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DISTRICT I

November 23, 2021

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2021AP504-CR State of Wisconsin v. Marvin A. Patterson (L.C. # 2018CF1482)

Before Brash, C.J., Donald, P.J., and White, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marvin A. Patterson appeals from a judgment, entered upon his guilty plea, convicting him of one count of homicide by reckless use of a firearm and sentencing him to the maximum of ten years' imprisonment. Patterson also appeals from an order that denied his postconviction motion for sentence modification. 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 (2019-20).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In March 2018, Milwaukee police responded to a citizen report of a car blocking an alley; the car was parked at an angle, the driver's door was open, and a woman in the passenger seat appeared to be deceased. The victim, K.L.B., had died from a "single gunshot that resulted in a through and through wound" to her head, and the medical examiner determined the cause of death to be homicide.

Patterson turned himself into police the day after K.L.B. was discovered. He admitted he had been in the vehicle with K.L.B. He initially told police that he had the gun with him in the vehicle. He said he took it out of the glove box and put it in the cup holder. When K.L.B. picked up the gun, he tried to take it back from her, but the gun went off during their tussle. Later in the interview, Patterson said that he and K.L.B. had been talking in the car. He decided to point the gun at her head. When he did so, it discharged and shot K.L.B., but he did not intend to kill her. After the shooting, he "freaked out," drove the car to an alley and parked it, then fled.

Patterson was originally charged with one count of first-degree reckless homicide by use of a dangerous weapon. In pre-trial proceedings, Patterson moved to suppress his statement to police. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264-65, 133 N.W.2d 753 (1965). The circuit court granted the motion.[2] Patterson subsequently agreed to resolve his case with a guilty plea to an amended charge of homicide by negligent handling of a dangerous weapon. The circuit court accepted the plea and, at a later sentencing hearing, imposed the maximum sentence of ten years' imprisonment.

[2] The suppression motion was granted by the Honorable David A. Borowski.

Patterson filed a postconviction motion for sentence modification. He compared his sentence to that of fifteen other defendants, sentenced between 2003 and 2018, who were also initially charged with first-degree reckless homicide and later convicted of an amended charge of homicide by negligent handling of a dangerous weapon. Patterson noted that only six out of the fifteen defendants received maximum sentences, and those six all had a prior record. Patterson further argued that he was "most similarly situated" with those defendants facing the same charges but without a prior record, and the defendants with no prior record "received either probation, half the sentence that Mr. Patterson received, or less than half." Patterson thus asserted that his sentence was "unduly harsh and excessive" compared to the similarly situated defendants and that his sentence was "disproportionate to the offense committed."

The circuit court denied the motion. Noting that "[i]ndividualized sentencing is the foundation of every sentence," it rejected any argument "that the sentences imposed in unrelated cases for the same offense are 'similarly situated.'" The circuit court also noted that "[t]he sentences imposed in unrelated cases are irrelevant to the sentence imposed in this case, making them insufficient to support a claim of undue harshness." Finally, the circuit court determined that the record "clearly reflects" its sentencing explanation and, thus, it rejected Patterson's claims that it had erroneously exercised its sentencing discretion. Patterson appeals.

Sentencing is committed to a circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender,

and the protection of the public. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. On appeal, our review is limited to determining whether the circuit court's discretion was erroneously exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶17.

A circuit court may not revise its sentence merely upon reflection but may consider whether the sentence imposed was unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. A sentence is unduly harsh or unconscionable if 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.'" *See* ***State v. Cummings***, 2014 WI 88, ¶72, 357 Wis. 2d 1, 850 N.W.2d 915 (citing ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). "[I]n deciding whether a sentence is unduly harsh, the circuit court's inquiry is confined to whether it erroneously exercised its sentencing discretion based on the information it had at the time of sentencing." ***State v. Klubertanz***, 2006 WI App 71, ¶40, 291 Wis. 2d 751, 713 N.W.2d 116. We review a circuit court's conclusion that its sentence was not unduly harsh for an erroneous exercise of discretion. *See* ***Grindemann***, 255 Wis. 2d 632, ¶30.

Current case law provides that "[a]lthough a sentence given to a similarly situated codefendant is relevant to the sentencing decision, it is not controlling." *See* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995). Patterson acknowledges that the defendants to whom he compares himself were not his codefendants. He argues, however, that "if a sentence given to a similarly situated codefendant is relevant in a sentencing decision [under ***Giebel***], then a sentence given to a similarly situated defendant convicted of the same offense in another case should be relevant in a sentencing decision." Relevant, perhaps, but neither controlling nor dispositive.

A sentencing court is permitted to "consider information about the distribution of sentences in cases similar to the case before it." *See* ***Gallion***, 270 Wis. 2d 535, ¶47. Still, when the sentencing court considers various factors in fashioning a sentence, the weight to be given to each factor is left to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Moreover, Wisconsin emphasizes the importance of "individualized sentencing." *See* ***Gallion***, 270 Wis. 2d 535, ¶48. Thus, defendants do not receive the same punishment simply because they are convicted of the same offense. Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). "[N]o two convicted felons stand before the sentencing court on identical footing ... and no two cases will present identical factors." ***Gallion***, 270 Wis. 2d 535, ¶48 (citation omitted; brackets in ***Gallion***).

Patterson's only comparison between his case and others is with regards to the nature of the charges and the sentence length in each case. He makes no comparisons between the sentencing factors considered in this case versus the sentencing factors considered in the other cases. For example, the circuit court here noted that Patterson gave two "divergent statements" to police about what happened and that he had fled the scene. There is no suggestion that the other first-time offenders similarly lacked candor, which could explain why they received less-than-maximum sentences.

Further, the fifteen defendants were presumably not sentenced by the same judge. "By its very nature, the exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular case." ***Ocanas***, 70 Wis. 2d at 187-88. Thus, "[t]his court will sustain a trial court's exercise of discretion if the conclusion reached by

the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion." ***Odom***, 294 Wis. 2d 844, ¶8.

Patterson further complains that "the court did not indicate in this case why the maximum sentence was appropriate other than the seriousness of the offense itself." He also contends that "[w]hen compared to other defendants with no prior record, [the] sentence is unusual … [and] disproportionate to the offense committed, shocks the public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances."

The circuit court rejected a probationary or time-served sentence because it felt such a sentence would unduly depreciate the seriousness of the offense. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The gravity of the offense is a proper factor for consideration at sentencing. *See* ***Odom***, 294 Wis. 2d 844, ¶7. Although the circuit court did not expressly identify a sentencing objective, it is clear from the court's comments that its primary objective was punishment; the circuit court recognized that Patterson was not a direct danger to the community at large and that this incident was a "horrible mistake" rather than something for which rehabilitation was necessary. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Nevertheless, this was still a "tragic" incident, for which the actual details still remained unknown and which caused a "ripple effect" among K.L.B.'s family following her death. Thus, the circuit court concluded that in light of the seriousness of the offense, it did not "see any alternative" but the maximum sentence.

"[W]hile it is true that not every judge would impose a maximum or near maximum sentence" for the offense Paterson committed, "it is hard to say that no reasonable judge would do so." ***Cummings***, 357 Wis. 2d 1, ¶77. If the seriousness of the offense was the factor deserving of the most weight in the sentencing decision in a given case, such is the circuit court's

prerogative. Indeed, we do not think a sentence consisting of five years of initial confinement and five years of extended supervision is a disproportionate penalty for causing the death of another person through negligent handling of a firearm.

The circuit court here stated the proper legal standards to apply at sentencing and stated the reasons for its sentence on the record. *See* ***id.***, ¶76. Accordingly, we are unpersuaded that the circuit court erroneously exercised its discretion in imposing sentence or in denying the postconviction motion.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals