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July 22, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1546-CR State of Wisconsin v. Katarina R. Powless (L.C. #2018CF317)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Katarina R. Powless appeals from a judgment convicting her of first-degree reckless homicide as party to a crime pursuant to WIS. STAT. § 940.02(2)(b) (2017-18)[1] and from an order

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

denying her postconviction motion. Powless argues that the sentencing court imposed an "unduly harsh and excessive" sentence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm as the sentencing court properly exercised its discretion in imposing its sentence.

Powless was charged with one count of first-degree reckless homicide by administering or assisting in administering a controlled substance as party to a crime for her role in the death of eighteen-year-old J.S. from a heroin overdose. Powless was on the scene when emergency personnel responded and found J.S.'s body on the grass outside Powless' apartment building, after Powless and her boyfriend had dragged him outside. An investigation into J.S.'s death revealed that Powless had purchased the heroin that J.S. used that day, and police later recovered evidence from J.S.'s cellphone that Powless had also agreed to inject J.S. with the heroin.

Powless pled guilty to the charge. At sentencing, the court addressed Powless' substantial role in J.S.'s death, explaining that Powless was just as culpable as the drug dealer, the co-defendant, in this case: "Now, if we said this was a gun that we put to somebody's head and pulled the trigger, my opinion is I rank you equally with [the drug dealer]. She provided the drug, and you inserted the drug. And I think that you're equally culpable for his tragic death." After addressing aggravating and mitigating factors, the court sentenced Powless to eleven years' initial confinement and ten years' extended supervision.

Powless filed a postconviction motion arguing that she was "entitled to a reduction in the length of her sentence because her sentence was unduly harsh and excessive" as she was given the same sentence as the co-defendant, despite the fact that the co-defendant "presumably had a

much worse criminal history" and had multiple read-in charges. Powless also claimed that her sentence was "unduly harsh and excessive given her upbringing and traumatic past" and her "rehabilitative needs." After a hearing, the court denied the motion. Powless appeals.

We review a court's conclusion that a sentence was not unduly harsh and unconscionable for an erroneous exercise of discretion.[2] ***State v. Cummings***, 2014 WI 88, ¶45, 357 Wis. 2d 1, 850 N.W.2d 915. A sentence is unduly harsh "only 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.*** (citation omitted); ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

When a defendant challenges a sentence, he or she must overcome a heavy burden as there is a strong public policy against interfering with the sentencing court's discretion. *See* ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409; ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. We will defer to the sentencing court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v.***

[2] Wisconsin circuit courts have inherent authority to modify criminal sentences under certain circumstances, but a court may not "modify a sentence merely 'on reflection and second thoughts alone.'" ***State v. Cummings***, 2014 WI 88, ¶70, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted). "Ordinarily a defendant seeking a sentence modification must show the existence of a 'new factor' unknown to the court at the time of sentencing." ***Id.*** (citation omitted). Where no new factor is present, a circuit court may modify a sentence "if 'the court determines that the sentence is unduly harsh or unconscionable.'" ***Id.***, ¶71 (citation omitted).

Echols, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). During postconviction proceedings, the court is provided an additional opportunity to explain its sentencing rationale, *see* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994), and we will search the entire record for reasons to sustain the sentencing court's exercise of discretion, *see* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

Powless argues that the sentencing court's rejection of her claim that she received an unduly harsh sentence was in error. We disagree. Powless was convicted of first-degree reckless homicide, which is a Class C felony. WIS. STAT. §§ 939.50(3)(c), 940.02(2)(b). A Class C felony carries a maximum penalty of forty years' imprisonment, bifurcated with a maximum term of initial confinement of twenty-five years. WIS. STAT. § 973.01(1), (2)(b)3. Powless was sentenced to eleven years' initial confinement, meaning she received less than half of the maximum term that the law allowed, which creates a presumption that her sentence is not unduly harsh. To prevail, therefore, Powless must overcome the presumption. She fails to do so.

"[Sentencing] courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill these sentencing objectives, the court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court may also consider a wide range of other relevant factors, and the "weight to be given to each factor is within the discretion of the sentencing court." ***Id.***

In this case, the sentencing court explicitly considered the primary sentencing factors and properly addressed the factors it deemed relevant to this case on the record. The court considered the gravity of the offense, explaining that "causing the death of another human being" is a "very … serious circumstance," and the need to protect the public, observing that "[p]eople who are willing to provide drugs to other human beings have to learn that they're going to have the result of harsh consequences." In discussing Powless' character, the court acknowledged Powless' mental health and drug treatment needs based on her "traumatic upbringing" but explained "[t]hat's not an excuse for what occurred here." The court stated:

> Ms. Powless you need help. I mean, do I think the prison system is the most successful mental health treatment place? I don't necessarily…. [But] the women's prison does have some decent programs that … people have told me that were in drug court that they thought actually helped them, and without that, they never would have been successful.

While recognizing that prison may not be ideal as a mental health treatment facility, the court observed that "unless [Powless was] prevented from … continuing to use drugs and continuing to run with people who use drugs and continuing to associate with people who have no goal in life other than to figure out how they're going to get another drug, you cannot work on yourself. Nobody can." In sum, the court considered the relevant factors in furtherance of appropriate sentencing goals, and, accordingly, the court properly exercised its sentencing discretion in this case.

Powless nevertheless argues that her sentence was unduly harsh because Powless and her co-defendant received identical sentences.[3] According to Powless, her co-defendant "had

[3] Both Powless and the co-defendant were sentenced by the Honorable Mary Kay Wagner.

numerous charges dismissed and read-in" and "she had a far more aggravating history than Powless." At the hearing denying the postconviction motion, the sentencing court reiterated that it felt that Powless and her co-defendant were "equally culpable" in the crime, but the court thought "a good argument could be made that Ms. Powless is the more culpable because she injected [the drug] and provided [it] to this boy, this young man." According to the court, "I treated them equally because I think they both had a very important part in causing the death of this person."

Even if Powless is correct that her co-defendant had more aggravating sentencing factors, that fact does not establish that Powless' sentence would "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Grindemann***, 255 Wis. 2d 632, ¶31 (quoting ***Ocanas***, 70 Wis. 2d at 185). Perhaps, based on the sentencing factors, the sentence imposed on the co-defendant was too lenient, but "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one." *See* ***Ocanas***, 70 Wis. 2d at 189; *cf.* ***State v. Studler***, 61 Wis. 2d 537, 541-42, 213 N.W.2d 24 (1973) ("The imposition of a lesser sentence upon an accomplice by a different judge does not ipso facto constitute such lesser sentence as the common denominator for the sentence to be imposed on all parties to a crime."). The sentencing court has wide discretion to determine the weight to assign to each sentencing factor. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. In the sentencing court's view, Powless' culpability and rehabilitative needs warranted an eleven-year term of initial confinement, regardless of the sentence given to her co-defendant. *See* ***State v. Toliver***, 187 Wis. 2d 346, 361, 523 N.W.2d 113 (Ct. App. 1994) ("A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation."). The

court properly exercised its sentencing discretion, and Powless' sentence is not unduly harsh or unconscionable.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals