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DISTRICT I

May 2, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Pamela Moorshead
Electronic Notice

Jacob J. Wittwer
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1429-CR State of Wisconsin v. Davoncia K. McAfee (L.C. # 2018CF5471)
2021AP1430-CR State of Wisconsin v. Davoncia K. McAfee (L.C. # 2018CF5570)

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).

Davoncia K. McAfee appeals from judgments of convictions and from the part of an order partially denying his postconviction motion for sentence modification. Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgments and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On November 18, 2018, the State filed a complaint charging McAfee with one count of first-degree sexual assault and one count of kidnapping, both as party to a crime. According to the complaint, M.L.W. met an individual named "Kels"[2] on an app called "Tagged." She and Kels, later identified as McAfee, decided to meet up. When they met, M.L.W. got into McAfee's vehicle. He drove for a short period of time, then another man popped up from the back seat, wrapped his arm around M.L.W.'s face and neck, put a small caliber handgun to the back of her neck, and blindfolded her.

After about fifteen minutes, the vehicle stopped. McAfee and the other man told M.L.W. not to move or scream as they got out of the vehicle. She was led up a set of stairs and into an apartment living room area. Once inside, M.L.W. could differentiate at least six different voices. McAfee and another person called "Boss" sat on a couch and told M.L.W. to perform fellatio on both of them. As she did so, multiple individuals took turns having penis-to-vagina sexual intercourse with her. The intercourse continued periodically for approximately five hours before McAfee and "Boss" drove her back to her car. When they dropped M.L.W. off, they told her not to turn around or they would "blow her head off."

M.L.W. used Facebook in an attempt to find Kels. She found a Facebook account with the name "Von ThaDon Baker" with the same photographs that were used on Kels' Tagged account. Police were able to determine that Von ThaDon Baker was McAfee. They assembled a photo array from which M.L.W. identified McAfee as the person who picked her up.

[2] According to the criminal complaint, McAfee's middle name is Kelly.

When police interviewed McAfee, he denied sexually assaulting anyone and denied having a Tagged account, but acknowledged having a Facebook account with the name Von ThaDon Baker. He gave written consent for police to search his phone. The next day, McAfee gave a more detailed statement. He admitted that dates were arranged on the internet for sex. He would drive to the pickup locations and the women would get in the front seat and another person would be in the back seat. The other individual would grab the women by the neck and blindfold them. The women would be taken to an apartment, where they were sexually assaulted. McAfee claimed to have only taken part in one of the sexual assaults, but admitted he was the driver on at least five dates.

On November 24, 2018, the State issued a new, multi-count complaint against McAfee and two codefendants, Durrell Dawuan Harris and Jerry Miller. McAfee was charged with two more counts of first-degree sexual assault and two more counts kidnapping, all as party to a crime, for incidents involving victims A.H. and L.A.M.

McAfee eventually entered a plea agreement with the State. He pled guilty to the sexual assault charges; the kidnapping charges were dismissed and read in. In July 2019, the circuit court imposed consecutive terms of imprisonment totaling fifty years of initial confinement and thirty years of extended supervision.

Harris and Miller had a joint trial. In an amended information, Harris was ultimately charged with thirteen offenses: four counts each of first-degree sexual assault and kidnapping, as party to a crime, with respect to victims M.L.W., A.H., L.A.M., M.A., and E.J.J., as well as attempted first-degree sexual assault, kidnapping, and robbery, all as party to a crime, with respect to victim S.M.K. Miller was charged with the sexual assaults and kidnappings of A.H.

and L.A.M. McAfee testified against both men. The jury convicted Harris on two counts of first-degree sexual assault, one count of attempted first-degree sexual assault, and one count of kidnapping. It convicted Miller on one count of first-degree sexual assault and two counts of kidnapping. Although Harris's and Miller's cases had begun with the same judge who convicted and sentenced McAfee, their cases had been rotated to a different judge by the time of trial. In July 2020, Harris and Miller were each given concurrent sentences totaling eighteen years of initial confinement and ten years of extended supervision.

McAfee filed a postconviction motion seeking sentence modification based on two new factors: the disparity between his sentence and the sentences of his co-actors, and his assistance to law enforcement. He asked the circuit court first to "equalize" the defendants' sentences by running his three terms concurrent, and then to further modify his sentence based on the assistance he provided to the State. The circuit court denied that part of the motion based on sentencing disparity and set the remainder for a hearing, pursuant to ***State v. Doe***, 2005 WI App 68, ¶10, 280 Wis. 2d 731, 697 N.W.2d 101 ("[P]ermitting the trial court, in appropriate cases, to modify a sentence after substantial assistance has been given to authorities, promotes sound public policy."). McAfee then filed a supplemental motion, further addressing his sentencing disparity claims and alleging that his sentence was "unduly harsh and excessive in light of the sentences his codefendants received."

