COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2695-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WINDELL CARRADINE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE and DAVID A. HANSHER Judges.[1] *Affirmed.*

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

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[1] The Honorable Michael D. Guolee presided over the motion to suppress and the trial and entered the judgments of conviction; the Honorable David A. Hansher entered the order denying the motion for postconviction relief.

PER CURIAM. Windell Carradine appeals from the judgments of conviction, following a jury trial, for armed robbery, second-degree reckless injury while armed, and attempted armed robbery, each as a party to a crime. He also appeals from an order denying his motion for sentence modification. Carradine argues that the trial court erred in denying his motion to suppress his confession and in denying his motion to modify his sentence. He also claims that his sentence is unduly harsh. We affirm.

Carradine was convicted of three crimes relating to two separate armed robberies. The first armed robbery took place on September 9, 1991, at a Burger King restaurant on West North Avenue in Milwaukee. The second took place on October 12, 1991, at Bill the Butcher, which is also located on West North Avenue. During the second armed robbery, Carradine shot a sales clerk in the arm and side with a sawed-off shotgun.

On October 22, 1991, Charles Hartley, a suspect in the Burger King robbery, gave a detailed statement to City of Milwaukee Police, implicating himself and Carradine in the robberies at Burger King and Bill the Butcher.

At approximately 6:00 p.m. on November 18, 1991, Federal Task Force agents arrested Carradine, pursuant to a Wisconsin warrant, at his mother's house in Chicago. The agents then escorted him to FBI headquarters in downtown Chicago and held him there until City of Milwaukee Police Detectives Thomas Meyer and Jeffrey Weismiller arrived to question him. After waiving his ***Miranda***[2] rights, Carradine gave the Milwaukee detectives a detailed confession about the two armed robberies. The entire interview lasted less than an hour.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

On November 18, 1993, a jury found Carradine guilty. On November 29, the trial court sentenced him to: (1) ten years' imprisonment on the armed robbery, party to a crime, of the Burger King; (2) five years' imprisonment for the second-degree reckless injury while armed, party to a crime; and (3) ten years' imprisonment for the attempted armed robbery, party to a crime, of Bill the Butcher.

I. ANALYSIS

Carradine first argues that the trial court erred in not suppressing his statement to the Milwaukee detectives because the State failed to prove beyond a reasonable doubt that his statement was voluntary. Carradine is incorrect.

Whether a defendant knowingly, intelligently, and voluntarily waived his or her ***Miranda*** rights presents a mixed question of law and fact. *See* ***State v. Santiago***, 206 Wis.2d 3, 18, 556 N.W.2d 687, 692 (1996). While we review issues of constitutional law *de novo*, *see* ***State v. Lee***, 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993), we review a trial court's findings of historical facts, which formed the basis for the ultimate finding of constitutional facts, under the clearly erroneous standard. *See* ***Santiago*** 206 Wis.2d at 17 n.10, 556 N.W.2d 692 n.10.

As the supreme court recently reiterated:

> When the State seeks to admit into evidence an accused's custodial statement, both the Untied States and Wisconsin constitutional protections against self-incrimination require that it make two showings. First, the State must prove that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly waived them. "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the

> consequences of the decision to abandon it." Second, the State must prove that the accused's statement was given voluntarily.

Santiago, 260 Wis.2d at 18-19, 556 N.W.2d at 692-93 (citations omitted). The State's burden of proof on these issues is by the preponderance of the evidence. ***Id.*** at 29, 556 N.W.2d at 697.

Under the ***Goodchild***[3] standard, "a prima facie case will be established 'when the state has established that the statement to be offered is, in fact, the statement of the defendant, that he was willing to give it, and that it was not the result of duress, threats, coercion or promises.'" ***State v. Mitchell***, 167 Wis.2d 672, 697-98, 482 N.W.2d 364, 374 (1992) (quoted source omitted). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986). If no coercive tactics were undertaken by the police, there is no basis for finding the confession involuntary. *See* ***State v. Owens***, 148 Wis.2d 922, 934, 436 N.W.2d 869, 874 (1989). The voluntary nature of a confession is determined by balancing the personal characteristics of the accused against the pressures exerted by the police. ***Grennier v. State***, 70 Wis.2d 204, 210, 234 N.W.2d 316, 320 (1975). The personal characteristics are not, however, dispositive if the trial court finds that the police did not engage in improper conduct. *See* ***State v. Deets***, 187 Wis.2d 630, 635-36, 523 N.W.2d 180, 182 (Ct. App. 1994). Again, the State's burden of proof on this issue is by the preponderance of the evidence. *See* ***Santiago***, 260 Wis.2d at 29, 556 N.W.2d at 697.

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[3] ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

Testimony at the suppression hearing established that Carradine was arrested between 5:30 and 6:00 p.m. on November 18, 1991. Following his arrest, the federal agents along with Chicago police took him to FBI headquarters where he was held until the Milwaukee detectives arrived just after 9:00 p.m. When Detectives Meyer and Westmeiller arrived, they found Carradine and two Chicago police officers watching television. The three men were seated in an assembly area,[4] and Carradine was handcuffed to the chair in which he was seated. Detective Meyer explained that "the Monday night football game was on, and they [the officers and Carradine] appeared to be joking and talking." Shortly after the detectives' arrival, the Chicago police officers removed Carradine's handcuffs. The Milwaukee detectives then escorted Carradine to an interview room.

Detective Meyer testified that after they entered the interview room, he read Carradine his rights and asked him if he understood them. Carradine responded affirmatively and signed a form which stated that he had been advised of his ***Miranda*** rights and had agreed to talk to the detectives without an attorney present. The detectives then asked Carradine for some background information about himself. Detective Meyer testified that Carradine was coherent and cognizant during questioning. He answered questions appropriately and with significant details about the sequences of events, the conversations that occurred during the robberies, and the money that was taken.

Detective Meyer testified that at no time did Carradine ever indicate that he had been physically or psychologically abused by the arresting officers. Detective Meyer also testified that he did not observe any physical injuries to

[4] The trial court noted that an assembly area is an open and unsecured area.

Carradine's face or body. Carridine testified, however, that while he was in the custody of the Chicago police they threatened to lock up his mother for hiding a fugitive unless he cooperated with the Milwaukee detectives who were coming to interrogate him.[5] He also told the court that while he was handcuffed to the chair in the assembly area, one of the Chicago police officers slapped him in the face and another kicked him and hit him in the chest. When the prosecutor asked him why he had not informed the Milwaukee detectives of this abuse, Carradine replied: I don't know, ma'am. I thought they all be together. My first time locked up. Why should I tell them? They might get messing with me. I didn't know what was going on.

Carradine also testified that he had never before been in police custody. When the prosecutor questioned him regarding his prior arrest for a domestic violence crime, he claimed he had never been arrested. On further inquiry concerning his prior contacts with police, Carradine admitted that he had been taken to a police station in regard to a domestic violence incident and a traffic violation, but added that he had not been prosecuted for either of them.

Carradine had difficulty remembering key facts about the night in question. He could not recall how many Chicago police officers were involved in his arrest, nor could he decscribe them. Carradine also claimed that he did not remember that one of the Milwaukee detectives wrote down his responses to their questions, and claimed that, at the conclusion of the interview, one of the detectives read him his accomplice's statement rather than his own.

[5] None of the Chicago police officers testified the Carradine's suppression hearing because the motion to suppress was general and did not give the State notice that Carradine would be claiming that he had been mistreated by Chicago police. Carradine never claimed that he was mistreated by the Milwaukee detectives.

At the conclusion of the suppression hearing, the trial court rejected Carradine's allegations of mistreatment. Commenting extensively on Carradine's selective memory, the court implicitly found that although the claim of Chicago police brutality was not directly refuted, it was unbelievable because Carradine's testimony was patently incredible. Carradine's lack of credibility, coupled with the circumstantial evidence of non-coercion—the fact that Carradine complained of nothing, exhibited no injuries, and appeared content when the Milwaukee police arrived—established that Carradine's statement was voluntary. Because these findings are not clearly erroneous, we conclude that the trial court properly rejected Carradine's motion to suppress his confession.

Carradine next argues that the trial court erroneously exercised discretion by sentencing him to seventy-one percent of the maximum possible sentence without first considering his personal characteristics and his limited contact with the police. We reject his argument.

Appellate review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The trial court is presumed to have acted reasonably, and the defendant bears the burden of showing unreasonableness from the record. *See* ***State v. Echols***, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640 (1993). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider whether the trial court considered the appropriate factors and whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The primary factors to be considered by the trial court are the gravity of the offense, the character of the offender, and the need to protect the public. ***Larsen***, 141 Wis.2d at 427, 415 N.W.2d at 541. An erroneous exercise of discretion occurs if

the sentencing court fails to state on the record the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. *See* ***id.*** at 428, 415 N.W.2d at 542.

The record reflects the trial court's careful consideration of all the required sentencing criteria. The trial court referred to the gravity of the offense and the need to protect the public from violent offenders. The court also referred to the aggravating factors in this case. In particular, the court was concerned about the emotional and physical trauma that two of the victims suffered as a result of the robberies. The court noted that the clerk in the Burger King robbery was pregnant when the robbery occurred and subsequently suffered a stress-related miscarriage. It also noted that the cashier in the Bill the Butcher robbery, whom Carradine shot when he did not respond quickly enough to Carradine's commands, received extensive injuries, leaving him with permanent nerve damage.

The sentencing court also considered Carradine's needs, his "low intelligence," his limited contact with the authorities, and his addiction to cocaine. The court concluded:

> Society needs to be protected from these aggressive, assaultive acts. It would depreciate the seriousness of this offense not to incarcerate him.… We have to send out the word … so we can deter him and deter others to say that … when you take a gun and rob someone and shoot someone that we will not as a civilization or society put up with it. So you will pay your price, and it's going to be a big price.

The record clearly reflects that the trial court considered the appropriate sentencing factors and adequately explained the bases for the sentence it imposed.

Carradine next argues that "[t]he sentence of the trial court was both unduly harsh and unconscionable." Carradine's argument is without merit. This

court will not find a sentence unduly harsh unless "'the sentence 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.'" ***State v. Dietzen***, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991) (quoted source omitted). Considering the emotional and physical trauma suffered by the victims in this case, Carradine's twenty-five-year sentence, which was well within the thirty-nine-year statutory maximum, is not unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461-62 (1975) (a sentence within the statutory maximum length is not unduly harsh).

By the Court.–Judgments and order affirmed.

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