COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP812-CR **Cir. Ct. No. 2008CF5417**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENE BLACKMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gene Blackmore appeals from a judgment of conviction entered upon his guilty pleas to two felonies as a party to the crimes: (1) conspiracy to commit armed robbery by use of force, and (2) false imprisonment. He also appeals from a postconviction order denying his motion to

modify his sentences. On appeal, Blackmore contends that the circuit court erroneously exercised its sentencing discretion and that the circuit court sentenced him in violation of his constitutional right to equal protection of the laws. We reject his contentions and affirm.

BACKGROUND

¶2 We take the facts from the totality of the record. On October 22, 2008, Blackmore told Joevonte J. Porter that Porter's brother, J.W., "had something to do with" the murder of Blackmore's cousin. Blackmore than stated that "they were going to go over" to J.W.'s home and "get[]" J.W. Blackmore, Porter, and a third co-actor, Deonta L. Duncan, rode together to the apartment building where J.W., who is paralyzed and confined to a wheelchair, lived with his wife and child. Blackmore and his companions entered the basement shared by the apartment units. The three men were unable, however, to enter J.W.'s locked first-floor apartment to commit the robbery they had planned. The three co-actors decided to switch off the circuit breakers in the hope that someone with a key to J.W.'s apartment would be lured down to the basement. The ruse succeeded. J.W.'s wife, S.W., went to the basement where Blackmore and Duncan attacked her while Porter watched. According to S.W., Blackmore and Duncan each carried a handgun, Duncan sexually assaulted her, and both Blackmore and Duncan struck her numerous times. After S.W. escaped, Blackmore and his co-actors fled.

¶3 The State charged Blackmore, Duncan, and Porter with a variety of offenses.[1] Incident to a plea bargain, Blackmore pled guilty to one count of conspiracy to commit armed robbery with use of force and one count of false imprisonment, both as a party to a crime. The State agreed to recommend a global disposition of fifteen years of initial confinement and eight years of extended supervision for the two convictions, and the State additionally moved to dismiss and read in for sentencing purposes one count of armed burglary as a party to a crime.

¶4 The matter proceeded to sentencing. At that time, the parties reminded the circuit court that it had sentenced Porter a few days earlier. The transcript of Porter's sentencing is in the record and shows that the circuit court sentenced Porter to two years of initial confinement and three years of extended supervision following his guilty plea to one count of burglary as a party to a crime. Additionally, Blackmore told the circuit court that a different judge sentenced Duncan to ten years of initial confinement and five years of extended supervision for his role in the incident. Blackmore then suggested that the circuit court treat him as the intermediate-level offender, and he asked the court to impose a total of five years of initial confinement and five years of extended supervision for his conduct. The circuit court declined to do so. It imposed a fifteen-year sentence for conspiracy to commit armed robbery while armed, bifurcated as ten years of initial confinement and five years of extended supervision. Additionally, the

[1] The State charged Blackmore, Duncan, and Porter with conspiracy to commit armed robbery with use of force as a party to a crime. The Stated charged Blackmore and Duncan with false imprisonment and armed burglary, both as a party to a crime. The State charged only Porter with burglary as party to a crime, and the State charged only Duncan with first-degree sexual assault while armed.

circuit court imposed a consecutive four-year sentence for false imprisonment, comprised of two years each of initial confinement and extended supervision.

¶5 Blackmore filed a postconviction motion challenging his sentences. The circuit court denied the motion, and this appeal followed.

DISCUSSION

¶6 Sentencing lies within the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We presume that the circuit court acted reasonably. ***Gallion***, 270 Wis. 2d 535, ¶18. "The defendant has the burden of showing that the 'sentence was based on clearly irrelevant or improper factors.'" ***Id.***, ¶72 (citations omitted).

