COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2660-CR **Cir. Ct. No. 2011CF57**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOELLE E. BOROWITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Joelle Borowitz appeals a judgment, entered upon her no contest pleas, convicting her of first-degree reckless injury with use of a dangerous weapon, and felony intimidation of a witness, both counts as party to a crime. Borowitz also challenges the order denying her postconviction motion for

resentencing. Borowitz claims: (1) the circuit court erroneously exercised its sentencing discretion; (2) she was denied the effective assistance of trial counsel at sentencing; and (3) she was sentenced on the basis of inaccurate information. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Borowitz with obstructing an officer, misdemeanor battery, first-degree reckless injury with use of a dangerous weapon, and two counts of felony intimidation of a witness, the latter four counts as party to a crime. The complaint alleged that Borowitz (then seventeen years old), Raini Moede, Crystal Antonsen and Sierra Ford planned to "jump" Joshua McEvilla in retaliation for McEvilla "snitching" on Moede's brother about a child abuse incident. The four women met McEvilla, who is legally blind, in the Shawano hotel room where he lived. Before arriving, Moede asked Antonsen to record the assault on her cellular phone. After some small talk with McEvilla, the conversation escalated and Moede told Antonsen to "record" before McEvilla was beaten and stabbed three times.

¶3 Borowitz ultimately pleaded no contest to first-degree reckless injury, with use of a dangerous weapon, and felony intimidation of Antonsen, both counts as party to a crime. In exchange for her no contest pleas, the State agreed to dismiss and read in the remaining counts. During her interview with the Department of Corrections presentence investigation (PSI) report writer, Borowitz indicated that "some" of the complaint's narrative was accurate, but she disputed that there was a plan to attack McEvilla. According to Borowitz, the women were simply hanging out with McEvilla and snorting his prescription Vicodin when Moede confronted McEvilla about snitching on her brother. Moede punched

McEvilla and both Borowitz and Ford then joined in the attack. Although Borowitz told police that nobody stabbed McEvilla, she admitted to the PSI writer that she stabbed him once with a small pocket knife at Moede's direction. Borowitz indicated that if McEvilla was stabbed more than once, "Moede must have done it when she was in the room alone with him." The PSI report ultimately recommended eight to fifteen years' initial confinement for the first-degree reckless injury conviction and two to three years' initial confinement for the witness intimidation conviction.

¶4 An alternative PSI was prepared. The writer indicated that Borowitz denied stabbing the victim and ultimately recommended that Borowitz be placed on probation. The State and Borowitz also asked for probation. Out of a maximum possible thirty-five-year sentence, the court imposed concurrent sentences totaling ten years, consisting of five years' initial confinement and five years' extended supervision. Borowitz filed a postconviction motion for resentencing. Her motion was denied after a hearing, and this appeal follows.

DISCUSSION

I. Sentencing Discretion

¶5 Borowitz argues the circuit court erroneously exercised its sentencing discretion. In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). There is a strong public policy against interfering with the circuit court's sentencing discretion, and sentences are afforded the presumption that the circuit court acted reasonably. *See* ***id.*** at 681-82. Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a

demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted).

¶6 The circuit court must consider the principal objectives of sentencing, including protection of the community, 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, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor, however, is committed to the circuit court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. Further, although the court should explain the reasons for the particular sentence imposed, "[h]ow much explanation is necessary … will vary from case to case." ***Id.***, ¶39.

¶7 Citing ***Gallion***, Borowitz argues the court erroneously exercised its discretion by placing undue emphasis on the factors concerning community protection and gravity of the offense, while failing to give due consideration to her character and lack of prior criminal history, as well as the minimum amount of confinement necessary to accomplish the sentencing goals. We disagree. The record establishes that the court appropriately weighed the proper factors in imposing sentence.

¶8 The court intimated that punishment and protection of the public were the factors it deemed most important, in light of the severity of the offenses and Borowitz's character. The court noted that the invasion of one's home by

subterfuge to engage in a "vicious and aggravated attack" of a vulnerable victim is a "prison event." The court further stated that the attack was not an impulsive action of youth but, rather, a "planned event" that continued with the intimidation of Antonsen.

¶9 While acknowledging that the youth of an offender "generally militates toward probation," the court stated it must look to the defendant's character to determine whether community supervision is likely to protect the public. When considering Borowitz's character, the court noted her motive for the offenses; lack of candor; participation in the conspiracy to conceal what happened; and her act of stabbing the victim.

¶10 The court emphasized Borowitz's history of lying, concluding it is a "basic part of her nature." The court noted that in this case, she lied to the police investigator and engaged in "considerable effort" to hide what really happened in order to lay blame on someone else. The court also noted the different versions of the stabbing told to the PSI writers. Adding that Borowitz had been kicked out of school and had "no experience in complying with rules or expectations or performance," the court ultimately determined Borowitz was "way too dangerous … to [place] on community supervision." Because the circuit court considered relevant factors, properly weighed them, and imposed a sentence authorized by law, we reject Borowitz's challenge to the circuit court's sentencing discretion.

