STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP1782-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMBATH PAL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court appropriately exercise its discretion in sentencing Sambath Pal?

The circuit court concluded that its sentence was not unduly harsh and excessive (37:10-15).

2. May this Court overrule its previous holding that the State may charge one count per victim for hit and run?

The circuit court concluded that it was bound by court of appeals' precedent holding that the State may charge one count for each hit-and-run victim (37:15-16).

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As the respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. The State will supplement the statement of the facts and case as appropriate in its argument.

ARGUMENT

I. The circuit court appropriately exercised its discretion in sentencing Pal.

A. Introduction.

In 2014, the State charged Sambath Pal with two counts of hit and run resulting in death, in violation of Wis. Stat. §§ 346.67(1) and 346.74(5)(d) (1; 7). The charges stemmed from an incident in April 2014 in which Pal drove a sport utility vehicle across a highway center line, struck and

killed two oncoming motorcyclists, D.J. and M.V., and drove away from the accident scene without stopping (1:1-3). Pal pled guilty to both counts (18; 35:8-9). The circuit court imposed two consecutive sentences, each consisting of ten years of initial confinement and ten years of extended supervision (18; 36:58).

On appeal, Pal argues that the circuit court imposed an unduly harsh and excessive sentence (Pal's Br. at 4-6). He also argues that, because he committed a single act of hit and run, the State violated constitutional protections against multiplicity[1] by charging and sentencing him on two counts (Pal's Br. at 6-14). Pal recognizes that *State v. Hartnek*, 146 Wis. 2d 188, 430 N.W.2d 361 (Ct. App. 1988), forecloses his multiplicity argument, but he argues that this Court should "reverse *Hartnek*" (Pal's Br. at 6).

Pal is not entitled to relief. The circuit court appropriately exercised its discretion in sentencing him. Further, this Court may not overrule *Hartnek*, which forecloses Pal's argument that multiple charges and sentences here were multiplicitous.

[1] "Multiplicity arises where the defendant is charged in more than one count for a single offense." *State v. Davison*, 2003 WI 89, ¶ 34, 263 Wis. 2d 145, 666 N.W.2d 1 (quotation marks and quoted source omitted). Multiplicity violates either due process or double jeopardy, depending on whether the charges are for the "'same offense.'" *See id.*, ¶¶ 32-33, 46.

B. Applicable legal standards.

This Court "review[s] an allegedly harsh and excessive sentence for an erroneous exercise of discretion." *State v. Mursal*, 2013 WI App 125, ¶ 24, 351 Wis. 2d 180, 839 N.W.2d 173 (citation omitted). "A sentence is unduly harsh when it is 'so excessive and unusual and so disproportionate to the offense committed so as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *Id.* (quoting *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). "'A sentence well within the limits of the maximum sentence[,]' however, 'is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *Id.* (alteration added in *Mursal*) (quoting *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983)).

"A defendant challenging a sentence as excessive carries a heavy burden. [This Court] begin[s] with the presumption that the trial court acted reasonably, and before [this Court] will consider overturning a sentence, the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Drusch*, 139 Wis. 2d 312, 328, 407 N.W.2d 328 (Ct. App. 1987) (quotation marks and quoted source omitted).

C. Pal's sentence is not unduly harsh and excessive.

For several reasons, Pal's sentence is not unduly harsh and excessive. First, his sentence is well within the statutory maximums. Hit and run resulting in death is a Class D felony. Wis. Stat. §§ 346.67(1), 346.74(5)(d). The maximum penalty for a Class D felony is twenty-five years of imprisonment, bifurcated as fifteen years of initial confinement and ten years of extended supervision. Wis. Stat. §§ 939.50(3)(d), 973.01(2)(b)4. & (2)(d)3.

Thus, Pal faced a total maximum of fifty years of imprisonment, consisting of thirty years of initial confinement and twenty years of extended supervision (*see* 1:1-2; 7:1-2). The circuit court gave Pal a global sentence of forty years of imprisonment, consisting of twenty years of initial confinement and twenty years of extended supervision (18; 36:58).

