

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 25, 1997

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

NOTICE

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

No. 96-2054-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA G. STORLIE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Joshua Storlie appeals a judgment convicting him of aggravated battery and an order denying his postconviction motion. He argues that his attorney at the sentencing hearing had a conflict of interest and that the disparity between his sentence and that of three co-defendants should be corrected. We reject these arguments and affirm the judgment and order.

Pursuant to a plea agreement, Storlie pleaded guilty to aggravated battery, a ten-year offense. The State agreed to dismiss charges of intermediate battery, two counts of robbery, bail jumping, possession of THC and drug paraphernalia, third offense driving after revocation, disorderly conduct and criminal damage to property. All of these charges were read in for sentencing purposes. The court sentenced Storlie to eight years in prison.

At the sentencing hearing, the district attorney provided the court with two additional criminal complaints charging Storlie with delivering a controlled substance in Chippewa County and possession of drug paraphernalia in Eau Claire County. Storlie's attorney informed the court that she could not represent Storlie on these matters and could not "get into the facts" of the new charges because she had a conflict of interest based on her representation of a potential witness in one of these cases. The information regarding these additional crimes was introduced to show that Storlie had not significantly changed his conduct after being charged with aggravated battery in this case. At the postconviction hearing, the attorney indicated that her representation of Storlie was limited only insofar as arguing whether the facts in the Chippewa County complaint were true. She felt that she was nearly in the same position she would have been in had she not known the witness in the Chippewa County case. She could not think of any sentencing argument that she was constrained from presenting due to her representation of the witness in the Chippewa County case.

Storlie has not established a right to a new sentencing hearing based on his attorney's conflict of interest. To establish a Sixth Amendment violation on the basis of conflict of interest, he must demonstrate by clear and convincing evidence that his counsel had an actual conflict of interest that adversely affected counsel's performance. *State v. Street*, 202 Wis.2d 534, 543, 551 N.W.2d 830, 835 (Ct. App. 1996). Demonstrating a potential conflict of interest is not sufficient. *State v. Kaye*, 106 Wis.2d 1, 7, 315 N.W.2d 333, 340 (1982). Prejudice is presumed only if Storlie demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Storlie has not established any defect in his lawyer's performance. He identifies no argument that his counsel could have made but was constrained from making due to her representation of the other person. In the absence of any showing of prejudice, Storlie is not entitled to resentencing.

The trial court also properly refused to modify the sentence based on the disparity of Storlie's sentence with the sentences imposed on his co-defendants. Pursuant to plea agreements, his co-defendants pleaded guilty to reduced charges of intermediate battery and received the maximum sentence, two years. One co-defendant, who had numerous other charges against him, received consecutive sentences comparable to Storlie's. Sentences based on proper factors do not deny equal protection even if the sentences are disparate. *Ocanas v. State*, 70 Wis.2d 179, 189, 233 N.W.2d 457, 463 (1975). Leniency in one case does not transform a reasonable punishment in another case into a cruel one. *Id.* Rather, Storlie bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing. See *State v. Perez*, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992).

The trial court did not consider any improper factors in determining Storlie's sentence. The court relied primarily on the senseless cruelty of the offense in which Storlie repeatedly kicked the fallen victim in the head causing serious head injuries. The court also considered Storlie's history of disruptive behavior, the numerous read-in offenses and his criminal activity after the charges in this case were filed. The court considered the victim impact statements. Each of these factors was properly considered, see *In re Felony Sentencing Guidelines*, 120 Wis.2d 198, 201, 353 N.W.2d 793, 795 (1984), and provide an appropriate basis for the eight-year sentence.

To the extent Storlie challenges the prosecutor's decision to allow the co-defendants to plead to a lesser charge, he has not established any basis for appeal. There is no constitutional right to a plea bargain. Whether to offer a plea bargain is a matter of prosecutorial discretion. *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995). To challenge the prosecutor's charging decision, Storlie must show that the others were given more favorable plea bargains and that his prosecution was based on an impermissible motive. *Id.*; *State v. Annala*, 168 Wis.2d 453, 472-73, 484 N.W.2d 138, 146 (1992). He has shown no improper motive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.