¶11 Borowitz nevertheless challenges the disparity between her sentence and the concurrent ten-year probation terms Moede received. Disparity among co-defendants' sentences is not improper, however, 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). Moreover, leniency in

one case does not transform a reasonable punishment in another case into a cruel one. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

¶12 Here, the court acknowledged the lighter sentenced Moede received. The court, however, differentiated the two, noting that Borowitz stabbed the victim and had a long history of lying, which included lying to the police investigator. Reiterating Borowitz's danger to the community, the court concluded that prison was justified. The circuit court, therefore, properly exercised its sentencing discretion when imposing a sentence that differed from that of Borowitz's co-defendant.

II. Ineffective Assistance of Counsel at Sentencing

¶13 To prevail on her ineffective assistance claim, Borowitz must prove both that her counsel's performance was deficient and that she was prejudiced by that performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both deficiency and prejudice "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶14 Borowitz challenges counsel's performance in three ways. First, she claims counsel was ineffective by failing to review the alternative PSI with her prior to its submission to the court. At the postconviction hearing, counsel testified that he reviewed the alternative PSI report with Borowitz, noting: "I know we talked about it. We went over it." Counsel testified that in every case that he could remember where an alternative PSI report was ordered, he reviewed it with his client. Counsel also submitted billing records to the court indicating that on the day of sentencing, counsel had a conference with Borowitz before the hearing. Although Borowitz testified at the postconviction hearing that counsel did not review the alternative PSI report with her before sentencing, the circuit

court found her testimony to be incredible. The court, acting as fact-finder, is the ultimate arbiter of witness credibility. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Borowitz, therefore, fails to establish that counsel was deficient in this regard.

¶15 Second, Borowitz asserts counsel was ineffective by submitting the alternative PSI that, according to Borowitz, inaccurately recited that she denied stabbing the victim. Borowitz argues this "erroneous statement attributed to her" made it appear she was not accepting responsibility for the offense, thus "casting her in a bad light" before the sentencing court. At the postconviction motion hearing, trial counsel testified that given the "scary amount of [incarceration]" recommended by the DOC's PSI report, he determined it was in Borowitz's best interest to obtain an alternative PSI. The alternative PSI was then submitted to the court because it recommended probation rather than prison.

¶16 Borowitz fails to show that counsel was deficient for submitting the alternative PSI. As an initial matter, Borowitz has not proven that the challenged statement was false. She did not call the alternative PSI writer to testify at the postconviction motion hearing and the court found Borowitz's testimony on the veracity of the statement to be incredible. Moreover, the court determined that the alternative PSI's recommendation was "favorable to the defense." The court explained that had it relied strictly upon the DOC's PSI, "imposing an 8 to 14 year sentence would have occurred instead of the 5 year initial incarceration approved by the court." Because submission of the alternative PSI was reasonable under the circumstances, the circuit court properly determined counsel was not deficient in this respect.

¶17 In any event, Borowitz has not established prejudice. During postconviction proceedings, the court stated that the most important factor it considered before imposing sentence was that Borowitz stabbed the vulnerable victim. Further, the challenged statement in the alternative PSI, even if erroneous, was merely cumulative to Borowitz's history of inconsistent statements regarding the attack. In fact, the court noted that regardless of the statement in the alternative PSI, it had seen that "conflicting information was provided by [Borowitz,] who was actively involved with an attempt to cover up the offense." Thus, "[e]ven if the alternative PSI had not been presented, the court had problems with [Borowitz's] honesty." Borowitz, therefore, has failed to establish that counsel's submission of the alternative PSI prejudiced her at sentencing.

¶18 Third, Borowitz contends counsel was ineffective by providing the alternative PSI writer with a psychological evaluation that Borowitz deems to be "wholly negative." Borowitz, however, does not specify why the evaluation, prepared when Borowitz was twelve years old, should have been withheld from the alternative PSI writer. Ultimately, Borowitz fails to establish that submission of the evaluation to the alternative PSI writer was either deficient or prejudicial.

III. Inaccurate Information

¶19 Finally, Borowitz contends she is entitled to resentencing because the court relied on inaccurate information in the alternative PSI—specifically, the statement that she denied stabbing the victim.[1] A defendant has a due process

[1] Borowitz appears to claim that attachment of the psychological evaluation to the alternative PSI also provides grounds for resentencing. Apart from characterizing the evaluation as "wholly negative," however, Borowitz fails to establish that the evaluation was inaccurate. We therefore reject her claim that submission of the evaluation warrants resentencing.

right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue this court reviews independently. ***Id.*** A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish both that the information was inaccurate and that the trial court actually relied on the inaccurate information. ***Id.***, ¶31. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14.

¶20 As noted above, Borowitz failed to establish that the challenged statement from the alternative PSI was inaccurate. Further, although one is entitled to be sentenced on the basis of accurate information, Borowitz cites no authority to establish that the existence of *conflicting* information may form the basis for invalidating a sentence. In any event, as noted above, the court indicated the most important factor it considered when imposing sentence was that Borowitz stabbed the vulnerable victim. Because Borowitz has failed to establish that she was sentenced on the basis of inaccurate information, the court properly denied her resentencing motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).