Pal's sentence is well within the statutory maximums because his period of initial confinement is two-thirds of the statutory maximum, and his total sentence is slightly more than three-quarters of the statutory maximum. *See Ocanas*, 70 Wis. 2d at 183, 186 (concluding that a twenty-year sentence, which was "two-thirds of the statutory maximum," was "not excessive"); *State v. Magnuson*, 220 Wis. 2d 468, 472-73, 583 N.W.2d 843 (Ct. App. 1998) (concluding that two concurrent twelve-year sentences, when the defendant faced maximums of sixteen-year sentences, were not excessive and

were "substantially less than the maximum prison term"). Pal's sentence is "unlikely to be" unduly harsh and excessive because it is well within the statutory maximums. *See State v. Cummings*, 2014 WI 88, ¶ 74, 357 Wis. 2d 1, 850 N.W.2d 915 (citing *Daniels*, 117 Wis. 2d at 22).

Second, Pal's hit-and-run crimes were serious and his victims were young. D.J. and M.V. were eighteen and twenty-four years of age, respectively, when Pal killed them in a hit-and-run automobile accident (6:4-5). The circuit court stated that Pal's crimes here were "clearly serious offenses" and "it's serious with hitting and killing these two young men" (36:48, 57). The circuit court further stated that its sentence would "not unduly depreciate the seriousness of these offenses" (36:58). Accordingly, the victims' young ages and the seriousness of Pal's crimes support the length of his sentence. *See State v. Stenzel*, 2004 WI App 181, ¶ 22, 276 Wis. 2d 224, 688 N.W.2d 20 (concluding that Stenzel's sentence for killing two young children by intoxicated use of a vehicle was not excessive partly because, "considering the age of the victims and the gravity of the offenses, public sentiment supports the sentences imposed"); *see also Cummings*, 357 Wis. 2d 1, ¶¶ 76-77 (concluding that Cummings' near-maximum sentence was not unduly harsh and excessive partly because the circuit court determined that a shorter sentence would unduly depreciate the seriousness of the offense).

Third, as the circuit court stated in its decision denying Pal's postconviction motion, Pal displayed "callous disregard" for the victims (37:13). After striking two motorcyclists on a highway, Pal went to his girlfriend's parents' home and drank beer with his girlfriend's stepfather (36:50). Pal did not tell anyone there about his accident (36:50). The next morning, Pal returned to his father's home in Illinois (36:50). Pal denied involvement in the fatal crash when his father and girlfriend confronted him about it (36:50). On the night of the accident, however, Pal was aware that he had hit and killed people (36:52). Pal used his cell phone to search the Internet for how to avoid being caught for hit and run and how to hide a vehicle (36:51). Pal was arrested after his father turned him in to police (36:51). Pal contacted his girlfriend from jail and asked her to delete the Internet history from his cell phone (*see* 36:51-52). Pal's callous actions support the length of his sentence. *See Ocanas*, 70 Wis. 2d at 185-86 (holding that Ocanas' sentence was not excessive partly because his crime was "vicious" and "callous").

Finally, the circuit court stated that "[there] are two separate individuals, and each of them deserves justice individually" (36:58). The fact that there are two victims here supports Pal's consecutive sentences. *See Stenzel*, 276 Wis. 2d 224, ¶ 22 ("[B]ecause there were two victims, making the sentences consecutive does not shock the public

sentiment and make the sentences unduly harsh and unconscionable.").

