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DISTRICT II

February 3, 2016

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

2015AP1095-CR State of Wisconsin v. Randy L. Kemp (L.C. #2011CF1048)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

A jury found Randy L. Kemp guilty of first-degree recklessly endangering safety and armed robbery as party to a crime (PTAC). He appeals the sentencing portion of the judgment of conviction and the order denying his postconviction motion for sentence modification on grounds that his sentence is harsh and unconscionable relative to one of his co-actor's. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14). We affirm.

Jonathan Graf and Jeffrey Wright drove to Racine to view a van listed for sale on Craigslist. When the seller did not show up at the agreed-upon Burger King, the men were directed to another address. There, Kemp, Romelle Miller, and Joseph Yarborough led Wright and Graf in between two apartment buildings, allegedly to wait for someone to bring the van over. Yarborough produced a gun and doused Wright in gasoline. One of Kemp's accomplices[1] came at Wright with a lighter, while Kemp urged, "burn him, burn him" or "light him, light him." They let Graf and Wright go after robbing them of nearly $1500, an iPhone, and car keys. Before the trio fled in Kemp's car, Kemp poured gasoline inside Wright's vehicle.

Yarborough, Miller, and Kemp each were charged with one count of first-degree recklessly endangering safety and two counts of armed robbery, all as PTAC. Yarborough's case still is pending. Miller pled no contest to one count of armed robbery; the other two counts were dismissed and read in. The court sentenced him to eight years' imprisonment, bifurcated as four years' initial confinement (IC) and four years' extended supervision (ES).

Kemp went to trial and was found guilty of all three charges. The same court sentenced him. On the two armed robbery charges, it imposed consecutive eighteen-year sentences, bifurcated as ten years' IC plus eight years' ES. On the endangering safety count, it ordered four years' probation, consecutive to his ES, and a stayed six-year sentence.

Kemp moved for sentence modification. He contended his sentence was harsh and unconscionable compared to Miller's and that the disparity was unjustifiable, as Miller actively

[1] In Wright's initial report and preliminary hearing testimony, he said Yarborough had the lighter. At trial three years later, he testified that it was Miller. The State makes a convincing case that Wright confused the two perpetrators' names at trial. Graf did not testify at trial as he died in the interim.

participated in the crime, while he acted only as lookout. The court denied the motion. Kemp appeals. He seeks to have his sentence modified to one more similar to Miller's.

We review a motion for sentence modification by determining whether the court erroneously exercised its discretion in sentencing the defendant. ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. Persons with substantially the same case histories should receive substantially the same sentences. ***Jung v. State***, 32 Wis. 2d 541, 553, 145 N.W.2d 684 (1966). A sentence is improperly disparate if it results from considerations that were arbitrary or not pertinent to proper sentencing discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

At sentencing, the trial court identified and considered the objectives and factors underlying his sentence and deemed punishment and protection of the public the most important. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43 & nn.10, 11, 270 Wis. 2d 535, 678 N.W.2d 197. Kemp's claim thus is not that his sentence, viewed on its own merits, represents a misuse of discretion but that his forty-year sentence is unsustainably harsh when held up against Miller's eight-year sentence. He contends he and Miller are similarly situated and that the court mistakenly believed that he was more culpable than Miller.

The court accepted the prosecutor's statement at Miller's sentencing that the State's investigation led it to believe that Miller acted as lookout. That finding is not clearly erroneous, given that the testimony at Kemp's trial was inconsistent as to whether Miller stood by or more actively participated. Significantly, Kemp does not dispute that he exhorted whichever co-actor to set Wright on fire, did nothing to help the victims, poured gasoline inside Wright's vehicle,

and drove the getaway car. His actions and inaction, hardly negligible, support a greater sentence. *See* ***Drinkwater v. State***, 73 Wis. 2d 674, 680-81, 245 N.W.2d 664 (1976).

The trial court further explained the basis for the disparate sentences in its ruling on the postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (postconviction motion provides opportunity to clarify basis for sentence). It explained:

> [C]ulpability involves many factors[,] including age, prior record (meaning number of convictions/adjudications, and the type and nature of the crimes resulting in the adjudication or convictions), emotional or mental status or stability of the individual defendant; educational elements as may be applicable; and being mindful of the apparent leadership of the various actors at the time of the event.

More specifically, the court noted that Kemp, at twenty-nine, was "significantly older" than seventeen-year-old Miller; "had committed significantly more serious crimes" than Miller; was "a significantly higher risk to reoffend"; frequently had reoffended as an adult, while this was Miller's first adult offense and his juvenile priors were "significantly lesser crimes"; has a rehabilitation potential that is much poorer than Miller's; and was convicted of three crimes against two victims, whereas Miller had exposure for just one crime against one victim. It was a proper exercise of discretion to give greater weight to Kemp's additional convictions in this case than to Miller's read-ins. *See* ***State v. Straszkowski***, 2008 WI 65, ¶92, 310 Wis. 2d 259, 750 N.W.2d 835.

The record satisfies us that the disparity was not arbitrary or based on considerations irrelevant to proper sentencing discretion. *See* ***Ocanas***, 70 Wis. 2d at 187.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals