COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2635-CR **Cir. Ct. No. 2009CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SOCORRO KERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Socorro Kerner appeals a judgment of conviction and sentence for conspiracy to deliver cocaine and delivery of cocaine, following her guilty pleas, and an order denying postconviction relief. Kerner contends that: (1) the circuit court relied on inaccurate information and improper factors in

imposing sentence; (2) Kerner's trial counsel was ineffective at sentencing; and (3) the sentence imposed was unduly harsh. We reject these contentions for the following reasons, and affirm.

Background

¶2 In May 2009, Kerner was charged with four counts arising out of a police drug task force investigation into sales of controlled substances in Jackson County. Kerner pled guilty to conspiracy to deliver more than forty grams of cocaine and delivery of more than forty grams of cocaine, and the remaining counts were dismissed and read in for sentencing purposes. The court sentenced Kerner to fifteen years of initial confinement and fifteen years of extended supervision.

¶3 Kerner filed a postconviction motion. Kerner argued that the court relied on inaccurate information and improper sentencing factors, that trial counsel was ineffective at sentencing, and that her sentence was unduly harsh. The circuit court denied the motion without a hearing. Kerner appeals.

Discussion

¶4 Kerner argues that she was sentenced based on inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that a defendant has a constitutional right to be sentenced based on accurate information). A postconviction motion contending that the defendant was sentenced based on inaccurate information "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***Id.***, ¶26. Whether a defendant was denied the constitutional right to be sentenced on accurate information is a question of law

that we review de novo. ***Id.***, ¶9. We conclude that Kerner has not established that the circuit court relied on any information alleged to be inaccurate.

¶5 Kerner cites the following information offered at the sentencing hearing as inaccurate: testimony by Milwaukee Drug Task Force Agent John Belssinha that Kerner is a member of the Latin Kings or Latin Queens gang, Kerner's family has a lot of "juice" with the Latin Kings, and that Kerner's son is considered a "prince"; testimony by Agent Belssinha that Kerner had received consideration for her cooperation with law enforcement in her sentencing in other cases; and testimony by Agent Belssinha and Jackson County Sheriff's Office Captain Timothy Nichols as "victims" of Kerner's crimes under WIS. STAT. § 950.04 (2009-10).[1] Kerner disputes the accuracy of that information. She points to the fact that she informed the court that she was not a gang member, and that her attorney stated that Kerner's son was not being indoctrinated into the gang culture. She also asserts that the sentencing transcript for her other recent criminal conviction, in Milwaukee County, does not indicate that she received any consideration for her cooperation with law enforcement, and that there was no basis for the officers to testify as "victims."

¶6 Kerner then cites the following as indicating that the circuit court actually relied on the allegedly inaccurate information at sentencing: the court's statement that it wanted to hear from the officers as "the voice of the community, as a victim"; the court's questioning of Agent Belssinha as to what sentence he thought the court should impose and whether he thought a lengthy sentence would

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

deter others with a Latin Kings gang affiliation from victimizing the community; and the court's comment that its primary goals in sentencing were deterrence of others and protecting the public.

¶7 First, we disagree with Kerner that the record indicates the circuit court actually relied on testimony that Kerner was a member of the Latin Kings or Latin Queens, or that her family had a lot of "juice" with the gang and her son was considered a "prince." Kerner stated to the court that she was not a member of the Latin Kings or Latin Queens, but admitted that she was an associate of the gang. The court's questions to Agent Belssinha referenced a gang affiliation, not necessarily gang membership. The court also indicated that it felt empathy for Kerner in a way it would not feel for "some hardened gang member who had a [long criminal] history … and history of violence," indicating that the court did not consider Kerner a hardened gang member. The court did not otherwise indicate in its sentencing comments that it relied on Kerner's gang affiliation, but rather stated that its sentence was based on the need to deter others and protect the community from any person who considers coming to the community to deal drugs. Additionally, the court stated that "[n]o one has claimed that [Kerner is] anything but a kind, caring, loving mother," negating any inference that the court relied on the idea that Kerner was indoctrinating her son into the gang culture. Thus, the sentencing transcript indicates that the court actually relied on undisputed information in the record: that Kerner had brought drugs to the community, and that she had an affiliation with the Latin Kings. Regardless of whether the additional gang-related information was inaccurate, there is no indication that the court relied on that information in imposing sentence.

¶8 Next, we disagree with Kerner that the record indicates the circuit court actually relied on information that Kerner received sentencing consideration

in other cases for her cooperation with law enforcement. Assuming, as Kerner asserts, that Agent Belssinha's statement that Kerner received sentencing consideration in other cases was inaccurate, there is no indication in the court's sentencing comments that the court relied on that information in imposing sentence. Indeed, Kerner does not cite to anything in the sentencing transcript indicating that the court relied on the proposition that Kerner had received consideration in other cases in imposing sentence in this case. Accordingly, Kerner has not established that the circuit court relied on inaccurate information in imposing sentence based on police testimony that Kerner had received consideration in sentencing in other cases.

¶9 Finally, we disagree with Kerner's argument that the circuit court relied on the inaccurate information that the police were direct victims of Kerner's crimes. Kerner cites WIS. STAT. § 950.02 as defining a "victim" as "[a] person against whom a crime has been committed," and contends that the court relied on the inaccurate information that the officers were "victims" under the statute. However, the court did not indicate that it considered the officers direct victims of Kerner's crimes, but instead the court clearly indicated that the officers spoke on behalf of the community, which as a whole was the victim of Kerner's crimes. The court made clear at sentencing that it considered the community, as a whole, the victim. Thus, Kerner has not shown that the circuit court relied on the inaccurate information that the officers themselves were direct victims of Kerner's crimes.

¶10 Kerner also argues that the circuit court relied on improper factors in imposing sentence. *See* ***State v. Harris***, 2010 WI 79, ¶33, 326 Wis. 2d 685, 786 N.W.2d 409 (holding that a defendant has a constitutional right not to be sentenced on improper factors). A postconviction motion claiming the circuit

court relied on an improper factor at sentencing must show that the circuit court relied on an improper factor in imposing sentence. ***Id.*** We review a circuit court's sentence for an erroneous exercise of discretion, and a court erroneously exercises its sentencing discretion if it relies on improper sentencing factors. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude that Kerner has not shown that the circuit court relied on improper factors in imposing sentence.

¶11 Kerner argues, in a recast version of an argument addressed above, that the circuit court relied on the improper factor of the police officers' statements as "victims." However, as we have explained, the court made clear that it considered the officers' testimony as merely representing the community at large as a victim, not that the officers were individual victims themselves. Moreover, Kerner has not established that it was improper for the circuit court to consider testimony by the investigating officers in this case in determining sentence. *See* WIS. STAT. § 972.14(3)(a) ("Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement …. *The court may allow any other person to make or submit a statement under this paragraph.* Any statement under this paragraph must be relevant to the sentence." (emphasis added)).

¶12 Next, Kerner argues that the circuit court relied on the improper factor of information relating to Kerner's connection to the Latin Kings. She points to trial counsel's affidavit stating that the trial in this case was treated differently than other cases, including the use of metal detectors. Kerner cites the testimony as to her gang affiliation and the court's questioning of Agent Belssinha whether a lengthy sentence would deter others associated with the gang from bringing drugs into the community. Kerner draws a parallel between the facts of

this case and ***Jackson v. State***, 772 A.2d 273 (Md. 2001), in which the Maryland Court of Appeals held that the circuit court relied on the improper factors of the defendant's being from a large city and the defendant's race. Kerner asserts that here, as in ***Jackson***, the circuit court relied on improper factors, here, that Kerner was from Milwaukee and brought drugs into Jackson County. She asserts that the court's comments regarding deterring others from bringing drugs into Jackson County revealed that the court relied on the improper factor of Kerner's being from a large city rather than a local resident. We conclude that ***Jackson*** is distinguishable from this case and that the circuit court here did not rely on any improper factors in imposing sentence.

