COURT OF APPEALS
DECISION
DATED AND RELEASED

April 4, 1996

No. 93-2242-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROMONDO D. SEYMOUR,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Judgment affirmed in part; reversed in part and cause remanded with directions. Orders affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Romondo D. Seymour appeals from a judgment convicting him on six felony counts, and from orders denying his postconviction motions for relief. We reverse insofar as the judgment imposes a weapons enhancer under § 939.63, STATS., on three of the counts. We otherwise affirm.

Police officers were looking for Seymour on an apprehension request issued by his probation agent. Believing that they had located him at a motel, they placed it under surveillance. Several people were subsequently observed making short visits to a particular room. Several hours later, Seymour and Jean Sertish emerged from that room. Sertish climbed into the driver's seat of her car and Seymour went to its rear where the police observed him removing two items from a plastic bag in the trunk and handing them to Margaret Youngblood. Seymour then closed the trunk and climbed in the passenger's side of Sertish's car. Youngblood drove off separately.

When Sertish drove away from the motel, the police stopped the car and arrested Seymour. An officer then moved the car into a nearby parking lot and, ten minutes after the arrest, opened the trunk and seized the plastic bag. A subsequent inventory search of the bag disclosed two handguns, substantial quantities of three different controlled substances, and quantities of paraphernalia associated with illegal drug selling. A subsequent investigation found Seymour's fingerprints on one of the guns and on a piece of paper in the bag. The police found a large amount of cash and a pager on Seymour's person.

A search warrant executed at Youngblood's residence uncovered additional drugs, paraphernalia, ammunition for the seized guns, personal documents belonging to Seymour, other papers indicating he lived at Youngblood's address, and a written note stating, "Romondo, I sold four for 85." The drugs and Seymour's belongings were discovered in close proximity to one another.

As a result of the arrest and subsequent searches, the State charged Seymour with two counts of possessing a firearm as a felon, and four counts of illegally possessing controlled substances with intent to sell them, one each for the four different types of substances seized from the trunk and the apartment. The State charged him as a repeater on all counts and as a repeat drug offender on the drug charges. The State also alleged that he was subject to a penalty enhancer on the drug counts resulting from the trunk search because he committed them while possessing the handguns seized in the search. Section 939.63, STATS.

Seymour's jury trial proceeded after the trial court denied his motion to suppress the evidence seized from Sertish's trunk. At trial, the State used Seymour's stipulation to a prior manslaughter conviction to prove him a felon on the handgun charges. Seymour was subsequently convicted on all six counts, as a repeater and a drug repeater, subject to the firearm penalty enhancer on three of the drug counts. The trial court imposed consecutive prison sentences totaling fifty-five years.

In his postconviction motions, Seymour argued that he received ineffective assistance of trial counsel. He also sought a new trial on newly discovered evidence consisting of testimony from Youngblood. The trial court denied relief and this appeal ensued. The issues are whether the court properly denied his motion to suppress the evidence seized from the car trunk, whether Seymour received effective assistance of counsel, whether the court erred by allowing the jury to hear Seymour's stipulation to a manslaughter conviction, whether the evidence supported the verdict, whether the sentences were excessive,[1] whether the court should have granted a new trial on Seymour's newly discovered evidence, whether he should receive a new trial in the interest of justice and whether the court properly instructed the jury on the firearm penalty enhancer.

Seymour lacked standing to challenge the car search. ***State v. Guzy***, 139 Wis.2d 663, 407 N.W.2d 548, *cert. denied*, 484 U.S. 979 (1987), recognized a passenger's standing to challenge the legality of a vehicle stop, and to suppress evidence seized pursuant to an illegal stop. Seymour contends that ***Guzy*** applies in his case as well. However, the stop here was legal and was not challenged. Absent an illegal stop, a passenger in a car may not contest a search of that car unless he or she demonstrates a legitimate expectation in the privacy of the area searched. ***Rakas v. Illinois***, 439 U.S. 128, 148-49 (1978). Seymour made no such showing with regard to the trunk. Additionally, the fact that Seymour was probably the target of the search also fails to provide him with standing to challenge it. ***Id***. at 132-33.

[1] Seymour also raises the issue whether his conviction should have been dismissed because he was not provided a prompt probable cause determination after his arrest. Seymour acknowledges that dismissal is not presently a remedy for that particular violation of his rights. ***State v. Golden***, 185 Wis.2d 763, 519 N.W.2d 659 (Ct. App. 1994). He raises the issue merely to preserve it for further review.

Counsel did not provide ineffective trial representation because his allegedly deficient acts did not prejudice Seymour. He asserts that counsel unnecessarily allowed the jury to hear that Seymour's stipulated felony conviction was for manslaughter.[2] We conclude, however, that no reasonable probability exists of a different outcome had the jury not learned the specific nature of the conviction. The evidence is overwhelming that Seymour possessed both handguns and the drugs found in the apartment and in the trunk. Seymour's actions, his fingerprints, and the documentary evidence convicted him, not his previous conviction. Without prejudice, counsel's error is not grounds for reversal. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).

Seymour next argues that had counsel successfully moved to sever the drug counts from the firearm counts, the jury on the latter charges would not have known anything of his prior felony record. Again, the evidence and not Seymour's record convicted him on the drug counts, and no prejudice was shown.

