COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1921-CR **Cir. Ct. No. 99CF4345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELO J. EWING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed and cause remanded with directions*.

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

¶1 PER CURIAM. Angelo J. Ewing appeals from the judgment of conviction entered after he pled guilty to the crime of armed robbery, party to a

crime, contrary to WIS. STAT. §§ 943.32(1) and (2),[1] and 939.05(1999-2000).[2] He also appeals from the trial court's order denying his postconviction motion seeking sentence modification. Ewing contends: (1) his thirty-five year sentence is unduly harsh and unconstitutionally disparate from his co-defendant's twenty-year sentence; (2) his co-defendant's twenty-year sentence constitutes a "new factor" entitling him to re-sentencing; and (3) his trial counsel was ineffective for failing to make adequate sentencing recommendations. We disagree and affirm.

I. BACKGROUND.

¶2 On July 29, 1999, Ewing and Keith Glass approached a man who was sitting in his automobile and talking on his cellular phone in the parking lot of a restaurant. Ewing pointed a gun in the victim's face and ordered him out of his 1998 Lexus. Ewing told him to lie on the pavement and look the other way as the two suspects drove from the scene.

¶3 The Lexus was recovered on August 19, 1999. The police found Glass's fingerprints on the outside of the driver's door and on a CD inside the Lexus. Two witnesses also came forward to state that Ewing had been seen driving the Lexus on a regular basis since it was stolen. Both Ewing and Glass were charged with armed robbery.

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[1] Although it is clear from the record that Ewing pled guilty to armed robbery, a Class B felony, contrary to WIS. STAT. § 943.32(1) and (2), the judgment of conviction in this case states that Ewing pled guilty to robbery with use of force, a Class C felony, contrary to WIS. STAT. § 943.32(1)(a). We remand this matter to the trial court for the clerk of courts to correct this scrivener's error. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that the trial court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 On March 21, 2000, Ewing pled guilty to the charge of armed robbery, as a party to the crime, and to the charge of escape that resulted from his escape from the House of Correction in January 2000. On June 23, 2000, the trial court imposed a thirty-five-year sentence on Ewing for the armed robbery conviction. On September 15, 2000, after a jury trial, the same trial court sentenced the co-defendant, Glass, to twenty years on his armed robbery conviction. Ewing moved to modify his sentence based on the sentence imposed on Glass, but on June 22, 2001, the trial court denied his motion.

II. ANALYSIS.

A. Ewing's sentence is constitutionally permissible.

¶5 Ewing first argues that he was denied his right to equal protection because he was punished differently than his co-defendant, Glass. His premise for this argument is that he and his co-defendant "have histories that are so symbiotic and entwined" that "[e]quality of treatment under the [F]ourteenth [A]mendment requires substantially the same sentence for substantially the same case histories."[3] While we agree that the guarantees of due process and equal protection require that no one shall be subject to a greater punishment than similarly situated persons, we disagree that Ewing and Glass were "similarly situated." Accordingly, we

[3] Equal protection is guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, § 1 of the Wisconsin Constitution. The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article 1, § 1 of the Wisconsin Constitution states, in relevant part: "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness."

conclude that the trial court did not erroneously exercise its discretion in sentencing Ewing to a greater term of imprisonment than Glass.

¶6 Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). There is a strong public policy against interfering with the sentencing discretion of the trial court. ***Id.*** Therefore, the burden is on the defendant to show some unreasonable or unjustified basis in the record for the sentence imposed. *See* ***id.*** at 622-23.

¶7 "[A] finding that there has been a denial of equal protection must rest upon a conclusion that the disparity was arbitrary or based upon considerations not pertinent to proper sentencing discretion." ***Ocanas v. State***, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975). "In short, insofar as the length of sentence (within the statutory maximum) is left to the sound discretion of the trial judge, there can be no denial of equal protection of the law unless that discretion has been abused." ***Id.*** As addressed in ***Jung v. State***, 32 Wis. 2d 541, 145 N.W.2d 684 (1966), persons convicted of the same crime need not receive the same penalties:

> In this context it has been held equal protection of the laws requires that in the administration of criminal justice no one shall be subjected for the same offense to a greater or different punishment than that to which other persons of the same class are subjected. However, this does not mean that persons convicted of the same crime cannot be given different sentences depending upon their individual culpability and the need for rehabilitation.
>
> In reviewing a sentence for an abuse of discretion, we start with the presumption that the trial court acted reasonably and with the requirement that the complainant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. Consequently, in the instant case there must be a showing that in determining

> the sentence of [the defendant] the trial court based its determination upon factors not proper in or irrelevant to sentencing, or was influenced by motives inconsistent with impartiality.

Id. at 548 (citations omitted).

¶8 Here, Ewing has failed to show any unjustifiable or unreasonable basis in the record for his sentence. He simply presumes that his sentence is unconstitutional because the trial court imposed a greater sentence than that of his "similarly situated co-defendant." However, as determined by the trial court, Ewing and Glass do not have "substantially the same case histories," and, therefore, Ewing is not entitled to "substantially the same sentence." *See* ***Ocanas***, 70 Wis. 2d at 186.

¶9 First, the sentencing record reveals that Ewing and Glass have significantly dissimilar criminal histories. At the time of sentencing, Ewing had been convicted of two misdemeanors as well as two felonies, while Glass had been convicted of only three misdemeanors. More importantly, one of Ewing's felony convictions involved the carjacking of an eighty-one-year-old individual at gunpoint. Ewing was still on probation for that carjacking when he put a gun to the present victim's head, ordered him to the ground and stole his automobile. Glass was not on probation at the time of the instant crime. This factor played a significant role in the trial court's analysis:

> A person has the right to walk the streets, drive in the City of Milwaukee, without the fear of somebody coming up … to them [sic], armed … and taking their [sic] property. People should have the right to feel safe, and you and your friends violated that, not only this time, but the last time that you were involved in this….
>
> And you've done it twice. And the first time you – that's what's the most egregious thing about this case….

> So the court would agree that … the armed robbery is obviously the most egregious – becomes the most egregious not only because the act itself is not tolerable in a civilized society, but that you did it when you were on probation for another armed robbery. I mean, what would it take? Everybody wants chances and chances and chances…. There's just so many chances.

¶10 Second, at co-defendant Glass's sentencing hearing, the trial court specifically noted that, due to Ewing's prior armed robbery, Glass and Ewing were not similarly situated for sentencing purposes:

> And when you look at this in its totality, I don't disagree that the other person who you were with, Ewing, is in a different position than you are, based upon the fact that he was on probation for an armed robbery – for a carjacking, and – and perhaps that this Court gave to that young man should certainly be different than – than your sentence, based upon you as an individual.

¶11 Finally, in denying Ewing's postconviction motion, the trial court again highlighted the differences between the records of Ewing and Glass, and correctly concluded that the co-defendants were not similarly situated:

> [T]he defendant and Glass were not similarly situated from the standpoint of their criminal records. [T]he defendant had four previous convictions for armed robbery, felony escape and two counts of resisting an officer. In contrast, Glass's prior convictions consisted of three misdemeanor convictions for battery, disorderly conduct and violating a restraining order. Glass was placed on probation for the battery offense; however, probation was revoked before the instant offense.
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> Although the defendant and Glass had both been given the benefit of probation, the defendant, unlike Glass, was placed on probation for carjacking an elderly victim at gunpoint.

¶12 We agree with the trial court's analysis. "[A] disparity in sentences does not, in and of itself, constitute a violation of due process or equal protection." ***State v. McClanahan***, 54 Wis. 2d 751, 757, 196 N.W.2d 700 (1972). Here, the disparity in the sentences of Ewing and Glass was justified by Ewing's prior

conviction for armed robbery – a crime for which he was still on probation at the time of his second carjacking. The trial court stated specific reasons for its conclusion, including "[t]he defendant's past record of offenses, prior probation which was ineffective, and the seriousness and contemptible nature of the offense." ***Ocanas***, 70 Wis. 2d at 185. Thus, the trial court's analysis demonstrates "reasoning based on facts that are of record … and a conclusion based on a logical rationale founded upon proper legal standards." *See* ***id.***

B. Ewing's co-defendant's sentence does not constitute a "new factor."

¶13 Next, Ewing asserts that the disparate sentence imposed on his co-defendant provides an alternate ground for sentence modification. Ewing argues that because he was sentenced in June of 2000 and Glass was not sentenced until September of 2000, the imposition of a twenty-year sentence in Glass's case constitutes a "new factor," which is highly relevant and was unknown to the trial court at the time of his sentencing. We disagree that Glass's sentence is relevant.

¶14 "A sentence can be modified to reflect consideration of a new factor." ***State v. Toliver***, 187 Wis. 2d 346, 361, 523 N.W.2d 113 (Ct. App. 1994). "Whether a set of facts is a 'new factor' is a question of law which we review without deference to the trial court." ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). "Whether a new factor warrants a modification of sentence rests within the trial court's discretion." ***Id.*** Finally, the defendant carries the burden to demonstrate the existence of a "new factor" by clear and convincing evidence. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989).

