COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1653-CR **Cir. Ct. No. 2008CF418**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLOS A. CUMMINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Carlos Cummings appeals a judgment convicting him of first-degree reckless injury and an order denying in part his postconviction motion for relief. He claims that his statement to police should have been

suppressed and that his sentence was unduly harsh. We disagree for the reasons discussed below, and therefore affirm the circuit court.

BACKGROUND

¶2 The State charged Cummings as party to the crime of first-degree intentional homicide based upon allegations that he plotted with his lover to hire a woman to kill his lover's husband; drove the women to a location where she shot the husband in the head five times, then drove the woman away from the scene and hid the gun and bullets in his basement. The probable cause portion of the complaint included several inculpatory statements Cummings had made to police while in custody.

¶3 Cummings filed a suppression motion claiming, among other things, that police had violated his Fifth Amendment rights by continuing his interrogation after he had invoked his right to silence. After the circuit court ruled that most of Cummings' statements would be admissible, Cummings entered a plea to the reduced charge of being party to the crime of first-degree reckless injury, with two counts of aiding a felon read in.

¶4 At sentencing, the circuit court stated that it viewed Cummings as "the mastermind" of the plot, and it imposed a near-maximum term of fourteen years of initial confinement and ten years of extended supervision. Cummings filed a postconviction motion claiming that his sentence was unduly harsh and that trial counsel was ineffective for failing to request a risk reduction sentence on Cummings' behalf. The circuit court rejected both those arguments, and Cummings now appeals both the suppression ruling and the denial of his motion for sentence modification.

STANDARD OF REVIEW

¶5 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10);[1] ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. ***Id.***

¶6 A claim that a sentence was unduly harsh raises the question whether the circuit court erroneously exercised its sentencing discretion. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We afford discretionary sentence determinations a strong presumption of reasonableness because the trial court is in the best position to evaluate the relevant factors and the demeanor of the defendant. ***State v. Klubertanz***, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116.

DISCUSSION

Right to Remain Silence

¶7 A defendant may terminate an interrogation at any time by invoking his or her rights under the Fifth Amendment. ***State v. Markwardt***, 2007 WI App 242, ¶¶23-25, 306 Wis. 2d 420, 742 N.W.2d 546. However, an invocation of the right to remain silent is subject to the "clear articulation" rule, meaning that "'[a] suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

as such, inform the police that he or she wishes to remain silent.'" ***Id.***, ¶¶26-28 (citation omitted). If a statement is ambiguous, such that "any reasonable competing inference can be drawn" as to what the suspect intended, it does not constitute an unequivocal invocation requiring the police to immediately stop questioning. ***Id.***, ¶36.

¶8 The exchange during which Cummings claims to have invoked his right to silence went as follows:

> [OFFICER]: … This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know.
>
> [CUMMINGS]: I'm telling you.
>
> [OFFICER]: So why then do we got [the victim's wife] and [the shooter] telling us different?
>
> [CUMMINGS]: What are they telling you?
>
> [OFFICER]: I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you Carlos and say, "This is everything I know!"
>
> [CUMMINGS]: *Well, then, take me to my cell. Why waste your time? Ya know?* (Emphasis added.)
>
> [OFFICER]: Cuz I'm hoping…
>
> [CUMMINGS]: If you got enough…
>
> [OFFICER]: …to get the truth from ya.
>
> [CUMMINGS]: If you got enough to fucking charge me, well then, do it and I will say what I have to say, to whomever, when I plead innocent. And if they believe me, I get to go home, and if they don't…
>
> [OFFICER]: If who believes you?
>
> [CUMMINGS]: …and if they don't, I get locked up.
>
> [OFFICER]: And you're okay with that?

> [CUMMINGS]: No! I'm not okay with that! I don't want to be in that predicament, but right now, I'm under arrest. That's how I see it.

We fully agree with the circuit court's conclusion that Cummings' request to be taken to his cell was not an unequivocal invocation of Cummings' right to remain silent.

¶9 Cummings' statement was ambiguous because a competing, and indeed more compelling, interpretation is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying. That is, the suggestion that the police would be wasting their time if they were not willing to engage in a two-way flow of information could be taken as an invitation for more discussion, not a termination of the interview.

Sentence Modification

¶10 The courts of this state have the inherent power to modify an unjust sentence.[2] ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524 (abrogated on other grounds). There must, however, be some reason for the modification other than further reflection by the court. ***Id.***, ¶12. 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.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted).

[2] This inherent power is separate from the court's statutory power to adjust a sentence in limited circumstances under WIS. STAT. § 973.195. ***State v. Stenklyft***, 2005 WI 71, ¶¶39-48, 59, 281 Wis. 2d 484, 697 N.W.2d 769.

¶11 Here, Cummings contends that his sentence was unduly harsh because: (1) the circuit court failed to give adequate consideration to Cummings' "horrible childhood," his "significant" drug and alcohol issues, and his mental health problems; (2) the court refused to impose a Risk Reduction Sentence;[3] and (3) Cummings' role in the offense did not justify a term of initial confinement that was twice as long as that given to the shooter. None of these arguments is persuasive.

¶12 First of all, the record shows that the circuit court did explicitly acknowledge Cummings' difficult childhood, attention disorder, and AODA issues. However, the court also noted that Cummings was articulate and appeared capable of contributing to society if he would put his abilities to good use rather than criminal use. Instead, Cummings not only continued to commit offenses, but he also lied to police and attempted to manipulate the testimony of a co-conspirator. The court was entitled to decide what weight to give these various aspects of Cummings' character in assessing his amenability to rehabilitation and risk to reoffend, and deciding whether he was an appropriate candidate for a Risk Reduction Sentence.

¶13 Moreover, regardless of how the court viewed Cummings' character, the circuit court also noted that Cummings had already been given "considerable consideration" with respect to the reduction of the charge. The circuit court further reasoned that the offense was serious enough to warrant a sentence close to the maximum not only because it involved a "cruel plan" to commit a

[3] Although Cummings presented his Risk Reduction Sentence arguments in the context of ineffective assistance of counsel and a new factor at the postconviction hearing, he now simply includes them in his argument as to why his sentence was unduly harsh.

premeditated homicide primarily for financial benefit, but also because Cummings manipulated a cognitively impaired woman with an IQ in the 60s into being the shooter. The circuit court's assessment as to the relative culpability of the parties was based upon its own observations of Cummings, as well as information about the shooter's cognitive difficulties.

¶14 In sum, a sentence of fourteen years of initial confinement and ten years of supervision, for involvement in an offense that left the victim with the loss of an eye and a bullet lodged near his brain stem, does not shock the conscience of this court.

By the Court.—Judgment and order affirmed.

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