

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 1998

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. 96-3475-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. CONNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Thomas Conner appeals a judgment convicting him of armed robbery, and an order denying postconviction relief. Conner pled guilty and received a twenty-year prison sentence. He later moved for a reduced sentence on equal protection grounds. The trial court denied the motion, and this

appeal followed. We conclude that Conner is not entitled to relief from his sentence and therefore affirm.

The State's complaint alleged that Conner and an accomplice, Bromise Buchanan, used handguns to rob Dameon Peacock of money and a coat. In a separate complaint, the State alleged that Conner and Buchanan attempted to rob Larry March a few minutes later and shot him when he attempted to flee. The charges against both Conner and Buchanan included armed robbery, attempted armed robbery and attempted first-degree intentional homicide.

At the consolidated preliminary hearing, March testified that during the robbery Conner struck him in the face with a handgun and that both Conner and Buchanan fired several shots at him when he attempted to flee, with Conner firing the bullet that struck his arm. Peacock testified that after Conner and Buchanan robbed him as alleged in the complaint, Conner told Buchanan to shoot Peacock and Buchanan refused. Conner then struck Peacock in the head.

In unsworn statements, Buchanan later gave the same version of events. Conner, however, blamed Buchanan for hitting Peacock and alleged that Buchanan wanted to kill Peacock with Conner objecting, rather than vice versa. Both defendants claimed that Peacock and March were cocaine dealers and that they robbed Peacock of cocaine, not money.

Buchanan pled guilty to armed robbery (of Peacock) and recklessly endangering March's safety. In exchange for the plea, the State dropped the attempted armed robbery charge and the attempted first-degree intentional homicide charge, and recommended a fifteen-year prison term. The court sentenced Buchanan to ten years for armed robbery and to five years consecutive for reckless endangerment.

Several months later, with the same trial judge presiding, Conner pled guilty to armed robbery as a repeater. In exchange, the State dropped the remaining two charges, with a read-in provision. There was no agreement on a sentencing recommendation. The presentence investigator recommended a maximum twenty-two-year prison term for Conner, as did the prosecutor. Conner asked for an eight-year term. After considering the seriousness and circumstances of the armed robbery and the read-in offenses, and Conner's extensive adult and juvenile record, the court imposed a twenty-year prison term.

Conner's postconviction motion alleged that the sentence violated his equal protection right, given Buchanan's fifteen-year term on the same original charges. The trial court denied relief, explaining that it primarily based the disparate sentence on Conner's more aggravated conduct in the Peacock case, the fact that he fired the shot that struck March and the fact that the prosecutor recommended a fifteen-year sentence for Buchanan and stated on the record that she believed Conner to be more culpable. In the court's view, these facts more than offset Buchanan's much more serious and violent prior record. On appeal, Conner challenges the ruling on his motion and the reasoning behind it.

The Equal Protection Clause of the Fourteenth Amendment requires substantially the same sentence for different persons in substantially the same circumstances. *Jung v. State*, 32 Wis.2d 541, 553, 145 N.W.2d 684, 690 (1966). However, disparity alone does not violate the Equal Protection Clause if based on relevant and proper factors, with one such factor being the comparative roles of accomplices in the same crime. *Ocanas v. State*, 70 Wis.2d 179, 188-89, 233 N.W.2d 457, 462-63 (1975).

Here, Conner's comparatively greater culpability justified the disparate sentences. Most significantly, Conner was prepared to murder Peacock and Buchanan was not. Additionally, Conner struck both victims in the head. The court could reasonably conclude from this that Conner merited a longer sentence despite his comparatively less serious criminal record.

In his brief, Conner notes that the prosecutor also compared Conner unfavorably to Buchanan because Buchanan was more willing to enter a plea bargain, and because Conner asked for and received substitute counsel during the proceedings. Conner further contends that this argument improperly influenced the trial court. We agree that the argument was improper, but find nothing in the record indicating that it influenced the trial court's sentencing decision in any way.

Conner also contends that the trial court wrongly relied on the version of the crimes given by Peacock and March, because they were drug dealers who obviously lied about that aspect of the incidents in their testimony. The trial court's credibility determinations are not subject to review. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Even if they were, it does not follow that Peacock and March lied about Conner's actions merely because they wished to conceal their own alleged criminal status.

By the Court.—Judgment and order affirmed.

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

