a truck in the parking lot was able to obtain a partial license plate number and the police located Schmeltzer at his home in Merrill. Police obtained a search warrant and discovered a shotgun and tote bag in his truck, along with stolen drugs.

¶3 Schmeltzer pled no contest to armed robbery with threat of force, one count of false imprisonment while armed, and possession of narcotics. In exchange for his plea, the court dismissed but read in six remaining charges, including three additional counts of false imprisonment while armed, and one count each of possession of narcotics, possession of non-narcotic controlled substances, and criminal damage to property. The State agreed to cap its sentencing recommendation at fifteen to twenty years' initial confinement.

¶4 The circuit court imposed thirteen years' initial confinement and seven years' extended supervision on the armed robbery charge; four years' initial confinement and three years' extended supervision on the false imprisonment

charge; and one year initial confinement and two years' extended supervision on the possession of narcotics charge. The sentences were consecutive to each other.

¶5 Schmeltzer filed a postconviction motion seeking modification of his sentence. He argued a new factor existed and his sentence was harsh. Schmeltzer's arguments focused on a comparison of his sentence to the sentences imposed on four other men who committed an unrelated armed robbery of the same pharmacy a few weeks earlier. Schmeltzer contended the two cases were "linked" and therefore information about the other defendants' sentences constituted a relevant new factor warranting sentence modification.

¶6 The two crimes were linked, according to Schmeltzer, not only because they took place within weeks of each other and involved the same pharmacy, but also because the other armed robbery "permeated" Schmeltzer's sentencing. Schmeltzer argued he was not sentenced in isolation but, rather, as part of a local crime wave and in response to community fears about armed robberies. Schmeltzer also insisted that an extensively preplanned, intentionally violent armed robbery did not carry the same individual culpability as his crime. He contended his individual culpability was less and his rehabilitation needs were drastically different, yet he and the defendants in the prior robbery received almost the same sentences. The court denied his motion and Schmeltzer now appeals.

¶7 A new factor is a "fact or set of facts highly relevant to the imposition of sentence, but not known to the 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).[1] There must also be a nexus between the new factor and the sentence, i.e., the new factor must operate to frustrate the purpose of the original sentence. ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524. New factors must be proved by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9. Whether a set of facts is a new factor is a question of law, but whether a new factor warrants sentence modification is a matter of sentencing court discretion. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242.

¶8 It is well established that a disparity of sentences between co-defendants does not necessarily mean that the co-defendants who received the harsher sentence are entitled to sentence modification. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994). For the same reasons, defendants in unrelated cases are not entitled to sentence modification based on a disparity of sentences or similar sentences with disparate facts. A mere disparity between sentences is not improper if the sentences are based upon individual culpability and the need for rehabilitation. ***Id.***

¶9 Here, the circuit court individualized Schmeltzer's sentence based upon proper factors, such as his character and rehabilitative needs, the severity of the offense and the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). Although the sentencing transcript indicates

[1] There is no dispute the information concerning the sentencing of the prior robbery was not known to the circuit court at the time of Schmeltzer's sentencing. As the court stated:

> I did not know what the other judges were going to do with persons who had committed another armed robbery of the same store. It clearly didn't influence my decision, and the sentence I came up [with]."

the district attorney and the circuit court were cognizant of the earlier robbery, the record fails to demonstrate the court knew anything about the facts of the prior robbery or the sentences the other robbers might receive. Quite simply, the crimes were not linked.

¶10 Schmeltzer portrays himself as a compassionate nurse struggling with addiction, who impulsively committed an armed robbery. However, the circuit court found Schmeltzer's acts were not impulsive, but "intentional, it was planned, not perhaps days in advance, but it was not exactly spur-of-the-moment either." Schmeltzer also stipulated to a history of stealing drugs and falsifying medical records to obtain drugs. Among other things, Schmeltzer diverted controlled substances from his employer for personal use and falsely charted medications to patients in order to consume their drugs. He also administered reduced amounts of drugs to patients and used the remainder for himself. This behavior was addressed "in-house" by the medical profession and not reported to the criminal justice system. However, that does not make Schmeltzer's culpability less or his rehabilitation needs drastically different from the defendants in the prior robbery. As the court observed, Schmeltzer was a trained medical provider and the number of persons who suffered from his actions was astounding.

¶11 Moreover, the testimony of the Young's Drug Store employees as to the profound impact of Schmelter's actions in holding innocent employees at gunpoint in a public place critically undercuts his depreciation of the severity of the offense and the need to protect the public. Schmeltzer has not demonstrated by clear and convincing evidence that the information about the previous robbery was highly relevant to this case. He was not entitled to have his sentence modified on the basis of a new factor.

¶12 Similarly, the circuit court appropriately denied Schmeltzer's claim that his sentence was harsh. When a defendant argues that his sentence is excessive or unduly harsh, we may conclude an exercise of discretion is erroneous "only where the sentence was 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). Schmeltzer faced fifty-four years and six months of imprisonment. The court imposed a total of thirty years, consisting of eighteen years' initial confinement and twelve years' extended supervision. The sentence is not excessive as to shock the public sentiment. The sentence was not unduly harsh.

By the Court.—Judgment and order affirmed.

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