

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1727-CR

Cir. Ct. No. 2001CF6402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER D. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Christopher D. Smith appeals from an amended judgment of conviction for three armed robberies, and from a postconviction order denying his sentence modification motion. The issue is whether the trial court imposed an unduly and disparately harsh sentence as compared to his

accomplices' sentences. We conclude that the trial court properly exercised its discretion at sentencing and in explaining why Smith's lengthier sentence was neither unduly harsh nor disparate from his accomplices' sentences. Therefore, we affirm.

¶2 Smith and two accomplices were charged with three armed robberies with the threat of force, as a party to each crime.¹ Smith's two accomplices pled guilty to two armed robberies incident to a plea bargain pursuant to which one of the armed robberies was dismissed for each. One of the accomplices was sentenced to two ten-year consecutive sentences, comprised of two five-year respective periods of confinement and extended supervision; the other was sentenced to five- and thirteen-year sentences, comprised of confinement periods of one and nine years, and extended supervision of two four-year periods.

¶3 A jury found Smith guilty of three armed robberies with the threat of force as a party to each crime, contrary to WIS. STAT. §§ 943.32(2) (2001-02) and 939.05 (2001-02). The same trial judge who sentenced Smith's two accomplices sentenced Smith to three twenty-year consecutive sentences, each comprised of fifteen- and five-year respective periods of confinement and extended supervision. Smith moved for sentence modification, alleging that his sentences were unduly and disparately harsh as compared to those of his two accomplices. The trial court denied the motion, explaining why it imposed lengthier sentences for Smith's crimes. Smith appeals, again challenging his sentence as unduly and disparately harsh.

¹ Smith had three accomplices; the third drove the getaway car for the others. Smith does not challenge his sentence as compared to that of the getaway driver. Accordingly, we do not include her in our discussion.

¶4 Smith argues that his sixty-year sentence, forty-five years of which is in confinement, is unduly harsh for three armed robberies. A sentence is unduly harsh when 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.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. See *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶5 Incident to his unduly harsh challenge, Smith also contends that his sentence was disparately harsh as compared to the sentences of his accomplices.

Disparity alone does not amount to a denial of equal protection. The sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court. The sentence was not excessive. “Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one.”

Ocanas, 70 Wis. 2d at 189 (footnote omitted). The trial court is not obliged, however, to consider the sentence imposed on an accomplice. See *id.* at 188-89. The trial court’s sentencing obligation is to consider the primary sentencing factors (the gravity of the offense, the character of the offender, and the need for public protection), and to exercise its discretion in imposing a reasoned and reasonable sentence. See *State v. Larsen*, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶6 The trial court considered the gravity of the offenses, referring to a supreme court opinion, which characterized armed robbery as the most serious

offense in the criminal code, with the exception of murder and rape. It described these armed robberies as “appalling crime[s] against each of these victims,” who had been planning their mother’s funeral, and were then confronted by armed robbers. Each perpetrator threatened each victim with a gun, and demonstrated little patience or humanity in robbing each victim. It recalled the testimony of the three victims and its observations of “the living, lasting effects of the trauma of the crimes that you together with others committed on them.”

¶7 At sentencing, the trial court commented on the negative aspects of Smith’s character, which it “count[ed] against [him.]” In addition to his criminal history, the trial court emphasized Smith’s repeated attempts to deflect blame, characterizing him as manipulative, “conniving,” and “slick.” The trial court considered Smith’s different versions of the robberies and his shifting degrees of involvement as “patently unbelievable.” The trial court told Smith that it “didn’t think it was possible to think up that many versions of reality, but you’ve managed to do that and, of course, that counts against you.” It viewed Smith’s attempts to blame the prosecutor as “tak[ing] the cake.” During the course of trial and at sentencing, the trial court became familiar with Smith, and was convinced that he has “a criminal outlook and a criminal way of viewing things.” It was also insulted by Smith’s “flimsy, meager apology.” These same character factors, which supported a harsher sentence, also demonstrate why the trial court imposed a harsher sentence on Smith than it did on his accomplices.

¶8 The trial court was also convinced that Smith’s character defects and his brazen attitude required prison because he was “a riskier proposition in the community.” The trial court was entitled to consider Smith a greater community risk because he failed to avail himself of rehabilitation opportunities, and had returned to criminal conduct while on parole. Despite the trial court’s desire to

facilitate rehabilitation for convicted defendants, Smith “has [already] snubbed his nose at rehabilitation,” leaving prison as “our only option” for punishment and community protection.

¶9 In its postconviction order denying sentence modification, the trial court cited its reasons from the sentencing transcript for imposing a harsher sentence on Smith than on his accomplices. It characterized Smith as the ringleader, and it was mindful of his criminal conduct despite his parolee status, and his previous refusal to participate in rehabilitative programs, rendering him a greater societal risk than his accomplices.

¶10 Smith contends that the trial testimony does not support the trial court’s conclusions. The victims testified; Smith elected not to. Although Smith may properly challenge the testimony of these witnesses and the credibility and motives of his accomplices, who gave statements to the police, the jury found Smith guilty. The evidence allowed the trial court to consider Smith “far more culpable as the ringleader” than his accomplices, explaining that “[t]here was no other conclusion to draw other than the offenses would not have occurred had it not been for defendant Smith.”

¶11 Notwithstanding the similarity of the crimes, and some aspects of each defendant’s criminal history, there were sufficient differences to justify imposing a longer sentence on Smith. In its postconviction order, the trial court explained that it imposed a harsher sentence on Smith than on his accomplices because it viewed him as more culpable than they were, and considered him a “riskier proposition” to return to the community. The sentencing transcript also provides insight into the trial court’s view of Smith’s character. Many of these character insights were gained from Smith proceeding to trial. Although Smith

contends that the trial court should credit him for electing not to testify rather than lying to the jury, the trial court need not afford Smith credit for not testifying falsely.² It is unlikely that the trial court viewed the characters of Smith's accomplices as negatively as it viewed Smith's character. Additionally, by plea-bargaining their cases, Smith's accomplices received charging and presumably sentencing concessions that Smith did not.

¶12 Smith has not shown that his sentence was unduly or disparately harsh, only that the trial court exercised its discretion differently than he had hoped. That, however, is not an erroneous exercise of discretion. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

² Although Smith cites *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979), for the proposition that he is entitled to additional consideration for his unwillingness to lie under oath by testifying in his defense, we do not interpret *Cresci* as so holding. To afford Smith's interpretation the benefit of every doubt, we interpret that part of *Cresci* as condoning the trial court's exercise of discretion by offering reasons for crediting the defendant at sentencing, and considering his "remorse, repentance and cooperativeness." *Id.* (quoting *State v. Tew*, 54 Wis. 2d 361, 368, 195 N.W.2d 615 (1972), *overruled on other grounds by Byrd v. State*, 65 Wis. 2d 415, 425, 222 N.W.2d 696 (1974)). The trial court considered Smith's remorse and cooperativeness, and found them both lacking.

