COURT OF APPEALS
DECISION
DATED AND RELEASED

May 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2622-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER A. KNAPP,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Christopher A. Knapp appeals from a judgment of conviction of one count of possession of more than 2500 grams of tetrahydrocannabinols with intent to deliver. The issues are whether the trial court erred in denying Knapp's suppression motion and in sentencing him. We conclude the court properly denied the suppression motion, but did not

adequately explain the disparity between Knapp's sentence and that of his accomplice.

Knapp moved to suppress physical evidence seized from a vehicle Knapp was driving. After the trial court denied the motion, he pleaded guilty. According to testimony at the suppression hearing, officers followed the Knapp vehicle after it left a rural property that had been under surveillance. Other officers were attempting to obtain a search warrant for the property. The officers following Knapp decided to stop the vehicle. There was nothing about the operation or condition of the vehicle that gave the officers grounds to stop it. The search warrant was being sought based on a variety of information suggesting that Knapp and Greg Fowler may have been involved in controlled substance trafficking. Officers stopped and held the Knapp vehicle for approximately fifteen minutes. They were then notified by radio that the search warrant for the rural property had been issued. An officer drove the vehicle back to the property, where it was searched.

Knapp argues the seizure of the vehicle was unlawful. We disagree. Police may seize property without a warrant, on the basis of probable cause, for the time necessary to secure a warrant. ***Segura v. United States***, 468 U.S. 796, 806 (1984). Knapp does not dispute that probable cause existed to issue the search warrant. The facts supporting the warrant were also sufficient to support the officers' seizure of the vehicle while waiting for the warrant.

Knapp also argues that the court erred in sentencing him to an eight-year prison term. His argument is based partly on the fact that his accomplice, Greg Fowler, was given a four-year sentence. Fowler was the person who had the contact with their supplier in Texas, negotiated the price and arranged for transportation. Fowler made approximately twenty trips to Texas, while Knapp made many fewer. Fowler had been involved in trafficking longer. Fowler freely cooperated with the authorities after his arrest. Knapp initially pleaded not guilty and did not cooperate. Later, however, he did speak with police. He was not as cooperative as he could have been at the first meeting in Iowa, but was very cooperative at a later meeting in Texas.

In sentencing Knapp, the trial court acknowledged that he was involved less than Fowler, but also noted that he was less cooperative than

Fowler. The court expressly stated that Knapp should not be punished for exercising his constitutional rights. However, the court went on to state that if Knapp wants to have his sentence reduced for cooperation, he actually has to cooperate.

Knapp argues that his sentence was based on his exercise of his rights to remain silent and to plead not guilty, and that it was disproportionate to Fowler's. The trial court denied that it was considering Fowler's early exercise of his rights as a factor in his sentence. We accept the trial court's statement, and we turn to other factors that might justify the disparity.

Knapp argues that his sentence is disproportionate to Fowler's. A sentence may be reversed if the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing. ***State v. Perez***, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992).

As we read the trial court's discussion, when the court referred to Knapp's lesser degree of cooperation the court could have been referring to two things. The first is Knapp's less than complete cooperation at the first meeting in Iowa. However, this difference is not sufficient to justify the disparity in their sentences, especially since Knapp later cooperated fully. The second is that Fowler had more information to offer police because he was more involved. As Knapp argues, if this is accepted as justification for a lesser sentence, it leads to the peculiar result that criminals who are more deeply involved get lighter sentences than smaller criminals, even though both cooperate to the fullest extent they are able. We conclude that the court inadequately explained the difference between Knapp's sentence and Fowler's. On remand, the trial court shall reconsider Knapp's sentence.[1]

[1] The State argues that we should not review Knapp's sentence because he failed to seek modification in the circuit court. If we were to so conclude, Knapp could then raise the issue by filing a petition alleging his postconviction counsel was ineffective under ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992). We conclude it better serves judicial economy to order the trial court to reconsider Knapp's sentence now, rather than reject the argument entirely and risk its re-appearance at a later date.

By the Court.—Judgment reversed and cause remanded with directions.

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