¶7 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11. The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶8 The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the

community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶9 Sentencing discretion must be exercised on a "rational and explainable basis." ***Id.***, ¶39 (citation and one set of quotation marks omitted). When we review a sentencing decision, we consider both the circuit court's explanation given during the sentencing proceeding and any additional explanation that the circuit court provided in response to the defendant's postconviction motion for relief from the sentence. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). We recognize, however, that the amount of explanation needed for a sentencing decision varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶10 In Blackmore's first set of arguments, he contends that the circuit court did not give sufficient consideration to his character and to other factors that he views as mitigating. Blackmore asserts that the circuit court "could have imposed shorter confinement" by weighing the relevant factors differently, and he claims that the resulting sentences "would have been equally effective." Our inquiry, however, is whether the circuit court properly exercised its discretion, not whether discretion could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶11 The record reflects an appropriate exercise of sentencing discretion here. The circuit court first considered the primary sentencing factors. It discussed the seriousness of a home invasion and described S.W.'s experience as "horrible." The circuit court considered both positive and negative aspects of Blackmore's character. The circuit court praised Blackmore for pursuing a second job when he was fired from his first, and the circuit court acknowledged that he

was polite. The circuit court was troubled, however, by Blackmore's failure to display maturity, pointing out that Duncan and Porter were teenagers at the time of the incident while Blackmore was twenty-seven years old. In the postconviction order, the circuit court characterized Blackmore as lacking judgment, stating that he should "have had more sense than to participate" in the crimes. Turning to the safety of the public, the circuit court expressed particular concern that Blackmore was serving a term of extended supervision when he committed new crimes. The circuit court also observed that Blackmore had served time in prison, and that his prior criminal record included an offense involving a gun. The circuit court stated that Blackmore previously "robbed … kids of their candy" and "fired [a] gun in the air" but that he had "graduated" to more serious offenses.

¶12 The circuit court took into account facts and circumstances in addition to the three primary sentencing factors. It noted, for example, that Blackmore obtained a high school equivalency degree and that his "urine screens were negative" during his time on extended supervision. The positive factors that the circuit court considered, however, did not outweigh its concern that Blackmore must modify his behavior and "stop coming to court." The circuit court explained that it needed to deter Blackmore "and everybody else" by "send[ing] a message that this behavior is just not acceptable." Accordingly, the circuit court imposed two consecutive sentences requiring Blackmore to serve a seventeen-year term of imprisonment, bifurcated as twelve years of initial confinement and seven years of extended supervision. The circuit court's remarks fully explain why the sentencing factors and objectives led to the sentences imposed.

¶13 Blackmore complains that the circuit court "did not address [his own sentencing] recommendation or explain any reason for rejecting it." The circuit court, however, has no obligation to explain why it deviated from a party's

sentencing recommendation. ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990).

¶14 Blackmore next objects that the circuit court did not separately state reasons for imposing consecutive sentences. Again, Blackmore misunderstands the circuit court's sentencing obligations. "A [circuit] court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length." ***State v. Berggren***, 2009 WI App 82, ¶46, 320 Wis. 2d 209, 769 N.W.2d 110. The circuit court has no obligation to explain separately why it chose consecutive rather than concurrent sentences. *See* ***id.***, ¶45.

¶15 We also reject Blackmore's contention that the circuit court must explain why the convictions required exactly twelve years of initial confinement. We do not require the circuit court to explain a sentence with mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶49. Here, the circuit court discussed the relevant factors and imposed the confinement it deemed necessary to achieve the twin goals of deterring Blackmore from committing more crimes and sending a message to the public that the criminal activity in this case is intolerable. The explanation for the sentences is therefore sufficient.

¶16 Blackmore suggests that his sentences are unduly harsh. We disagree. "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.'" ***State v. Prineas***, 2009 WI App 28, ¶29, 316 Wis. 2d 414, 766 N.W.2d 206 (citation omitted). Blackmore targeted a wheelchair-bound man for an armed robbery, intruded into his home, lured his wife to the basement,

restrained her, and beat her. As a consequence, Blackmore faced forty-six years in prison. *See* WIS. STAT. §§ 943.32(2), 940.30, 939.50(3)(c) & (h) (2009-10).[2] The circuit court imposed a term of imprisonment that required Blackmore to serve approximately twenty-five percent of the available prison time in initial confinement. The sentence is well within the maximum allowed and thus is neither excessive nor shocking. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶17 We turn to Blackmore's contention that the circuit court's sentencing decisions denied him the equal protection of laws guaranteed by the United States and Wisconsin Constitutions. *See* U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1. Blackmore argues that his sentences cannot pass constitutional muster unless they are "shorter in length than Mr. Duncan's and more commensurate with Mr. Porter's." We disagree.

