COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2606-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON P. CANTWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, Vergeront and Frankel,[1] JJ.

PER CURIAM. Jon Cantwell appeals from a judgment convicting him of two counts of attempted homicide and one count of escape. He also

[1] Circuit Judge Mark A. Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

appeals from an order denying his motion for postconviction relief. The issue is whether the trial court properly denied Cantwell's motion to continue his sentencing hearing. We conclude that it did. Accordingly, we affirm.

Cantwell was found guilty of escape and attempted homicide for his role in attacking two sheriff's deputies and fleeing from jail. After the jury returned its verdict, the trial court informed Cantwell that it would proceed to sentencing after a short break. Cantwell moved to continue the sentencing hearing, but the trial court denied the motion, reminding Cantwell's attorney that it had previously stated that it would proceed immediately to sentencing if Cantwell were convicted. Cantwell informed the court that he was unaware of this fact, which apparently had been told to his attorney in chambers when he was not present. The trial court nevertheless proceeded to sentence Cantwell to two fifty-year terms of imprisonment on the attempted homicide counts, to be served consecutively to a previously imposed sentence of seventy-five years, and to a five-year term of imprisonment for escape, to be served concurrently.

The decision to grant or deny a continuance is committed to the sound discretion of the trial court. ***State v. Echols,*** 175 Wis.2d 653, 680, 499 N.W.2d 631, 640 (1993), *cert. denied*, 510 U.S. 899 (1993). "A denial of a continuance potentially implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law." ***State v. Wollman***, 86 Wis.2d 459, 468, 273 N.W.2d 225, 230 (1979). In determining whether the trial court misused its discretion, we must balance "the defendant's constitutional right to adequate representation by counsel [and due process] against the public interest [in] the prompt and efficient administration of justice." ***Id.*** In so doing, we consider: (1) the length of the delay requested; (2) whether other continuances have been requested and received by the movant; (3) the inconvenience to the

parties, witnesses and the court; (4) whether the delay seems to be for legitimate reasons; and (5) other relevant factors. ***Id.*** at 470, 273 N.W.2d at 231.[2]

Balancing Cantwell's rights against the public interest in prompt and efficient administration of justice, we conclude that the trial court's decision to deny a continuance of the sentencing hearing was an appropriate exercise of discretion and did not violate Cantwell's rights to due process or to the effective assistance of counsel.

The convenience of the court and the State mitigated in favor of immediate sentencing. Cantwell was incarcerated at Green Bay Correctional Institution and would have to travel a long distance back from Green Bay for sentencing in Richland Center at a later date. Cantwell had already attempted to escape from incarceration twice, and transportation to and from Green Bay Correctional Institution was especially risky for Cantwell because of his history. The trial judge was from Crawford County, rather than Grant County, and would also have to return for a sentencing hearing held at a later date. It was much more convenient for the trial court and the State to sentence Cantwell immediately after the verdict was returned. *Cf.* ***Wollman***, 86 Wis.2d at 470, 273 N.W.2d at 231.

Cantwell's counsel had notice of the sentencing hearing and had an opportunity to confer with Cantwell and prepare for it.[3] At a status conference

[2] The sixth consideration listed in ***State v. Wollman***, 86 Wis.2d 459, 470, 273 N.W.2d 225, 231 (1979), "[w]hether the 'lead' counsel has associates prepared to try the case in his absence," does not apply in this case.

shortly before the trial began, counsel was advised that the trial court would proceed with sentencing if a guilty verdict were returned. Counsel testified at the postconviction motion hearing that he had adequate time to prepare for sentencing and that he had gone over a prior presentence investigation report with Cantwell. He further testified that he asked Cantwell if he knew of anyone who would speak on his behalf at sentencing, but that Cantwell did not. We conclude that trial counsel did not need a continuation to prepare for sentencing.

Although Cantwell argues that he was not prepared to exercise his right to allocution because his counsel did not prepare him before he spoke on his own behalf at the sentencing hearing, counsel testified at the postconviction motion hearing that he did not prepare Cantwell to speak at sentencing because he did not expect him to speak and that Cantwell spoke against his wishes. He further testified that he did not believe that Cantwell would have followed his directions even if he had prepared him to speak because he was not able to control his emotions and had previously made "intemperate" remarks. There is no indication of what, if anything, Cantwell would have done differently if he had had additional time to prepare for sentencing.

We conclude that the trial court properly exercised its discretion in denying the motion to continue the sentencing hearing. Cantwell posed a serious flight risk and it was much more convenient to hold the sentencing hearing

[3] We note that Cantwell may have been personally apprised that sentencing would occur immediately if he were convicted. At the end of the third day of trial, counsel for Cantwell's co-defendant had a discussion with the trial court about the trial court's previous statement that the parties would be going immediately to sentencing if guilty verdicts were returned. Cantwell was present during the discussion on jury instructions which occurred shortly before and there is no indication from the record that Cantwell did not continue to be present when the discussion regarding sentencing took place. Our decision, however, does not rely on the fact that Cantwell may have been aware that sentencing would occur immediately if he were convicted.

immediately. Because counsel had ample opportunity to consult with Cantwell about the sentencing hearing and prepare himself for it, the trial court's decision to proceed was not so "fundamentally unfair" to Cantwell as to violate his right to due process, nor did it deprive Cantwell of the effective assistance of counsel. *See* ***Wollman***, 86 Wis.2d at 470, 273 N.W.2d at 231.

Cantwell next argues that the trial court should have granted his request to prepare a new presentence investigation report. The trial court relied on a prior presentence investigation report because Cantwell had been incarcerated since it was prepared. Although the report did not contain Cantwell's version of the current crime, the trial court was informed of Cantwell's version by trial counsel and Cantwell during sentencing. The prior presentence investigation report was prepared the year before the sentencing on these convictions. Given the short time that had elapsed, the trial court did not err in relying on the prior presentence investigation report.

By the Court.—Judgment and order affirmed.

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