

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2256-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-103

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHELLY L. FISHER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Green County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Shelly Fisher appeals her judgments of conviction for first-degree recklessly endangering safety and battery, each committed with a dangerous weapon and as domestic abuse. She also appeals an order denying her postconviction motion to withdraw her no contest pleas or, alternatively, to have the court impose the sentences jointly recommended by the parties. Fisher claims

the trial court erroneously exercised its discretion by refusing to honor the joint sentencing recommendation negotiated in the plea agreement and by sentencing her as if she had been convicted of the original charges rather than the reduced charges to which she pled. We conclude, however, that controlling precedent precludes the relief Fisher seeks.

¶2 Fisher shot her husband in the chest with a 12-gauge shotgun. She claimed the gun went off accidentally as she was hurriedly loading it to go deer hunting. Fisher's husband claimed that she shot him intentionally because she was angry that he was planning to move in with another woman. After the shooting, Fisher told her husband that she would call an ambulance, but instead called the leader of her motorcycle gang. The husband himself called 911 about fifteen minutes later. Fisher initially lied to the authorities about having shot her husband and having called the motorcycle gang leader. The police also recovered a four-inch knife from her purse.

¶3 The State charged Fisher with intentionally attempting to cause the death of another human being; the lesser-included offense of intentionally causing bodily harm to another person by conduct that creates a substantial risk of great bodily harm while using a dangerous weapon; obstructing a police officer; obstructing a conservation warden; and carrying a concealed weapon. The charges carried a combined potential penalty of fifty-six years. *See* WIS. STAT. §§ 939.32(1)(a), 940.01(1)(a), 939.63(1)(a), 940.19(6), 946.41, 939.51(3)(a), 29.951, and 941.23 (1997-98).¹

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 The parties eventually negotiated a plea bargain whereby Fisher agreed to enter no contest pleas to amended charges of recklessly endangering safety and battery, both by use of a dangerous weapon and as domestic abuse offenses, in exchange for a joint recommendation that Fisher be sentenced to five years of probation with conditions that she serve ninety days in jail with Huber privileges, maintain employment, pay appropriate fees, and complete any programs recommended by the probation agent. The parties further agreed that if Fisher successfully completed probation, the State would amend the reckless endangerment count to misdemeanor battery.

¶5 The State amended the charges and Fisher entered her pleas as agreed. However, after ordering and reviewing a presentence investigation report, the trial court declined to follow the joint sentencing recommendation. It instead sentenced Fisher to five years in prison on the reckless endangerment count and imposed and stayed a fifteen-month sentence on the battery count subject to a three-year period of probation.

¶6 Fisher moved to withdraw her pleas, alleging that she would not have entered them had she known that she would be sentenced to prison. The record shows, however, that the trial court properly informed Fisher before she entered her pleas of the maximum penalties she faced. The trial court was not obligated to follow the sentence recommendation of the parties, and its failure to do so did not invalidate the plea agreement. *See State v. Williams*, 2000 WI 78, ¶¶16, 34, 236 Wis. 2d 293, 613 N.W.2d 132. Nor did Fisher's dissatisfaction with the sentences she received create a manifest injustice warranting plea withdrawal. *See State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶7 Fisher also contends that by accepting her pleas to reduced charges, the trial court was obligated to accept her version of the underlying events. She argues that the court's failure to do so violated the plea agreement by treating her as if she had been convicted of the original charges. We disagree.

¶8 To begin with, when Fisher entered her pleas, she agreed that the facts set forth in the complaint and information and adduced at the preliminary hearing, if believed, would form a sufficient factual basis for conviction. Those facts included her husband's version of the shooting. There is nothing in the transcript of the plea hearing to indicate that the trial court was relying on Fisher's version of the shooting as the factual basis for accepting the pleas.

¶9 Furthermore, the trial court is permitted to consider even uncharged conduct when sentencing. *State v. Johnson*, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). It was therefore entirely appropriate for the trial court to take into account for sentencing purposes the presentence investigator's view of the events leading up to the shooting, even if that conduct would have supported a higher charge. Given that the sentences the trial court imposed were well within the maximum available penalties for the reduced charges to which Fisher pled, we are not persuaded that the court was somehow attempting to sentence her as if she had been convicted of the original charges merely because it rejected her claim that the shooting was accidental.

By the Court.—Judgments and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

