COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0215-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EUREKA SCRUGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, Fine and Curley, JJ.

PER CURIAM. Eureka Scruggs appeals from a judgment entered after she pled guilty to delivery of a controlled substance (cocaine) within 1,000 feet of a jail, and possession with intent to deliver a controlled substance (cocaine), within 1,000 feet of a jail, contrary to §§ 161.16(2)(b)(1), 161.41(1)(cm)(1), 161.49(1)(2)(a), 161.16(2)(b)(1), 161.41(1m)(cm)(1) and

161.49(1)(2)(a), STATS. (1993-94). She also appeals from an order denying her postconviction motion, which sought sentence modification. She claims the trial court erroneously exercised its sentencing discretion because it: (1) failed to consider her cooperation in the prosecution of Danny Connor as a relevant sentencing factor; (2) imposed an excessive and unduly harsh sentence; and (3) relied on inaccurate information when it imposed sentence. Because the trial court properly exercised its sentencing discretion, we affirm.

I. BACKGROUND

On February 2, 1996, Scruggs was arrested for selling drugs out of a house that she shared with her boyfriend, Danny Connor. She was originally charged with delivery of a controlled substance (cocaine) within 1,000 feet of a jail and possession of a controlled substance (cocaine) with intent to deliver within 1,000 feet of a jail; each charge alleged that the offense involved "more than five grams, but not more than fifteen grams" of cocaine. Pursuant to plea negotiations, the second charge was reduced to "less than five grams." In exchange for the amendment of charges, Scruggs agreed to testify against Connor, who had been charged with first-degree intentional homicide. Connor had asked Scruggs if she would kill a man (Albert Thompson) who was seated in an Ameritech van, who Connor mistakenly believed was an undercover officer conducting surveillance of his drug dealing operation. Scruggs said no. Scruggs also observed Connor solicit a thirteen-year-old to shoot Thompson. The State agreed to ask the sentencing court to consider Scruggs's cooperation as a witness against Connor as a mitigating factor.

On April 24, 1996, Scruggs entered guilty pleas to the delivery count and the amended possession count. In May 1996, she testified for the State against

Connor, who was convicted. On July 10, 1996, Scruggs was sentenced. At the sentencing hearing, the State asked that Scruggs's cooperation as a witness be taken into consideration when the court imposed its sentence. The State recommended twelve-year concurrent sentences on the charges and that Scruggs receive "some consideration for her testimony." The court sentenced Scruggs to ten years in prison on each count to be served consecutively. Scruggs filed a postconviction motion seeking sentence modification, which was denied. She now appeals.

II. DISCUSSION

A. Consideration of proper sentencing factors.

Scruggs contends that the trial court erroneously exercised its sentencing discretion because it failed to consider her cooperation with the prosecution of Connor as a mitigating factor. We are not persuaded.

We review a challenge to a sentence under the erroneous exercise of discretion standard. *See* ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560-61 (1980). A trial court erroneously exercises its sentencing discretion if it fails to consider the proper factors in imposing sentence. The three primary factors that a sentencing court must consider include: the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The trial may also consider:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational

> background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of the pretrial detention.

State v. Borrell, 167 Wis.2d 749, 773-74, 482 N.W.2d 883, 892 (1992) (citation omitted). After reviewing the record, we conclude that the trial court considered the relevant factors and did not erroneously exercise its discretion.

The sentencing transcript demonstrates that the trial court considered the nature of the crime–drug dealing and drug possession with intent to deal at a drug house in Milwaukee. The trial court also found significant the fact that a homicide relating to the drug dealing occurred and that Scruggs continued to sell the drugs even after the murder. The record also shows that the trial court considered Scruggs's character and rehabilitative needs. The trial court noted her lack of a prior record, her long history of sexual abuse from others, and her possible alcohol abuse. The trial court expressed concern that Scruggs was easily controlled by Connor. The trial court noted that the community needed to be protected from Scruggs because another Danny Connor might convince her to be a drug dealer again due to her weakened and impaired state.

Our review of the record reveals that the trial court considered the proper factors. Although the trial court did not specifically note that Scruggs cooperated with Connor's prosecution, the trial court was aware of this fact as it noted Scruggs's role in relation to Connor and the homicide. The trial court was not impressed by the fact that Scruggs refused to do the killing, commenting that "for a citizen to respond to someone else that I'm not going to kill another citizen for, you know, I don't think they should get any brownie points, because that should be just as easy as opening and closing our eyes to say no to killing another human being."

Therefore, we reject Scruggs's claim that the trial court erroneously exercised its sentencing discretion on this basis.

B. Unduly Harsh or Excessive.

Scruggs next claims that the ten-year consecutive sentences were unduly harsh or excessive for a first-time offender who was convicted on crimes involving only $120 of cocaine. We are not persuaded.

A sentence is harsh and unconscionable only where 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. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). The sentence Scruggs received does not fall into this category. The maximum sentence on each count was fifteen years. The trial court imposed only ten years on each count. Given her involvement in running a drug house, the fact that this drug house was connected to a homicide of an innocent victim, and her willingness to continue selling drugs even after the drug-related homicide ordered by her boyfriend, the sentence imposed is not unduly harsh or excessive. The penalties set by the legislature in this area are not based on how many times a drug dealer is caught or convicted and are not based on the dollar value involved. Scruggs faced a potential of a maximum of thirty years in prison for her crimes. She received twenty years. The trial court did not erroneously exercise its discretion here.

C. Inaccurate Information.

Last, Scruggs claims the trial court relied on inaccurate information at sentencing because it misunderstood the plea agreement. Her argument is that

the State was not recommending a twelve-year sentence on each count (concurrent), but that the recommendation was for something less than that in consideration for her testimony. Scruggs contends that the trial court believed the State was recommending the twelve-year sentence, and not "something less than that."

A defendant who requests resentencing based on a claim of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *See* ***State v. Johnson***, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990).

Scruggs has failed to meet the second prong of this burden and, therefore, we reject her claim. She has not proven that the trial court actually relied on the State's sentencing recommendation when it imposed the sentence. We glean from the record that the trial court did not rely on the State's recommendation and, therefore, even if the trial court did not understand the plea negotiation, Scruggs was not prejudiced.

Scruggs asserts that the plea negotiation called for a recommendation of something less than twelve years on each count (concurrent) in light of her testimony which helped convict Connor. The trial court imposed ten years on each count, consecutive, for a total of twenty years. It did so noting that it was not impressed by Scruggs's conduct of refusing Connor's request to commit the homicide and that Scruggs's willingness to continue the drug dealing operation even after the homicide was a threat to the community. Based on this review, we are convinced that the trial court did not feel the State's recommendation was appropriate punishment for the crimes and disregarded it in favor of a more lengthy sentence.

Accordingly, Scruggs has failed to show any evidence that the trial court actually relied on any inaccurate information in imposing sentence. Therefore, we reject Scruggs's request for resentencing.

By the Court.—Judgment and order affirmed.

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