¶13 The ***Jackson*** court held "that the trial court's comments at sentencing exceeded the outer limit of a judge's broad discretion in sentencing and therefore amounted to the application of impermissible sentencing criteria." ***Id.*** at 274. The court highlighted the following comments by the circuit court as demonstrating at least the appearance of reliance on the impermissible factors of race and geographical origin:

> *Now, unfortunately, a number of communities in the lovely city of Columbia have attracted a large number of rotten apples. Unfortunately, most of them came from the city. And they live and act like they're living in a ghetto somewhere. And they weren't invited out here to behave like animals…. [G]oing to somebody-going out of the way to go to somebody else's house and confront people with sawed-off shotguns is what they do in the city. That's why people moved out here. To get away from people like Mr. Jackson. Not to associate with them and have them follow them out here and act like this was a jungle of some kind. So. It's not. And our only chance to preserve it is to protect it….* Civilized people are not on the roads at 3:30 in the morning, confronting other people with sawed-off shotguns. Civilized people don't own sawed-off shotguns.

Id. at 275-76 (footnote omitted). The court determined that race, as well as "the fact of where a criminal defendant lives, or has lived, [should not] play *any* role in the sentencing of a defendant." ***Id.*** at 281. The court then explained that the trial court's sentencing comments "might lead a reasonable person to infer that [the judge] might have been motivated by ill-will or prejudice, especially as it relates to persons from 'the city.'" ***Id.*** It stated that the court's comments "give the appearance of bias towards persons who are raised in an urban environment," and possibly "demonstrate actual prejudice in the sentencing process towards residents of cities or, … worse, towards persons based upon their racial background." ***Id.*** at 282. The court held that the court at least gave the impression that it "based [Jackson's] sentence, at least in part, on the improper presumption that [Jackson] was from Baltimore City, or from a city, rather than Howard County," and thus the court had improperly "considered [Jackson's] origins in formulating the sentence." ***Id.***

¶14 Here, unlike in ***Jackson***, the circuit court's comments did not indicate the court was basing its sentence in any way on Kerner's race or place of residence. Rather, the court here specifically stated it was basing the sentence on a need to deter *anyone* from bringing drugs into the community. The court stated that its top priorities in sentencing Kerner were deterrence of others and protecting the community, explaining: "I'm charged with protecting the public. I'm charged with protecting my public. People in my county. The potential victims in my county because I am the only law, the only judge that can do that in Jackson County." The court also said:

> I must impose a sentence that sends a message to anyone who would come into my community and deal drugs, and create victims; and it's a spider web you create when you do this. It starts with one person and spreads to their families, and to their friends. And whether or not it's direct

> harm or indirect harm, economic harm, physical harm, the harm of creating the issue of addiction, it still spreads, and it spreads, and spreads. And I have to do what I can to stop the spread of the poison. I have to do what I can to cut off the source. I have [to] make people afraid to come into this county and pose the kind of risk that, unfortunately, your history here has posed ….
>
> [Y]ou dealt, substantially, for an extended period of time in the trafficking of cocaine in my jurisdiction.

Thus, the court made clear that its sentencing goal was to deter anyone from bringing drugs into the community, not especially targeting those from a specific geographical area or of a specific racial background, as in ***Jackson***. Kerner has not established that it was improper for the circuit court to consider the need to deter others from bringing cocaine into the community in imposing sentence.

¶15 Next, Kerner argues that her sentence was unduly harsh. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (we review a circuit court's sentencing for an erroneous exercise of discretion; a circuit court erroneously exercises its sentencing discretion "where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances"). Kerner argues that the court's sentence of fifteen years of initial confinement followed by fifteen years of extended supervision was contrary to the following mitigating factors before the court: Kerner had grown up amidst crime in a poverty-stricken neighborhood; she turned to drug-dealing as a way to support her family; Kerner is a loving mother whose child is succeeding in school; there was no violence involved in this case; and Kerner exhibited sincere remorse and a willingness to change. She argues that the incarceration of a loving mother for the rest of her son's childhood for a non-

violent crime shocks public sentiment and violates the judgment of reasonable people as to what is proper under the circumstances.

