COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP96-CR **Cir. Ct. No. 2016CF3077**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAYRIMUS FRANKIE PORTER,

DEFENDANT-APPELLANT.

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

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 Dayrimus Frankie Porter appeals a judgment entered after he pled guilty to two counts of armed robbery as a party to a crime. He also appeals an order denying postconviction relief. He claims he is entitled to sentence modification based on the disparity between his concurrent twenty-five-year sentences and the sentences imposed on his co-defendants Cameron Green and Antown Smith who received, respectively, a sixteen-year term and a seventeen-year term for their roles in the two armed robberies. We disagree and affirm.

Background

¶2 The State charged Porter and Green, as parties to a crime, with three counts of armed robbery and one count of attempted robbery. The State charged Smith, as a party to a crime, with two of the armed robberies as well as the attempted armed robbery. Each offense involved allegations that suspects entered a business establishment in Milwaukee, Wisconsin, displayed an object that appeared to be a handgun, and demanded money and property from an employee. Although the State charged the three men jointly in a single complaint, the State prosecuted the men separately, and each man's case was heard by a different circuit court judge.

¶3 Porter was the first of the three men to resolve the pending charges. Pursuant to a plea bargain, he pled guilty to two of the armed robbery counts against him in this case. The parties agreed that the third armed robbery and the attempted armed robbery would be dismissed and read in for sentencing purposes and that five other armed robberies would be treated as uncharged read-in

offenses. Additionally, Porter pled guilty to a charge of substantial battery pending against him in a separate and unrelated case.[1]

¶4 Porter proceeded to sentencing. For the armed robberies, the circuit court imposed two concurrent twenty-five-year terms of imprisonment, each bifurcated as fourteen years of initial confinement and eleven years of extended supervision. The circuit court also imposed a consecutive twelve-month jail sentence for the substantial battery conviction.

¶5 Smith subsequently resolved his pending charges short of trial. Pursuant to a plea bargain, he, like Porter, pled guilty in this case to two counts of armed robbery as a party to a crime. Smith additionally pled guilty to a charge of first-degree recklessly endangering safety pending in a separate case. He and the State agreed that the attempted armed robbery charge in this case, along with seven bail jumping charges and two theft charges, would be dismissed and read in for sentencing purposes. The agreement's terms also included treating five uncharged armed robberies as read-in offenses at sentencing.

¶6 For the two armed robbery convictions, Smith received two consecutive evenly bifurcated eight-year terms of imprisonment, resulting in an aggregate of eight years of initial confinement and eight years of extended supervision. He received an additional consecutive and evenly bifurcated eight-year term of imprisonment for recklessly endangering safety.

[1] Porter does not appeal the judgment of conviction for substantial battery and that matter is not before us. Accordingly, we discuss it only to the extent that it is relevant to our review of the issues raised in regard to the sentences for armed robbery.

¶7 Green also pled guilty in this case to two counts of armed robbery as a party to a crime. Pursuant to a plea bargain, the remaining armed robbery and attempted armed robbery charges were dismissed and read in for sentencing purposes. He and the State further agreed to treat six uncharged armed robberies as read-in offenses. Unlike Porter and Smith, Green was not facing pending charges in another case.

¶8 At Green's sentencing, Green received an aggregate of nine years of initial confinement and eight years of extended supervision. Specifically, for one of the armed robberies, the circuit court imposed a nine-year term of imprisonment bifurcated as five years of initial confinement and four years of extended supervision; for the other armed robbery, the circuit court imposed a consecutive, evenly bifurcated eight-year term of imprisonment.

¶9 After all three men were sentenced, Porter moved for postconviction relief. He asserted that: (1) the shorter aggregate sentences imposed on his two accomplices for the armed robberies that the three men committed together constituted a new factor warranting sentence modification; (2) his sentences were unduly harsh when compared to his accomplices' sentences; and (3) the disparity between his sentences and those of his accomplices denied him equal protection. The circuit court rejected his arguments, and he appeals.

Discussion

¶10 We first consider the claim that Porter is entitled to relief because the sentences imposed on Smith and Green constitute a new factor. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the

parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***id.***, ¶33.

