COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0561-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ARTURO MELENDEZ,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Arturo Melendez appeals from a trial court judgment entered after he pleaded guilty to first-degree reckless homicide, party to a crime, and first-degree reckless injury, party to a crime, in violation of §§ 940.02(1), 940.23(1), and 939.05, STATS. Melendez also appeals from the order denying his motion for postconviction relief. Melendez pleaded guilty after

entering into a plea agreement. He claims the prosecutor breached the plea agreement by recommending the maximum sentence to the trial court on count one, after agreeing not to request any maximum sentences. He also believes the trial court erroneously exercised its discretion in sentencing because his sentences were disproportionately harsh and excessive when compared to those received by his accomplices. Because we conclude the prosecutor did not breach the plea agreement and because the trial court properly exercised its discretion in sentencing, we affirm.

I. BACKGROUND.

Melendez's criminal charges stem from his involvement in a gang shooting that occurred on September 6, 1994. The undisputed facts are that Melendez, along with Jesus Flores, Paul Brigantti, and Richard Jagiello, left a party seeking to shoot members of the Latin Kings, an opposing gang.[1] The four men walked down a street where they expected to encounter members of the Latin Kings. Melendez and Flores were on one side of the street and the other two men were on the opposite sidewalk. All four had been drinking alcohol and/or smoking marijuana, and all four had guns. Upon seeing four men who seemed to be Latin King gang members by their appearance and their comments, Melendez and his three companions started shooting at the other four men, with Flores and Melendez shooting first, followed by the shots of the other two. One man who was shot at, Sandro Fuentes, was killed, and two others who were shot at were

[1] Melendez testified at the trial of Flores, against the advice of his attorney, whom he subsequently fired. His account of the events is essentially the same as that contained in this opinion, except that he asserts that Flores was not one of the four men present that evening.

injured. It was later determined that the bullet killing Fuentes came from a .357 revolver. Flores was the only person carrying this type of weapon.

Melendez was originally charged with one count of first-degree intentional homicide and two counts of attempted first-degree intentional homicide. He agreed to plead guilty to one count of first-degree reckless homicide and two counts of first-degree reckless injury, for which the maximum sentences are forty years, ten years and ten years respectively. In exchange for his guilty pleas to the amended charges, the assistant district attorney advised the trial court: "… [the defense attorney] asked me if I would recommend the maximum, and I told him that I would not say the maximum. The word 'maximum' will not come out of my mouth."

At sentencing, held approximately ten days later, the prosecutor, in addressing the sentencing issue, told the trial court: "I think a reasonable figure in this case, however, is somewhere in the area forty-five to fifty years, so that this figure is, I believe, less than the maximum." Later the prosecutor, in discussing the need to protect the community, said that the actions of the appellant called for a "substantial period of incarceration, and I believe that the figure that I have suggested to the Court is forty-five to fifty years is appropriate." The trial court, in the course of sentencing Melendez to the maximum term of forty years' imprisonment on the first count, five years' imprisonment consecutive to the first count on the second count, and seven years of probation on the remaining count, to be served consecutive to count two, responded to the State's sentencing recommendation by remarking: "The State hit it right on the money."

Following his sentencing, Melendez filed a *pro se* postconviction motion, seeking the appointment of a successor public defender. The appointment

was opposed by the public defender's office and Melendez was not appointed counsel until this court directed the Public Defender to appoint new counsel for Melendez. Eventually, a revised postconviction motion was filed, alleging that the prosecutor breached the plea agreement by recommending a sentence of forty-five to fifty years, and claiming that the trial court erroneously exercised its discretion in sentencing because of the extreme disparity between the sentences of the four participants in the shooting, particularly when it was established that Melendez did not directly murder the victim. The motion was denied and this appeal follows.

II. ANALYSIS.

A. Breach of plea agreement.

Generally, when there is a claim that a prosecutor violated the terms of a plea agreement and the determination does not turn on a question of fact, the question, as here, is one of law to be reviewed *de novo*. *See* ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). Additionally, ***State v. Poole***, 131 Wis.2d 359, 394 N.W.2d 909 (1986), established that "the appropriate remedy for the state's breach of its agreement is resentencing." ***Id.*** at 365, 394 N.W.2d at 911-12.

Melendez argues that the prosecutor breached the plea agreement because her request for a sentence of forty-five to fifty years was more than the maximum for the count of first-degree reckless homicide, and she had promised not to ask for any maximum sentences. As further evidence that the State was asking for the maximum on the first charge, Melendez argues that the trial court clearly perceived that the State was asking for the maximum because the trial court remarked while sentencing him to the maximum sentence on count one, that "the State hit it right on the money." We do not agree.

