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November 23, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1011-CR

State of Wisconsin v. Michael Vincent Allison
(L.C. # 2013CF3222)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Michael Vincent Allison appeals a judgment of conviction and an order denying his postconviction motion to modify his sentence. He argues that the disparity between his sentence and that of a co-defendant violates his equal protection rights because it is arbitrary. He also argues that the circuit court erroneously exercised its discretion by failing to explain specifically why it imposed twelve years of initial confinement. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment and order of the circuit court.

Allison and a co-defendant, Larentaz Daniels, participated in a break-in and an armed robbery with two other men. One of the other two men committing the robbery died after being shot with his own gun during a scuffle with the robbery victim, and Allison and Daniels were charged with felony murder under WIS. STAT. § 940.03. Allison and Daniels each pleaded guilty to reduced charges of second-degree reckless homicide contrary to WIS. STAT. § 940.06(1). Allison received twelve years of initial confinement and eight years of extended supervision, and Daniels received four years of initial confinement and six years of extended supervision. Allison sought postconviction relief, which was denied. Allison appeals.

First, Allison argues that the disparity between his sentence and Daniels' is arbitrary and therefore violates his constitutional right to equal protection. U.S. CONST. amend. XIV, § 2; WIS. CONST. art. I, § 1. Under equal protection guarantees, defendants have the right to receive “substantially the same sentence for substantially the same case histories.” *Ocanas v. State*, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). A sentencing disparity violates equal protection guarantees when the disparity is arbitrary or is based upon improper considerations. *Id.* at 187. Disparate sentences for co-defendants are “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).

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In the postconviction decision,² the circuit court explained the differences in individual backgrounds and culpability by noting that Allison’s criminal record went back to 2009 as a juvenile, with more charges involving separate felonies as an adult, and a history of failing on probation and extended supervision. In contrast, Daniels had “never been to the [House of Correction], he had never been on adult probation, or been revoked, or been to prison, or convicted of carrying a firearm as a convicted felon, or been on extended supervision.” This distinction is relevant to consideration of the need for deterrence, rehabilitation, and punishment. In addition, Daniels was credited for cooperating with police, without which his co-defendants “would never have been identified, charged or prosecuted.” This distinction is relevant to consideration of individual culpability. These distinctions suffice to provide a reasonable basis for the variations between Allison’s and Daniels’ sentences.

Next, Allison argues that the circuit court erroneously exercised its discretion because it failed to explain “why, specifically, a twelve-year term of initial confinement – as opposed to four years (or any other number) – was the minimum amount of custody necessary in Allison’s case.” He argues that such explanation is required by *State v. Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197, which requires “an explanation for the general range of the sentence imposed.” However, in *State v. Klubertanz*, 2006 WI App 71, ¶22, 291 Wis. 2d 751, 713 N.W.2d 116, we held that *Gallion* does not require an explanation of why, specifically, a

² Allison argues that the postconviction decision is contradicted by the sentencing transcripts and that the equal protection issue should be decided by looking at the transcripts rather than the postconviction decision. Allison’s characterization overstates the differences between the two and emphasizes what the court did not say at sentencing. “Moreover, when we review a sentence, we still look to the entire record, including any postconviction proceedings and to the totality of the court’s remarks.” *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. It makes sense to consider the ruling on the postconviction motion as well as the transcripts because the circuit court had no reason to address Allison’s equal protection argument before Allison made it.

circuit court chooses a particular minimum amount of custody: “The circuit court did explain why it imposed a term of imprisonment rather than probation *Gallion* does not require that it explain why it imposed three years as opposed to one or two.” Here, the record shows that the circuit court satisfied *Gallion*’s requirement of an explanation by citing the seriousness of the offense as well as Allison’s prior record, Allison’s acceptance of responsibility, and the fact that Allison was not the one carrying the gun. There is no basis under *Gallion* to argue that the circuit court erroneously exercised its discretion by failing to explain specifically why it imposed a particular number of years as opposed to a lower number.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals