COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-3378-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HECTOR J. BOISSONNEAULT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

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

PER CURIAM. Hector J. Boissonneault has appealed from a judgment convicting him upon a guilty plea of possession of marijuana with intent to deliver, as a party to the crime, in violation of §§ 161.41(1m)(h)1 and 939.05(1), STATS., 1993-94. In the judgment he was sentenced to the maximum prison term of three years and ordered to pay a fine of $5000. Boissonneault has also appealed from an order denying his motion for postconviction relief.

Boissonneault argues that the sentence and fine imposed on him were excessive, that his trial counsel rendered ineffective assistance at sentencing, and that his sentence should be modified. Underlying all of these arguments is a claim that the presentence report contained erroneous information; namely, that Boissonneault told the presentence report writer that he made $10,000 to $20,000 in the four to six weeks that he was involved in drug sales. In postconviction proceedings, Boissonneault denied saying that he actually made or was owed $10,000 to $20,000. He testified that he actually made $1000 "tops" and that he merely told the presentence writer that he could have made $10,000 to $20,000 if he had been deeply involved in drug dealing.

Boissonneault further contends that his trial counsel rendered ineffective assistance when rather than informing the trial court that Boissonneault never made this amount of money dealing drugs, he stated at sentencing that Boissonneault was referring to money which might have been owed to him but was never collected. Boissonneault denied ever making such a statement to his trial counsel or even discussing the presentence report with him prior to sentencing. We conclude that the trial court properly rejected Boissonneault's arguments and affirm the judgment and the order.

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Rodgers,*** 203 Wis.2d 83, 93, 552 N.W.2d 123, 127 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *See* ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record. *See* ***id.*** at 622-23, 350 N.W.2d at 638-39.

The primary factors the trial court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. *See* ***id.*** at 623, 350 N.W.2d at 639. Additional relevant considerations include the defendant's past criminal record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; his or her remorse and cooperativeness; the need for close rehabilitative control of the defendant; and the rights of the public. *See* ***id.*** at 623-24, 350 N.W.2d at 639.

An erroneous exercise of discretion may be found when the sentence is so excessive and unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). However, the weight to be given to each of the relevant sentencing factors is particularly within the wide discretion of the trial court. *See* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered. *See* ***id.***

Boissonneault contends that the trial court based its sentencing decision on an inaccurate understanding of his degree of involvement in the marijuana trade by proceeding in the mistaken belief that he received or was owed as much as $20,000 as a marijuana dealer. However, this information was set forth in the presentence report and was not disputed by Boissonneault at the time of sentencing. The trial court therefore properly relied on that information at sentencing.

Moreover, the extent of Boissonneault's involvement in drug dealing was only one factor considered by the trial court at sentencing. It also expressly addressed Boissonneault's character, including his lengthy and extensive juvenile record, his commission of the present offense shortly after being discharged from probation, and his failure to change his ways despite expressing remorse and promising to reform in the past. In addition, it considered his sophistication in setting up and operating the drug sales, his description of drug dealing as an investment, and his use of others to do the "dirty work" of making deliveries. After considering these factors, the trial court concluded that Boissonneault presented a continued danger to the public and required close rehabilitative control. It also concluded that the gravity of the offense necessitated a punitive component to the sentence. Because it considered proper sentencing factors and weighed them in a reasonable manner, no basis exists to conclude that it erroneously exercised its discretion in imposing a three-year sentence and a $5000 fine.

Boissonneault next argues that his trial counsel was ineffective for failing to argue or present evidence to establish that he never earned the amount alleged in the presentence report. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *See* ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990).

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). The trial court is the ultimate arbiter of witness credibility, *see* § 805.17(2), STATS., and its findings of fact concerning the circumstances of the case and counsel's conduct will not be disturbed unless they are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 542 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

After hearing postconviction testimony from both Boissonneault and his trial counsel, the trial court rejected the claim of ineffective assistance of counsel, finding incredible Boissonneault's claim that the presentence report did not accurately relate his statements to the presentence writer. In making this determination, the trial court found incredible the likelihood that the presentence writer totally misunderstood what Boissonneault told him and mistakenly stated that Boissonneault made $10,000 to $20,000 when, in fact, he made only $1000. In making this finding, the trial court also pointed to the intricate and sophisticated nature of the drug-dealing operation set up by Boissonneault and the "coherent statement" made by him to the presentence writer as to how he began the operation and ran it, including relaying that he began the operation by "kiting" a check for $1500 which he used to purchase drugs whose sales grossed him $2100. The trial court reasonably concluded that it was unlikely that the presentence writer accurately reported all of this related information but completely misreported the information relayed by Boissonneault as to the $10,000 to $20,000 figure.

Based in part on these findings, the trial court rejected Boissonneault's claim that his trial counsel was ineffective for failing to argue or present evidence at sentencing to establish that he never earned the amount alleged in the presentence report. Boissonneault's claim that his trial counsel failed to discuss the presentence report with him prior to sentencing was contradicted by the testimony of his trial counsel, who testified that this particular section of the presentence report was specifically discussed by them. Moreover, while counsel stated that Boissonneault denied telling the presentence writer that he made $10,000 to $20,000 and remarked that he wished he could have made as much money as the report said, counsel also testified that his remarks at sentencing were based upon information provided to him by Boissonneault and that at the time of sentencing he had a base of knowledge from which he was confident that he was making correct statements to the trial court.

As noted by the trial court, nothing in the testimony of trial counsel provides a basis to believe that Boissonneault ever told him that, including receivables, he earned only $800 to $1000 from drug dealing. The trial court reasonably concluded that it was incredible to believe that Boissonneault made only $800 to $1000 but failed to inform his trial counsel of this fact when they discussed the presentence report. In making this determination, the trial court also reasonably found counsel more credible than Boissonneault when he testified that he gave Boissonneault time to review the presentence report and discussed it with him, including the section concerning his drug sales operation.

Based on its finding that the presentence report writer accurately relayed what Boissonneault told him and its finding that Boissonneault never told his trial counsel that his earnings and receivables totaled only $1000, the trial court was not convinced that his level of involvement in drug dealing was substantially

less than that described in the presentence report. The trial court therefore properly rejected Boissonneault's claim that his trial counsel rendered deficient performance by failing to argue that his drug involvement was less than that conveyed by the report. Because the trial court's findings are not clearly erroneous, no basis exists to disturb its order denying relief based on ineffective assistance of counsel.

Boissonneault's final argument is that the trial court should have modified his sentence based on his postconviction testimony that he did not make $10,000 to $20,000 as a drug dealer. A trial court may, in the exercise of its discretion, modify a criminal sentence upon a showing of a new factor. *See* ***State v. Michels***, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). The burden is on the defendant to establish the existence of a new factor by clear and convincing evidence. *See* ***id.*** at 97, 441 N.W.2d at 279. However, no new factor was found here. Instead, the trial court concluded that Boissonneault was sentenced based on accurate information, finding that he in fact told the presentence writer that he made $10,000 to $20,000 and finding incredible his contention that he earned only $800 to $1000. Because these findings are supported by the record, they cannot be disturbed by this court.

By the Court.—Judgment and order affirmed.

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