While it is true that in this state a prosecutor is duty bound not to "'taint[] the sentencing process,'" ***id.*** at 364, 394 N.W.2d at 911 (citation omitted), and, "a prosecutor may not render less than a neutral recitation of the terms of the plea agreement," ***id.***, here, the district attorney did neither. The assistant district attorney's original agreement reserved the right to make a sentencing recommendation at the time of sentencing, and the only requirement of the negotiation was that she "would not be recommending the maximum sentence." Further, at the guilty plea proceeding, she advised both the trial court and the defense attorney that "… I am not going to commit myself to a number of years at this point in time and that was not part of the negotiations."

It is apparent from the context of her statements at the time of sentencing that the district attorney was giving to the court a cumulative range of years for all three charges as her sentencing recommendation. Although her range exceeded the maximum for the first count, her recommendation was for all three counts. She never told the court she was recommending forty years on the reckless homicide, nor did she make any specific recommendation on the other two charges.

The maximum sentence for all three crimes to which Melendez pleaded guilty is sixty years. The district attorney did not recommend a sixty-year sentence; hence, the district attorney did not recommend the maximum. As a consequence, the prosecutor kept her promise and did not breach the agreement.

Although Melendez chooses to interpret the trial court's comment that "the State hit it right on the money" as an adoption of what he views as the State's request for a maximum sentence, there is another more obvious interpretation of the trial court's comment. It is apparent that the trial court agreed

with the number of years the State was recommending and then independently chose to divide up that figure by giving Melendez the maximum sentence on the first charge. We conclude that the trial court's comments, which are ambiguous at best, do not support Melendez's contentions. Only one set of numbers was recommended to the trial court by the State. It is apparent the trial court accepted the range of numbers and applied it according to its own determinations. Thus, we conclude that the trial court did not misunderstand the State's recommendation and that Melendez is not entitled to be resentenced.

B. Harsh and excessive sentence.

Sentencing is generally the exclusive province of the trial court, and the appellate court is loath to disturb the trial court's sentencing decisions unless the appellant proves that the trial court erroneously exercised its discretion. *See* ***State v. Echols***, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640 (1993), and ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). The procedure for a challenge to a sentence based upon a claim of a harsh and excessive sentence is a two-step process. First, the appellate court must determine whether the trial court properly exercised its discretion in imposing sentence, and then, the appellate court looks to see if the trial court erroneously exercised its discretion by imposing an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984).

Melendez contends that the trial court erroneously exercised its discretion when sentencing him. His claim is rooted in his belief that the disparity between his sentences and those of his co-participants makes his sentence harsh and excessive. While Melendez concedes that disparate sentences between co-actors do not always amount to a denial of equal protection, nor always violate

the requirement that sentences not be harsh or excessive, Melendez argues that the acute disparity of sentences in this case is so great as to render his sentences unduly harsh and excessive. Melendez relies primarily on the fact that the sentences for the four men involved in this shooting ranged from ninety to zero years. He finds his sentence to be particularly harsh because it is undisputed that his gun was not the murder weapon, and the only other charged participant who was not directly responsible for the murder was given a sentence of twenty years.[2] We are not persuaded.

The three primary factors to be considered by the trial court at sentencing are the gravity of the offense, the character of the accused, and the need for the protection of the public. *See* ***State v. Mosley***, 201 Wis.2d 36, 43-44, 547 N.W.2d 806, 809 (Ct. App. 1996). The transcript reveals that the trial court properly considered the relevant sentencing factors. The trial court made note that, at the time of the offense, the four set out to "essentially hunt[] for other human beings" while armed and with the intent to harm or disable opposing gang members out of a desire for revenge. The trial court considered these acts to be extremely serious and, in the postconviction decision, in discussing the need for the protection of the public, stated, "the absolute need for community protection from this type of activity [is] of paramount importance in the imposition of sentence in this case."

Also, the distinctions between Melendez and the co-actor, Brigantti, who received a twenty-year sentence, are considerable. During sentencing, the trial court took notice of the fact that Melendez had a prior felony and

[2] The fourth claimed participant, Jagiello, was not charged, for reasons that are not apparent in this appellate record.

misdemeanor record. Melendez also had a more serious criminal record than did Brigantti. And, more importantly, unlike Brigantti, Melendez did not assist the State in the prosecution of Flores. In fact, Melendez testified for Flores at his jury trial that Flores was not present during the shooting. A review of Melendez's sentences reveals that he was appropriately sentenced based upon the totality of his individual circumstances. Thus, we conclude that the difference in the sentences in this case does not give rise to a claim of unequal treatment, nor are we convinced that Melendez's sentences are harsh or excessive.

A trial court's sentence will only constitute an erroneous exercise of discretion "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." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 452, 461 (1975). This was a premeditated gang-related shooting which took place on a public street where one man was killed and two injured. Melendez was under the influence of either or both alcohol and illicit drugs when he, while armed, sought to find opposing gang members to shoot. Given this background, his sentences do not shock public sentiment nor violate the judgment of reasonable people.

By the Court.—Judgment and order affirmed.

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