COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2668-CR **Cir. Ct. No. 99-CF-259**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONSO ARIAS-CRUZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Alfonso Arias-Cruz appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the circuit court erroneously exercised its discretion when it sentenced him and when it denied his motion for

sentence modification. Because we conclude that the circuit court did not err, we affirm.

¶2 Arias-Cruz was charged with twenty-two counts relating to a collision caused when he drove while intoxicated. After the collision, his blood alcohol level was .206% and he had traces of THC and cocaine in his blood. He was driving without a valid license and without insurance. The collision occurred when he drove through a stop sign and hit a car which then struck another car. One person was killed instantly, and others were injured. One of them, the 19-year-old daughter of the woman who was killed, suffered severe, permanent, and debilitating injuries. Arias-Cruz fled from the scene and was found hiding in a cornfield. He tried to conceal his identity by giving the police the wrong name.

¶3 Arias-Cruz pled guilty to one count of homicide by the intoxicated use of a motor vehicle as a repeat offender, one count of hit-and-run homicide, two counts of operating while intoxicated causing great bodily harm as a repeat offender, two counts of hit and run causing great bodily harm, two counts of operating while intoxicated causing injury, and two counts of hit and run causing injury. Twelve additional counts were dismissed and read-in. The court sentenced him to consecutive sentences on each count for the maximum possible of eighty-five years in prison.

¶4 After sentencing, Arias-Cruz moved the court for sentence modification alleging the existence of a new factor. Arias-Cruz argued that the court improperly relied on a 1987 case, and did not consider other cases when it sentenced him. When imposing sentence, the circuit court referred to a sentence imposed in Walworth county for homicide by the intoxicated use of a motor vehicle in 1987. The court noted that the maximum sentence allowed at that

time—five years—was imposed. Arias-Cruz argued that the court did not consider other cases in Walworth county in which the maximum was not imposed, even once the maximum had been increased to forty years. He argued before the trial and again on appeal that the failure of the court to consider these other cases constitutes a new factor which warrants modification of his sentence. He also argues that his sentence is harsh and excessive.

¶5 Sentence modification involves a two-step process in Wisconsin. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A new factor, as defined in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's determinations. ***Hegwood***, 113 Wis. 2d at 547. If a defendant demonstrates the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. *See* ***id.*** at 546. This determination is committed to the circuit court's discretion and will be reviewed under an erroneous exercise of discretion standard. ***Id.***

¶6 We agree with the circuit court that Arias-Cruz did not demonstrate the existence of a new factor. When imposing sentence, the court did not rely on the 1987 case, but merely mentioned it to show the difference in the way the law treated serious vehicular homicide. The court was merely explaining that the

greater maximum sentence under subsequent legislation has not stemmed the ongoing problem of drunken driving.

¶7 Further, the additional cases cited by Arias-Cruz are simply not a new factor. There is nothing to suggest that the circuit court or defense counsel was unaware of these cases. Further, as the State argues, the cases are factually different. Arias-Cruz's blood alcohol content was extremely high and contained traces of THC and cocaine. He fled the scene, hiding from the police, and attempted to conceal his identity when he was caught. He was a repeat offender, who was on probation for a substantial battery, and who violated a condition of probation by drinking and using drugs. He was in this country illegally, without a valid driver's license or insurance. These facts presented a more aggravated situation than those in which a less severe sentence was imposed. The circuit court was not required to consider these cases.

¶8 Moreover, as our supreme court has stated:

> There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences. On the contrary, individualized sentencing is a cornerstone to Wisconsin's system of indeterminate sentencing. "[N]o two convicted felons stand before the sentencing court on identical footing. The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors." Imposing such a requirement would ignore the particular mitigating and aggravating factors in each case. The defendant here has failed to establish any connection between himself and his crimes and those defendants and crimes to which he has compared his sentence. Absent such connection, "disparate sentences are totally irrelevant" to the sentence imposed in this case.

State v. Lechner, 217 Wis. 2d 392, 427-28, 576 N.W.2d 912 (1998) (citations omitted).

¶9 Neither do we agree with Arias-Cruz's argument that the circuit court erroneously exercised its discretion when it sentenced him. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶10 The circuit court here considered the appropriate factors. We agree with the court's statement that Arias-Cruz's conduct came close to intentional homicide. He was drunk early in the morning, driving recklessly, chasing a car, caused a horrific accident, fled the scene, and tried to obstruct the police investigation. One person died, and another young woman, besides losing her mother, will live with horrendous injuries for the rest of her life. We conclude that the circuit court did not erroneously exercise its discretion when it sentenced Arias-Cruz to the maximum allowed, and that the court properly denied his motion for sentence modification. We affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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