¶11 We must reject Porter's new factor claim. It runs afoul of a well-settled rule, namely, "[t]he fact that a different judge imposed a lesser sentence upon an accomplice is not a 'new factor.'" *See* ***State v. Studler***, 61 Wis. 2d 537, 541, 213 N.W.2d 24 (1973); *see also* ***State v. Crochiere***, 2004 WI 78, ¶15, 273 Wis. 2d 57, 681 N.W.2d 524 (stating that "a new factor has been held not to include ... disparity in sentencing between co-defendants"), *abrogated on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶¶48-52 & n.11

¶12 Porter asserts that the foregoing rule is inapplicable to him because the cases in which courts have applied it involved situations in which the defendant sought relief "due to disparate sentences on the basis of only <u>one</u> codefendant's sentence." (Emphasis by Porter.) We are not persuaded. Porter fails to identify any decision *declining* to apply the ***Studler*** rule on the ground that multiple accomplices received lesser sentences than the defendant. This failure is unsurprising because the reasons for the rule apply regardless of the number of codefendants sentenced for a crime. As the ***Studler*** court explained, "the legislature intended that individual criminals ... were to be sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***Id.***, 61 Wis. 2d at 542 (citing ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971)). Therefore, when disparate sentences are imposed on codefendants, the disparity is not a new factor for any of the offenders: "imposition of a lesser sentence upon an accomplice by a different judge does not *ipso facto* constitute such lesser sentence as the common denominator for the

sentence to be imposed on all parties to a crime." *See* ***Studler***, 61 Wis. 2d at 541-42 (italics added).

¶13 We are satisfied that Porter fails to show any applicable exception to the rule that excludes sentencing disparity from the kinds of allegations that may be viewed as new factors.[2] Accordingly, we are bound by controlling authority to conclude that the sentences imposed on Porter's accomplices may not be considered a new factor here. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶14 Porter next argues that the circuit court wrongly rejected his claim that he received an unduly harsh sentence. A sentence is unduly harsh "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* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). A sentence well within the statutory limits is presumptively not unduly harsh. ***Id.***, ¶32.

¶15 Here, Porter faced eighty years of imprisonment and $200,000 in fines upon his convictions for two armed robberies. *See* WIS. STAT. §§ 943.32(2)

[2] We observe that in ***State v. Studler***, 61 Wis. 2d 537, 213 N.W.2d 24 (1973), the supreme court rejected a new factor claim based on sentencing disparity in circumstances involving multiple codefendants. *See* ***id.*** at 539, 543. The opinion reflects that the defendant, who received a ten-year sentence, pursued a new factor claim in circuit court based on the five-year sentence imposed on one of two accomplices. *See* ***id.*** at 541. On appeal, the defendant expanded the argument to include a claim for relief based on the allegation that he "had no worse record than his codefendants, both of whom received lighter sentences." *See* ***id.*** at 543. The ***Studler*** court stated that the defendant's assertion on appeal "was not part of the record, but assuming it to be true, it is, nonetheless, unpersuasive." *See* ***id.***

(2015-16),[3] 939.50(3)(c). His concurrent twenty-five-year terms of imprisonment were far less than the law allowed. Therefore, to prevail, Porter must overcome the presumption that his sentences were not unduly harsh. He fails to do so.

¶16 We review a circuit court's conclusion that a sentence was not unduly harsh for an erroneous exercise of discretion. *See* ***State v. Cummings***, 2014 WI 88, ¶45, 357 Wis. 2d 1, 850 N.W.2d 915. The challenger's burden is a heavy one, consistent with our strong public policy against interfering with the circuit court's sentencing discretion. *See* ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶17 A circuit court exercises its broad sentencing discretion guided by well-established standards. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-38, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court is required to identify the sentencing objectives, which may "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *See* ***id.***, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court may also consider a wide range of other factors relating to the defendant, the offense, and the community. *See* ***id.***

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶18 When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Moreover, if the defendant thereafter pursues an appeal, a reviewing court will search the entire record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***McCleary***, 49 Wis. 2d at 282.

¶19 Here, the circuit court identified deterrence, community protection, and rehabilitation as the primary sentencing goals, and the circuit court thoroughly and thoughtfully discussed the sentencing factors it deemed relevant to achieving those objectives. The circuit court began by considering the gravity of the offenses, acknowledging that no one was injured during the robberies and crediting Porter for choosing to use a BB gun so "no one would get killed." Nonetheless, the circuit court deemed the offenses aggravated given "the sheer number" of armed robberies at issue and the fear that they instilled in the victims.

¶20 The circuit court then turned to Porter's character, which the circuit court described as "challenging." The circuit court acknowledged that Porter had accepted responsibility for his crimes, but the circuit court pointed out that he had the opportunity after each crime to decide that he would "not do[] that anymore" and the circuit court lamented that Porter did not make that choice. The circuit court considered that as a juvenile, Porter had been adjudicated delinquent for several matters, including a burglary, and that he had a prior conviction for burglary as an adult. The circuit court commended Porter, however, for successfully completing probation following his burglary conviction and then "remain[ing] crime free" for approximately eighteen months before participating in the crime spree at issue here.

¶21 The circuit court took into account that Porter suffered from a mental illness and stated that he had apparently "been on [his] medication ... so that's good." The circuit court went on to observe that Porter appeared intelligent but did not have a high school diploma or its equivalent and that Porter had not offered any information demonstrating that he ever held legitimate employment.