Under ***Strickland***, the burden is on the defendant to prove prejudice from counsel's ineffectiveness. ***Strickland***, 466 U.S. at 687. Seymour suggests that under WIS. CONST. art. I, § 7, the State must bear that burden beyond a reasonable doubt. We do not reach that question because no prejudice resulted from counsel's actions no matter which party bears the burden.

The specific references to Seymour's manslaughter conviction were not plain error because they did not affect his substantial rights. Section 901.03(4), STATS. Additionally, the plain error rule is reserved for cases where the erroneous introduction of evidence likely infringed on the defendant's constitutional rights. ***State v. Wiese***, 162 Wis.2d 507, 515, 469 N.W.2d 908, 911 (Ct. App. 1991). Seymour did not forfeit any constitutional right by the error in identifying his previous felony.

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[2] A defendant being tried for possessing a firearm as a felon may stipulate to a previous felony conviction without identifying the nature of the felony. ***State v. McAllister***, 153 Wis.2d 523, 529, 451 N.W.2d 764, 767 (Ct. App. 1989).

The jury heard sufficient evidence to convict Seymour on all counts. Seymour argues that the evidence linking him to the drugs and the guns was tenuous at best. We disagree. Seymour's fingerprints were undisputedly on one of the guns and a piece of paper found in the bag in Sertish's trunk. Because of their location in the bag, Seymour cannot reasonably argue that he accidentally touched them while retrieving other items for Youngblood. As for the apartment, numerous documents were found there including Seymour's social security card, driver's permit, a note addressed to him, and other documents linking him with the apartment. Also recovered from the same area was ammunition fitting the seized weapons. The jury could reasonably infer that Seymour resided in the apartment and possessed the drugs found near his belongings.

Seymour did not receive an excessive sentence. In passing sentence, the trial court considered Seymour's lengthy criminal record as a juvenile and as an adult. His adult felonies included several violent crimes violence and drug related offenses. The court also noted that for seventeen years Seymour was either in prison or continuously engaged in criminal activity. The court considered the extensive efforts to rehabilitate Seymour, and their evident failure. The court concluded that Seymour was a dangerous man and that there was no likelihood that he would stop committing crimes. The "bottom line" was the public's need to be protected.

The trial court has great latitude in passing sentence. ***State v. J.E.B.***, 161 Wis.2d 655, 662, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). A sentence is excessive only when it is so disproportionate to the crimes as to shock public sentiment. ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 191 (Ct. App. 1984). Given Seymour's extensive criminal history, with no rehabilitative potential, the sentence is not shocking.

The trial court properly denied Seymour's motion for a new trial based on newly discovered evidence. That evidence consisted of exculpatory testimony from Youngblood. However, Seymour was aware of that testimony before his trial. The reason he did not use it was Youngblood's stated intention to invoke her Fifth Amendment right to refuse to answer any and all questions if she were called to testify. Evidence that is known to the defendant but unavailable, is not newly discovered evidence that justifies a new trial when it

becomes available later. ***State v. Jackson***, 188 Wis.2d 187, 201, 525 N.W.2d 739, 745 (Ct. App. 1994).

Seymour is not entitled to a new trial in the interest of justice. We may in our discretion order a new trial in the interest of justice if the real controversy has not been fully and fairly tried. Section 752.35, STATS. Seymour contends that the case was not fully and fairly tried because of ineffective assistance of counsel, plain error in divulging his manslaughter conviction, and the omission of Youngblood's testimony. As we have noted, neither counsel's actions nor the alleged plain error caused Seymour prejudice. As the trial court noted, Youngblood's testimony would have been neither credible nor effective in refuting the strong physical and documentary evidence of possession. We therefore conclude that the controversy was fully and fairly tried.

We reverse the judgment in part to eliminate the weapon enhancer on three of the drug counts. Under ***State v. Peete***, 185 Wis.2d 4, 18, 517 N.W.2d 149, 154 (1994), the State must prove not only that the defendant possessed a weapon while committing an offense, but that he or she actually used or threatened to use it. As in ***Peete***, we reverse because the trial court did not require that the jury find beyond a reasonable doubt that Seymour possessed the handguns in order to facilitate the commission of the predicate drug offenses. ***Id***. at 19, 517 N.W.2d at 154. Although Seymour's trial occurred three years before ***Peete*** was decided, new rules for criminal prosecutions are retroactive in all cases pending on direct review or not yet final. ***State v. Koch***, 175 Wis.2d 684, 694, 499 N.W.2d 152, 158, *cert. denied*, 114 S. Ct. 221 (1993).

On remand, the State may elect whether to conduct a retrial solely on the issue whether Seymour committed the three predicate drug offenses while possessing a dangerous weapon. If the State elects not to retry Seymour, the trial court shall resentence Seymour without considering the weapons enhancer. *See* ***State v. Avila***, 192 Wis.2d 870, 893b, 535 N.W.2d 440, 440 (1995) (per curiam) (even if the sentence imposed is less than the maximum, resentencing is necessary where we cannot ascertain from the record whether a portion of the sentence was nonetheless due to the invalid enhancer.)

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Orders affirmed.

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