¶18 The equal protection clauses require that persons similarly situated be accorded similar treatment. *See* ***Treiber v. Knoll***, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987). Whether undisputed facts establish a constitutional violation is a question of law that we review *de novo*. ***State v. Cobbs***, 221 Wis. 2d 101, 105, 584 N.W.2d 709 (Ct. App. 1998).

¶19 "[M]ere disparity in sentencing does not constitute a denial of equal protection of the law." ***Ocanas v. State***, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). To prevail on a claimed violation of equal protection at sentencing, the defendant must show that "the disparity was arbitrary or based upon

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

considerations not pertinent to proper sentencing discretion." ***Id.*** at 187. Moreover, "[e]ven leniency in one case does not transform a reasonable punishment in another case into a cruel one." ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

¶20 The record contains ample support for the circuit court's decision to give Blackmore a longer sentence than that given to Porter. Most significantly, the two men were not convicted of the same crimes. The transcript of Porter's sentencing reflects that he pled guilty to one offense, namely, burglary as a party to a crime. He faced a maximum prison sentence of twelve years and six months. *See* WIS. STAT. §§ 943.10(1m), 939.50(3)(f). Blackmore pled guilty to two offenses, and he faced more than three times as many years in prison as Porter faced upon conviction. Additionally, as the circuit court pointed out in the postconviction order, Blackmore and Porter have different criminal histories. Unlike Blackmore, Porter had no prior convictions as an adult offender. Because Blackmore does not demonstrate that he and Porter were similarly situated, Blackmore does not demonstrate that the equal protection clauses require similar sentences for the two men.

¶21 Blackmore also asserts that the equal protection clauses entitle him to a lighter sentence than Duncan received. The record contains neither a sentencing transcript nor a judgment of conviction evidencing the resolution of the charges against Duncan. The record contains only the State's reference to a plea bargain in Duncan's case[3] and unsupported statements from Blackmore's lawyers

[3] At Blackmore's sentencing, the State noted that it had "dismiss[ed] the sexual assault in Mr. Duncan's case upon a plea to some other charges."

indicating that Duncan received a sentence of ten years of initial confinement and five years of extended supervision following a guilty plea to armed robbery with use of force. Conclusory assertions regarding the outcome of Duncan's prosecution are an inadequate foundation to support an argument that Blackmore's sentences are constitutionally infirm. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433 ("postconviction motion for relief requires more than conclusory allegations").

¶22 Moreover, were we to rely on the unsupported description of Duncan's conviction and sentence offered here, we would nonetheless reject Blackmore's claim of constitutionally infirm sentences. Blackmore cites multiple sources for the proposition that equal protection of the laws "requires substantially the same sentence for the same case histories." *See, e.g.*, ***Ocanas***, 70 Wis. 2d at 186. Blackmore fails to demonstrate, however, that this proposition gives him a constitutional entitlement to a more lenient sentence than that imposed on a co-actor. Instead, he returns to the theme that the circuit court must base a sentence on consideration of appropriate factors and that "mitigating factors compel the conclusion [that] a lesser sentence is warranted." We are satisfied that Blackmore's equal protection argument in relation to Duncan is merely a reiteration of the claim that the circuit court erroneously exercised its sentencing discretion. As we have already explained, that claim lacks merit.

¶23 Finally, Blackmore asserts that he "identified several misuses of the court's discretion entitling him to relief," and therefore the circuit court erred by denying his postconviction motion for sentence modification. Because we conclude that the circuit court properly exercised its sentencing discretion, this claim must fail.

By the Court.—Judgment and order affirmed.

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