¶15 "[T]he phrase 'new factor' refers to 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). However, the case law since ***Rosado*** has limited the "new factor" standard to situations where the new factor frustrates the purpose of the original sentencing. ***Michels***, 150 Wis. 2d at 97. Thus, "[t]here must be some connection between the factor and the sentencing – something which strikes at the very purpose for the sentence selected by the trial court." ***Id.*** at 99.

¶16 Although sentencing of a "similarly situated" co-defendant is relevant to the sentencing decision, *see* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995), here, as we have previously discussed, Ewing and Glass were not "similarly situated." Thus, Glass's sentence was irrelevant. Further, the trial court individualized Ewing's sentence based on the relevant factors, such as the severity of the offense, the need to protect the community, and Ewing's rehabilitative needs. *See* ***Toliver***, 187 Wis. 2d at 363. Accordingly, because the disparity in sentences did not frustrate the sentencing court's original intent, Glass's sentence does not constitute a "new factor." *See* ***id.***

C. Ewing's trial counsel was not ineffective.

¶17 Finally, Ewing contends that his trial counsel was ineffective for failing to make an adequate sentencing recommendation. On the date of sentencing, June 23, 2000, Ewing was sentenced for three felony offenses – the

armed robbery in question, as well as escape and operating a motor vehicle without the owner's consent (OMVWOC).[4]

¶18 At the time of sentencing, pursuant to a plea negotiation, the prosecution refrained from recommending the length for Ewing's sentence with respect to the armed robbery conviction:

> Now, the big issue in this case is how much of the 40 years should he get for the armed robbery. I am urging it all run concurrent to each other. [W]hat I've discussed again with counsel this morning is I'm leaving that up to the Court. I'm going to be commenting on the factors the Court should consider, but I'm going to leave the length of that [armed robbery] sentence up to the court.

In response, after analyzing the relevant sentencing factors, Ewing's counsel did not recommend a specific term, but requested that any sentence imposed for the armed robbery conviction run concurrently with his other sentences. Nevertheless, the trial court imposed a thirty-five-year sentence for the armed robbery conviction to run consecutively to any other sentences. Ewing now claims, "Counsel's performance in failing to provide a recommendation constituting the shortest fair prison sentence was therefore deficient."

¶19 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice.

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[4] Ewing entered a plea to the escape charge on March 21, 2000 and had previously entered his plea to the earlier-committed OMVWOC offense. All three cases were consolidated for the purposes of sentencing.

Ewing was sentenced to five years for the OMVWOC conviction and three years for the escape conviction. The trial court ordered these sentences to run concurrently to any sentences Ewing was currently serving or would serve in the future. At the time of sentencing, Ewing had his probation revoked and was serving a ten-year sentence that was previously imposed and stayed. Ewing does not challenge these sentences on appeal.

Strickland v. Washington, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶20 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶21 We are not persuaded that the result of the proceeding would have been different had Ewing's trial counsel recommended a specific term. It is well-settled that the trial court is not bound by sentencing recommendations. *See* ***State v. Williams***, 2000 WI 78, ¶11, 236 Wis. 2d 293, 613 N.W.2d 132. Thus, Ewing was not prejudiced by trial counsel's allegedly deficient performance, because even if defense counsel had recommended a specific term, the sentence would have been the same. This is evidenced by the trial court's decision denying Ewing's postconviction motion:

> The defendant also urges that trial counsel was ineffective for failing to make a specific recommendation as to the length of incarceration…. The defendant fails to set forth what specific recommendation trial counsel should have made. Even if trial counsel had made a specific recommendation, the defendant acknowledges that the court would not have been bound by the same…. The court was well aware of the maximum penalty for this crime, and its sentence was based upon a consideration of all the relevant sentencing factors in this case. [C]ounsel was not ineffective in failing to make a specific recommendation under the circumstances.

Again, we agree with the trial court's analysis, and conclude that Ewing was not prejudiced by defense counsel's failure to recommend a specific term. Because we have concluded that Ewing was not prejudiced, we need not determine whether defense counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697 (stating that if the defendant fails to prove one prong, we need not address the other prong).

¶22 Based upon the foregoing reasons, we affirm the trial court's judgment and order and remand with directions that the trial court correct the sentence portion of the written judgment.

By the Court.—Judgment and order affirmed and cause remanded with directions.

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