COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 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. 2005AP1988-CR **Cir. Ct. No. 2001CF682**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENATA M. NEUAONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Renata M. Neuaone appeals from a judgment convicting her of attempted first-degree intentional homicide and substantial battery on her guilty pleas and from an order denying her postconviction motion.

We conclude that trial counsel was not ineffective, and Neuaone did not establish grounds to modify the sentence. Therefore, we affirm.

¶2 The charges against Neuaone arose out of the abduction, battery and attempted murder of a woman whom Neuaone and others accused of stealing illegal drugs from Neuaone's home. Neuaone entered guilty pleas after a plea colloquy. Postconviction, Neuaone moved the circuit court to withdraw her guilty pleas because they were not voluntarily or intelligently made due to ineffective assistance of trial counsel. Neuaone alleged that trial counsel[1] coerced her into entering the guilty pleas and did not investigate defenses that others coerced her into participating in the offenses and that she was a battered woman in her marriage. She also sought sentence modification because trial counsel did not present mitigating evidence at sentencing, the sentence was excessive and disproportionate to her co-actors' sentences, and there were new factors. The circuit court rejected these claims.

¶3 On appeal, Neuaone ties a number of her arguments to her claim that she was a battered woman and that this status should have been presented at trial as a defense to the charges and at sentencing as a mitigating factor. She faults trial counsel for not doing so. She also argues that her status as a battered woman is a new factor warranting sentence modification.

¶4 Ineffective assistance of counsel can satisfy the manifest injustice standard for postsentencing plea withdrawal. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Our review in this case is informed by the circuit

[1] Neuaone had two attorneys representing her in the circuit court. We refer to them collectively as "trial counsel."

court's determination that trial counsel's testimony at the postconviction motion hearing was more credible than Neuaone's testimony. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (the circuit court's credibility findings are binding on us).

¶5 The ineffective assistance of counsel standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.

State v. Kimbrough, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** at 236-37.

¶6 Neuaone's trial counsel testified at the postconviction motion hearing that they considered and rejected a battered woman defense to the charges. Counsel met and consulted with Neuaone numerous times and reviewed evidence and discovery materials. Counsel considered all possible defenses, including that Neuaone was a battered woman, but concluded that the evidence was overwhelmingly against Neuaone. In particular, counsel considered that during the offenses in this case, Neuaone's husband, the alleged batterer, was in jail. Moreover, in recordings of her telephone conversations with her husband and others, Neuaone suggested punishment for the victim and otherwise directed the

conversation and the course of events, rather than being directed or controlled by her husband. Counsel denied coercing Neuaone to plead guilty.[2]

¶7 A licensed psychotherapist testified postconviction that she evaluated Neuaone and concluded that Neuaone was a battered woman who suffered emotional, mental and physical abuse at the hands of her husband. In the psychotherapist's opinion, Neuaone's status as a battered woman could not be divorced from her conduct in this case.

¶8 In denying Neuaone's postconviction motion, the circuit court deemed credible trial counsel's description of "the preparation, analysis, investigation, evaluation, arrangements, collaboration, and coordination which went into" Neuaone's defense. The court found that counsel investigated the facts and circumstances of the case, met with Neuaone on several occasions and explored potential defenses. The court found that counsel concluded that there was no support in the facts for a claim that Neuaone was coerced into the offenses or that her status as a battered woman was a factor. The court deemed the psychotherapist's opinion "feckless," and noted the psychotherapist's testimony that even as a battered woman, Neuaone remained accountable for her criminal acts. Additionally, the court questioned the applicability of the battered woman's defense to this case because the victim was a third-party, not the batterer. The court determined that the plea colloquy demonstrated that Neuaone's guilty pleas were voluntarily, knowingly and intelligently entered. The court found no

[2] Neuaone and her mother testified postconviction that counsel threatened to withdraw if Neuaone did not enter a plea. The circuit court did not find this claim credible.

manifest injustice, and declined to permit plea withdrawal. The court concluded that trial counsel did not perform deficiently.

¶9 The circuit court's findings are not clearly erroneous. They are based largely on the court's credibility determinations; such determinations are binding on us. *See* ***Hughes***, 233 Wis. 2d 280, ¶2 n.1. The court's conclusion that trial counsel was not deficient for considering and rejecting a battered woman defense and counseling guilty pleas is supported by the record.

¶10 We also conclude that trial counsel did not perform deficiently at sentencing. Counsel rightly recognized that the sentence was going to include a period of incarceration. Counsel attempted to mitigate Neuaone's culpability by referring to the negative impact of drugs and her husband on her life. The circuit court was not persuaded either at sentencing or postconviction when a psychotherapist opined that Neuaone was a battered woman.

¶11 We turn to Neuaone's challenge to her sentence. The circuit court found that Neuaone was sentenced based upon the facts and circumstances of her case. The court further found that the disparity between Neuaone's sentence and that of her co-actors did not render Neuaone's sentence unduly harsh and was not a new factor.

¶12 Neuaone argues that her sentence was unduly harsh and excessive. A sentence may be set aside if it was unduly harsh or unconscionable. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. A sentence may be considered unduly harsh or unconscionable only 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." ***Id.*** The weight to be attached

to any particular sentencing factor is within the discretion of the sentencing court. ***State v. Evers***, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987).

¶13 The circuit court imposed a forty-year sentence for the attempted first-degree intentional homicide consisting of twenty years of initial incarceration and twenty years of extended supervision and a consecutive five-year sentence for the battery consisting of two years of initial incarceration and three years of extended supervision. In sentencing Neuaone, the court focused on the gravity and severity of the offenses, Neuaone's character and prior criminal history, the fact that she permitted children to observe the battery, and the need to protect the public from drug-related crime. The court heard recorded telephone conversations involving Neuaone, her husband and others who participated in the offenses.[3] The court characterized the acts perpetrated against the victim as "outrageous" and "shocking." The court weighed the appropriate factors at sentencing, and the sentence was not disproportionate to the offenses.

¶14 The circuit court did not err in rejecting the disparity of the sentences imposed upon Neuaone and her co-actors as a new factor. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the parties and the circuit court at the time of sentencing and which frustrates the purpose of the original sentence. ***State v. Champion***, 2002 WI App 267, ¶4,

[3] The parties did not have an agreement about which evidence would be presented at the sentencing hearing. Clearly, Neuaone's recorded telephone conversations had an impact on the circuit court's assessment of her culpability. Nevertheless, relevant information cannot be withheld from the sentencing court. ***State v. McQuay***, 154 Wis. 2d 116, 125, 126, 452 N.W.2d 377 (1990). For that reason, we reject Neuaone's claim that the State breached the plea agreement when it introduced the recorded conversations at sentencing or that trial counsel was ineffective in relation to the introduction of the recorded conversations.

258 Wis. 2d 781, 654 N.W.2d 242. Whether a particular set of facts constitutes a new factor is a question of law that we review de novo. ***Id.***

¶15 A disparity in sentences among co-actors "is not improper 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). As discussed above, the circuit court considered the proper factors in imposing an individualized sentence upon Neuaone. The co-actors' sentences did not frustrate the circuit court's purpose in sentencing Neuaone.

¶16 We also agree with the circuit court that Neuaone's status as a battered woman did not constitute a new factor for sentencing purposes. At sentencing, the court was apprised of the domestic violence in Neuaone's life. The presentence investigation reports referred to domestic violence, and Neuaone's trial counsel noted at sentencing that Neuaone was young and controlled by her husband who, though jailed at the time, encouraged the offenses. That domestic violence was a factor in Neuaone's life was not new information, and the psychotherapist's postconviction testimony, to which the circuit court did not give weight, only offered further support for a theory already before the circuit court at sentencing.

¶17 Finally, we do not agree with Neuaone that the prosecutor breached the plea agreement by arguing more forcefully at sentencing than warranted by the recommended sentence. The State agreed to recommend no more than thirty years of which at least twelve years would be extended supervision. In arguing for this sentence, the State emphasized Neuaone's culpability and relied upon the recorded telephone conversations. A prosecutor may offer relevant, negative information at sentencing to support a sentence recommendation, even if such evidence is harsh.

State v. Liukonen, 2004 WI App 157, ¶¶10-11, 276 Wis. 2d 64, 686 N.W.2d 689. The sentencing transcript does not demonstrate that the State backed away from its agreed-upon sentence recommendation.

By the Court.—Judgment and order affirmed.

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