Pal raises several meritless arguments that his sentence is unduly harsh and excessive. He argues that the circuit court improperly relied on his flight from the accident scene and the victims' deaths as aggravating factors (Pal's Br. at 5). He argues that those factors are not aggravating because they are elements of the crime (Pal's Br. at 5). However, in its decision denying Pal's postconviction motion, the circuit court explained that it did not "find the flight, the immediate leaving of the scene itself, to be an aggravating factor" (*see* 37:11). Instead, the circuit court explained that the aggravating factors were Pal's "total lack of remorse" and his failure "to take any responsibility for this matter until he did enter his plea" (37:13). Those aggravating factors were based on Pal's actions after he left the accident scene, discussed above (37:11-13). The sentencing hearing confirms that the circuit court considered the aggravating factors to be Pal's actions immediately after leaving the accident scene and over the next several days (36:48-52).

Pal points out that the circuit court imposed a sentence longer than the one that the State recommended (Pal's Br. at 4). However, a circuit court is "not obligated" to follow counsels' sentence recommendations. *State v. Klubertanz*, 2006 WI App 71, ¶ 19, 291 Wis. 2d 751, 713 N.W.2d 116.

Finally, Pal argues that there are several mitigating factors, such as his lack of recklessness or intent to kill and the lack of evidence that he was impaired by drugs or alcohol at the time of the accident (Pal's Br. at 4, 6). At the sentencing hearing, the circuit court considered mitigating factors and concluded that they "have been greatly outweighed by the gravity of these particular offenses" (36:54-55, 57). Although the facts that Pal identifies as positive ones may be mitigating factors in a given case, the circuit court here appropriately exercised its discretion in assigning them little weight compared to the factors that supported a lengthy sentence. *See Stenzel*, 276 Wis. 2d 224, ¶ 16 (concluding "that the circuit court appropriately exercised its discretion when it did not give Stenzel's age the overriding and mitigating significance that he would have preferred," because a sentencing court has discretion to determine which factors are relevant and how much weight to assign to them); *see also Drusch*, 139 Wis. 2d at 328-29.

II. This Court may not overrule its prior holding that charging one count for each hit-and-run victim is not multiplicitous.

In *Hartnek*, this Court held that the State does not violate constitutional protections against multiplicity by charging a defendant with one count per victim for hit and run in violation of Wis. Stat. §§ 346.67(1) and 346.74(5). 146 Wis. 2d at 192-97. Here, "Pal asks this court to reverse

Hartnek" (Pal's Br. at 6).[2] Pal argues at length that *Hartnek* was wrongly decided (Pal's Br. at 6-14).

However, "the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Accordingly, this Court may not overrule *Hartnek*, which forecloses Pal's argument that the State here violated constitutional protections against multiplicity by charging and punishing him for one count of hit and run per victim. *See Hartnek*, 146 Wis. 2d at 192-97. Indeed, Pal concedes that *Hartnek* "resolves the issue raised" (Pal's Br. at 6).[3]

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[2] Because this Court is not reviewing *Hartnek* on direct appeal, Pal is asking this Court to overrule, rather than reverse, *Hartnek*. *See State v. Jackson*, 2011 WI App 63, ¶ 15 n.3, 333 Wis. 2d 665, 799 N.W.2d 461 (noting that a case can be reversed, not overruled, on direct review).

[3] Pal argues that he did not waive his multiplicity argument by failing to raise it before sentencing (Pal's Br. at 14). He reasons that his trial counsel was ineffective for failing to raise that issue before sentencing (Pal's Br. at 14). Pal also argues that this Court should grant relief in the interest of justice (Pal's Br. at 14). This Court should not consider those arguments because they are undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, because *Hartnek* forecloses Pal's multiplicity argument, his trial attorney did not provide ineffective assistance by declining to raise that issue before sentencing. *See State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369 (noting that an attorney's failure to make a losing argument is neither deficient performance nor prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984)). Further, because Pal's arguments fail on their merits, he is not entitled to relief in the interest of justice. *See State v. Lock*, 2012 WI App 99, ¶ 124, 344 Wis. 2d 166, 823 N.W.2d 378.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction and order denying Pal's motion for postconviction relief.

Dated this 10th day of December, 2015,

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2094 words.

_____
Scott E. Rosenow
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of December, 2015.

_____
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