At the ***Doe*** hearing, the circuit court reiterated its denial of sentence modification based on sentencing disparity but granted modification under ***Doe***. The circuit court modified McAfee's terms of initial confinement to reduce the total initial confinement from fifty years to thirty-seven years. McAfee appeals.

On appeal, McAfee has abandoned the "new factor" approach and focuses instead on his claim that his sentence is "patently harsh and excessive in comparison with" Harris's and Miller's sentences. He asserts that "fundamental fairness" requires correction of his sentence.

Sentencing in Wisconsin is individualized; no two convicted felons stand before the sentencing court on identical footing, and no two cases will present identical factors. *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. 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).

"In the absence of a new factor, a circuit court has authority to modify a sentence only under certain narrow circumstances," including when "the court determines that the sentence is unduly harsh or unconscionable." *See* ***State v. Cummings***, 2014 WI 88, ¶71, 357 Wis. 2d 1, 850 N.W.2d 915 (citations omitted). "A sentence is 'unduly harsh' when it is 'so excessive and unusual and so disproportionate to the offense committed so as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Harvey***, 2022 WI App 60, ¶59, 405 Wis. 2d 332, 983 N.W.2d 700 (citations omitted). We review a circuit court's conclusion that a sentence it imposed was not unduly harsh for an exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

Here, the circuit court explained in its written order, and again at the ***Doe*** hearing, why it did not believe McAfee's sentence should be modified based on his codefendants' sentences.

First, the circuit court explained that, at the original sentencing hearing, it had "carefully and thoughtfully considered the relevant sentencing factors, including the horrific nature of the offenses; the defendant's role in them; his background, character, and rehabilitative needs; and the interest in punishment, deterrence, and community protection." It then balanced those considerations "with some positives, such as the defendant's statement to police and his willingness to accept responsibility, sparing his victims of the burden and stress of testifying at trial." Based upon all of those factors, "the court imposed a total bifurcated sentence consisting of fifty years of initial confinement and thirty years of extended supervision, a significant sentence but consistent with the court's intent" to impose "the lowest amount of initial confinement" that the court believed to be appropriate.

The circuit court was not persuaded by McAfee's claim that he was less culpable than Harris or Miller, stating that the proposition was "debatable" because McAfee "provided the bait by using his face to lure the victims, and he drove the vehicle that was used to kidnap them," both "major contributing factor[s] to the 'success' of this despicable scheme." It also rejected the notion that disparity, by itself, supports a claim of undue harshness, stating that under ***State v. Studler***, 61 Wis. 2d 537, 541, 213 N.W.2d 24 (1973), "[t]he fact that a different judge imposed a lesser sentence upon an accomplice … does not establish that the trial court … [erroneously exercised] its discretion …." The circuit court acknowledged that the judge who sentenced Harris and Miller "imposed substantially less time," but explained that the lower sentence "does not ipso facto constitute … the common denominator for the sentence to be imposed on all parties to a crime." *See* ***id.*** at 542. The circuit court also noted that McAfee had the highest number of convictions for first-degree sexual assault; he had pled guilty to three counts, while the jury convicted Harris of two counts of the same offense, and Miller of only one.

At the conclusion of the ***Doe*** hearing, the circuit court further explained that it did not know how presiding over Harris and Miller's trial influenced the other judge's sentencing decision, but the circuit court explained that it continued to believe, as it had commented at the original sentencing hearing, "that this constellation of sexual assaults are really some of the worst crimes that I have ever been involved with in this level professionally." For all of those reasons, the circuit court declined to modify McAfee's total sentence based on those received by Harris and Miller, although the circuit court did make some modifications under ***Doe***.

"The mere fact that the three sentences are different is not enough to support a conclusion that [McAfee's] sentence is unduly disparate." *See* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one." ***Ocanas v. State***, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975) (quoting ***Howard v. Fleming***, 191 U.S. 126, 136 (1903)). McAfee has not shown any sentence disparity is arbitrary or based on inappropriate sentencing considerations. *See* ***id.*** Accordingly, we are not persuaded that the circuit court erroneously exercised its discretion when it declined to modify McAfee's sentence.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments 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