COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2010
A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2238-CR **Cir. Ct. No. 2007CF676**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY A. SILVERS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Gregory A. Silvers, Jr., appeals from a judgment convicting him of burglary while armed with a dangerous weapon, theft with a firearm and armed robbery with use of force, all as party to a crime (PTAC). He

also appeals from an order denying his motion for postconviction relief by which he sought sentence modification. Silvers contends his sentence—over twice the length of his co-actor's—violates his right to equal protection. We conclude there was a rational basis for the sentence. We affirm.

¶2 This case arises from a home invasion by ejected partygoers. James, Michael and Matthew Luccas hosted an underage drinking party while their parents were away. Eighteen-year-old Silvers and sixteen-year-old Derek VonKoningsveld went to the party with Sam Valdez, who was acquainted with someone there. The Luccases and the other guests did not know Silvers or VonKoningsveld. While the Luccas brothers allowed the use of alcohol and marijuana, James, the eldest, became upset when Silvers offered Matthew cocaine. Silvers, VonKoningsveld and Valdez were asked to leave.

¶3 In the early morning hours, the trio returned to the Luccas home.[1] The brothers and their nine guests were asleep. The occupants awoke to the shattering of the glass patio door and were ordered to hand over their cell phones. One intruder held a handgun to James' head and punched him in the temple; one went upstairs gathering items to steal. After wreaking about $15,000 damage, the burglars fled with two laptops, two shotguns, cash and a valuable watch. This much is not in dispute. The victims' accounts to police varied, however, as to which of the two was armed and who did what. The perpetrators pointed fingers at each other.

[1] We focus only on Silvers and VonKoningsveld because Silver's appeal stems from the disparity in his and VonKoningsveld's sentences.

¶4 Silvers and VonKoningsveld were charged with nine identical counts, all as PTAC. Eventually, Silvers pled guilty to three counts: burglary while armed with a dangerous weapon, theft with a firearm and armed robbery with use of force. He faced sixty-one years' imprisonment. The court sentenced Silvers to a total of twenty-six years: thirteen years' initial confinement and thirteen years' extended supervision.[2] VonKoningsveld pled no contest to two counts, burglary and armed robbery with use of force. Sentenced two weeks later by the same trial court judge, VonKoningsveld received a ten-year sentence, bifurcated equally between initial confinement and extended supervision.

¶5 Silvers filed a postconviction motion for sentence modification. He acknowledged that, viewed alone, his sentence represented a proper exercise of discretion. He argued, however, that when compared to VonKoningsveld's, equitable considerations demanded that his sentence be modified. The trial court disagreed, explained its rationale for the difference and denied the motion.

¶6 We typically review a motion for sentence modification by determining whether the court erroneously exercised its discretion in sentencing the defendant. *See* ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 577, 653 N.W.2d 895, 897. Here, however, Silvers first argues that the disparity in the co-actors' sentences for "substantially the same case histories" violates his right to equal protection. This presents a question of law. *See* ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶11, 263 Wis. 2d 83, 664 N.W.2d 596.

[2] The remaining six counts from this case and two counts—possession of drug paraphernalia and carrying a concealed weapon—from Racine county case number 07CM988 were dismissed and read in for sentencing.

¶7 Equal protection guarantees in the United States and Wisconsin Constitutions require that persons similarly situated be accorded similar treatment. *See* U.S. CONST. amend. XIV, § 1 and WIS. CONST. art. I, § 1. The mere fact of disparity in sentences received by persons committing similar crimes does not establish denial of equal protection. ***McCleary v. State***, 49 Wis. 2d 263, 272, 182 N.W.2d 512 (1971). Even leniency in one case does not transform a reasonable punishment in another case into a cruel one. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Sentence disparity is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). The test is whether there exists any rational basis to justify the classification. *See* ***Hilber v. State***, 89 Wis. 2d 49, 54, 277 N.W. 2d 839 (1979) ("[D]ifferences in the treatment of criminal offenders have been viewed as being subject to the rational basis test.").

¶8 A rational basis does exist. Although Silvers stresses the fact that he and VonKoningsveld were charged identically, he glosses over the fact that there were differences in the crimes they pled to and were convicted of. Both were convicted of armed robbery by use of force, but the similarity ended there. VonKoningsveld also was convicted of burglary; for Silvers, it was the more serious charges of burglary while armed with a dangerous weapon and theft with a firearm. Silvers' exposure also was greater than VonKoningsveld's and the stolen shotguns were recovered from Silvers' residence. Besides, Silvers was an adult at the time of the offense. VonKoningsveld was sixteen.

¶9 And although witness reports of the intrusion varied, several had Silvers brandishing a gun. House guest Greg Nowak reported that it was Silvers who pointed a gun at his head and said, "Give me your f—ing phone and I won't

shoot." Nowak assumed his name was Greg Silvers because earlier at the party, that person had said his name was Greg and that his brother Dave Silvers went to one of the local high schools. James Luccas likewise told police that Silvers had a handgun. He also said that the shorter of the two, which would be Silvers, made repeated comments that James had "talk[ed] shit" to him earlier and was the one who punched him in the temple.

¶10 The court deemed the differing victims' identifications logical given the terror and chaos of the intrusion. Since James had spoken to Silvers at the party and Nowak assumed the "Greg" with a brother surnamed "Silvers" was Greg Silvers, it was reasonable to adopt James' and Nowak's versions as the most credible. These findings are not inherently or patently incredible, and we accept them. *See* ***State v. Curiel***, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999). Further, the court reasonably could have inferred that it was Silvers who instigated the return to exact revenge for being ejected from the party. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) (a sentence may be based upon factors that can be reasonably derived by inference from the record).

¶11 Silvers next asserts that the trial court erred in denying his motion for sentence modification by making a "suspiciously tardy finding of fact." Noting that the court observed at sentencing that he may or may not have had the gun in his possession, Silvers argues that at the motion hearing the court "suddenly decided" that Silvers was the armed perpetrator when "the record establishes, if anything, that VonKoningsveld was more likely the gun man" or at least that they were equal participants.

¶12 He points to ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), as persuasive authority for his claim, or at least as being illustrative of his point.

Under ***Apprendi,*** the trial court may not find "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." ***Id.*** at 490. Rather, it must be submitted to a jury and proved beyond a reasonable doubt. ***Id.***

¶13 We miss the relevance at all of ***Apprendi***. Silvers characterizes the finding that he was armed as "suspiciously tardy." ***Apprendi*** applies to factual findings a court makes at sentencing to increase a penalty. Further, upon conviction, Silvers faced a statutory maximum sentence of sixty-one years. *See* WIS. STAT. §§ 943.10(2)(a), 943.20(1)(a), 943.32(2) and 939.50(3)(c), (e) and (h) (2007-08). ***Apprendi*** applies to penalties over the prescribed statutory maximum.

¶14 At bottom, we do not interpret the court's action as new fact finding but as simply explaining the underpinnings of the sentence already meted out. Silvers himself does not attack the propriety of his sentence when not compared to VonKoningsveld's. Nothing in ***Apprendi*** renders Silvers' sentence improper in any way.

¶15 More comparable sentences might have been imposed and might have been upheld on appeal. That is not the question we face. The question is whether Silver's sentence has a rational basis. It does.

By the Court.—Judgment and order affirmed.

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