¶16 However, we cannot agree that Kerner's sentence of fifteen years of initial confinement and fifteen years of extended supervision was so excessive and disproportionate to the offenses that it shocks public sentiment. Kerner was convicted of conspiracy to deliver more than forty grams of cocaine and delivery of more than forty grams of cocaine, and thus faced a potential sentence of eighty years, with fifty years of initial confinement. *See* WIS. STAT. §§ 961.41(1)(cm)4. (providing that delivery of more than forty grams of cocaine is a Class C felony); 961.41(1x) (providing that conspiracy to deliver cocaine subjects offender to same punishment as delivery of cocaine); 939.50(3)(c) (providing that Class C felonies are punishable by up to forty years of imprisonment and $100,000 fine); and 973.01(2)(b)3. (under bifurcated sentence, maximum term of initial confinement for Class C felony is twenty-five years). While we recognize that Kerner received a lengthy sentence, the sentence was well within the maximum Kerner faced, and thus was not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

¶17 Finally, Kerner contends that her trial counsel was ineffective at sentencing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Kerner contends first that the State's failures to advise defense counsel as to what information it planned to elicit from the police officers at sentencing,

and that it planned to present testimony by the officers as "victims," caused defense counsel to be ineffective. *See* ***United States v. Cronic***, 466 U.S. 648, 659-60 (1984) (providing that circumstances may exist such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial"). She contends that this allowed the State to provide the court with the following information that the defense was unable to rebut: that Kerner was tied to eleven local suspects who were charged with drug-related activity, and multiple others who were not charged; that Kerner was reported to have dropped off large quantities of marijuana; that Kerner had provided drugs worth hundreds of thousands of dollars for distribution; that Kerner was a member of the Latin Kings; and that Kerner had provided a gun that had been connected to a shooting. Kerner asserts that the State's lack of notice denied counsel with the opportunity to challenge that information.

¶18 We do not agree that the fact that the State did not detail what information would be provided by the officers at sentencing created circumstances under which it was highly unlikely that any defense counsel could provide effective assistance. First, the allegation that Kerner was tied to large quantities of local drug sales, involving multiple individuals, was provided in the criminal complaint. As to the testimony regarding Kerner's gang membership, Kerner admitted an association with the Latin Kings and was able to rebut the allegation that she was a gang member by stating that she was only an associate, not a member. As to the officer's statement regarding a gun, that information was offered in response to defense counsel's cross-examination attempting to establish that Kerner had not been tied to any violent acts. The officer said that he had never sought charges against Kerner for a violent act, but that he had "information

of a gun that [Kerner] had provided that was used in a shooting." That one comment by the officer, in response to clarification by defense counsel that Kerner had not been tied to violent acts, did not create a scenario that rendered defense counsel unable to provide effective assistance at sentencing.

¶19 Kerner also contends that her counsel was ineffective by: (1) failing to object to officer testimony that Kerner is a member of the Latin Kings, that her family has "juice" with the gang, and that her son is considered a "prince"; and (2) failing to specifically argue that the officers were not "victims" under WIS. STAT. § 950.02. However, we have already concluded that there is no indication in the sentencing transcript that the circuit court relied on testimony as to Kerner's membership as opposed to association with the Latin Kings, or her family's "juice" in the gang or its treatment of her son. Thus, Kerner has not made a showing of prejudice resulting from any alleged deficient performance by counsel in failing to object to that testimony. As to counsel's failure to object to the officer testimony as "victim" testimony under § 950.02, we have concluded that the circuit court properly allowed the testimony under the statute. Accordingly, Kerner has not made a showing of prejudice resulting from the absence of objections or argument.

¶20 In sum, we conclude that Kerner has not established any basis to disturb the circuit court's sentence.[2] We affirm.

[2] Kerner also contends that she is entitled to a hearing on each of the claims raised in her postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (a defendant is entitled to a hearing on a postconviction motion that alleges facts that, if true, entitle the defendant to relief). Because we have concluded that the record establishes that Kerner is not entitled to relief as to any of her claims, we conclude that the circuit court properly denied Kerner's postconviction motion without a hearing. *See* ***id.*** ("[I]f the record conclusively (continued)

By the Court.—Judgment and order affirmed.

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

demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.").