¶22 In considering the need for community protection, the circuit court returned to the nature of the weapon used to commit the armed robberies and noted that, notwithstanding the use of a BB gun, the crimes created "a dangerous circumstance: psychologically [and] physically for everybody that's involved." The circuit court pointed out that "somebody else in the store might [have] had a real gun, and then real bullets could have started flying, and Lord knows what would have happened after that." The circuit court also observed that crimes committed against local businesses imperil their existence, potentially "making it even harder for the people that work there to [earn] a living." Finally, the circuit court determined that it could advance public safety by sending a message that "when you commit a whole series of armed robberies, that there's a pretty serious penalty.... [T]he public has a strong interest in ... general deterrence."

¶23 In sum, the circuit court considered relevant factors in furtherance of appropriate sentencing goals and then imposed lawful sentences. Accordingly, the circuit court properly exercised its sentencing discretion in this case.

¶24 Porter nonetheless contends that his sentences are unduly harsh because "Smith's criminal record and character [are] far worse than Porter's" and because Porter's "culpability and character [are] no more severe or serious than Green's." Even if Porter's assertions were correct, they would not establish that Porter's sentences are shocking or offensive to a reasonable person's sensibilities.

See ***Grindemann***, 255 Wis. 2d 632, ¶31. As the State points out, however, Porter's assertions are not correct.

¶25 Turning first to Smith, the record shows that, unlike Porter, Smith had no criminal history at the time of his sentencing beyond the crimes for which he was before the court. Indeed, during Smith's sentencing the circuit court observed that he "hadn't been in trouble with the law before" nor had he previously "been in this kind of lifestyle," and the circuit court stated that it was fashioning sentences in light of his "background and lack of record." In assessing Smith's character, the circuit court took into account that he was married and supporting three children, had a high school diploma, and had attended college. Further, although Porter asserts that his "level of culpability ... is far less aggravating than Smith's," the record shows that Smith—unlike Porter—never acted as the gunman during the armed robberies but served solely as the driver of the getaway car.

¶26 Green, again unlike Porter, had no prior criminal record, and while Green had contacts with the criminal justice system, the record reflects that those contacts did "not even ris[e] to the level of crimes." Also unlike Porter, Green was a high school graduate and had an employment history. Finally Green, unlike Porter, was not facing sentencing for any crimes in addition to the armed robberies committed in this case. In sum, the record simply does not support Porter's effort to equate his record, character, and culpability with those of Smith and Green.

¶27 Porter next asserts that the sentencing court in Green's case "materially erred" by finding Green's situation less "serious and aggravated" than Porter's. The circuit court in the instant case considered and rejected that argument, explaining: "[w]hether [the judge that sentenced Green] erred or not ...

is not the issue here. [The issue] is how *this* court viewed Porter and his criminal activity – past and present, his character, and the protection needed for the public." The circuit court was correct. Even assuming that the sentencing court in Green's case was too generous in assessing the severity of Green's conduct, "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975) (citation omitted).

¶28 Porter also cites ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990), as support for his claim that his sentences are unduly harsh. That case does not aid him. In ***Ralph***, the circuit court modified the defendant's sentence after an accomplice received a more lenient disposition. ***Id.*** at 435-36. The circuit court stated that it wanted the defendant's sentence to be similar to the accomplice's sentence, explaining that the accomplice not only committed the same crime under the same circumstances, but also had a background consistent with the defendant's. *See* ***id.*** at 436. The State appealed and we affirmed, concluding that the circuit court properly exercised its discretion in modifying the defendant's sentence. *See* ***id.*** at 434-35. That conclusion does not in any way suggest that the circuit court in this case erroneously exercised its discretion by declining to order a sentence modification.

¶29 The circuit court here explained in postconviction proceedings that it did not view Porter's background as similar to that of Green and Smith, noting particularly that Porter, unlike his co-defendants, had a "substantial" prior record. Porter offers several reasons why he believes that the circuit court should have discounted his prior record when assessing his postconviction claim, but a circuit court has wide discretion to determine the weight to assign to each sentencing factor. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d

20. In the circuit court's view, Porter's rehabilitative needs and culpability warranted an aggregate twenty-five-year term of imprisonment, regardless of the sentences imposed on his accomplices. That decision rested in the circuit court's discretion and does not render the sentences Porter received unduly harsh. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994).

¶30 Last, Porter argues that the disparity between his sentences and those imposed on Smith and Green "deny [Porter] equal protection under the law." We reject this argument. ***Ocanas*** establishes that sentencing disparity does not amount to a denial of equal protection unless the circuit court erroneously exercised its sentencing discretion. *See* ***id.***, 70 Wis. 2d at 187. As we have seen, the circuit court sentenced Porter based on appropriate and relevant factors and properly exercised its sentencing discretion. Accordingly, Porter's equal protection claim must fail. *See* ***id.***

By the Court.—Judgment and order affirmed.

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