

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 24, 2022
Certiorari to the Court of Appeals, 2019CA994 District Court, Jefferson County, 2014CR3235	
Petitioner: Perry Sawano, v.	Supreme Court Case No: 2022SC221
Respondent: The People of the State of Colorado.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 24, 2022.

19CA0994 Peo v Sawano 02-24-2022

COLORADO COURT OF APPEALS

DATE FILED: February 24, 2022

Court of Appeals No. 19CA0994
Jefferson County District Court No. 14CR3235
Honorable Christopher C. Zenisek, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Perry Sawano,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE J. JONES
Lipinsky and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced February 24, 2022

Philip J. Weiser, Attorney General; John T. Lee, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Perry Sawano, Pro Se

¶ 1 Defendant, Perry Sawano, appeals the trial court's order denying his Crim. P. 35(c) motion for a proportionality review. We affirm.

I. Background

¶ 2 A grand jury indicted Sawano on five counts of securities fraud and twelve counts of theft. The indictment alleged that Sawano was a licensed investment advisor representative and that, over several years, he misappropriated his clients' investments and misled those clients regarding his actions.

¶ 3 Sawano agreed to plead guilty to two counts of class 3 felony theft (\$20,000 or more) and two added counts of class 3 felony securities fraud in exchange for the dismissal of the remaining charges. One securities fraud count involved twelve victims and the other involved twelve other victims.

¶ 4 The trial court accepted Sawano's pleas and sentenced him to four consecutive seven-year prison terms. The court also ordered him to pay over \$4,400,000 in restitution.

¶ 5 Thereafter, Sawano filed a Crim. P. 35(c) motion, requesting a proportionality review of his sentences. He argued that, under an abbreviated proportionality review, none of the offenses of which he

was convicted were grave and serious and that, therefore, his seven-year “maximum in the aggravated range” prison sentence on each conviction raised an inference of gross disproportionality. Sawano then asserted that his sentences should be deemed unconstitutional under an extended proportionality review.

¶ 6 In denying the motion, the postconviction court noted that, contrary to Sawano’s assertion, the seven-year prison sentences imposed on each offense were “*below* the mid-point of the presumptive range in the statute.” The court further found that, in light of the “amount stolen, the number of victims impacted, and the resulting extraordinary harm suffered by the victims and community,” “[a] seven-year sentence on each of these four counts d[id] not give rise to an inference of gross disparity.”

II. Legal Authority and Standard of Review

¶ 7 The Eighth Amendment to the United States Constitution prohibits the imposition of a sentence that is grossly disproportionate to the severity of the crime committed. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Wells-Yates v. People*, 2019 CO 90M, ¶ 5. The Amendment “does not require strict

proportionality between crime and sentence.” *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); *see also Close v. People*, 48 P.3d 528, 536 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. *Close*, 48 P.3d at 536.

¶ 8 Review of the constitutional proportionality of a sentence involves a two-step process: an abbreviated proportionality review and, if needed, an extended proportionality review. *Wells-Yates*, ¶¶ 7, 10.

¶ 9 Upon request, a trial court must conduct an abbreviated proportionality review of a defendant’s sentence. *People v. Gee*, 2015 COA 151, ¶ 57. An abbreviated proportionality review involves a comparison of two subparts — the gravity or seriousness of the offense and the harshness of the penalty — to determine whether an inference of gross disproportionality is raised. *Wells-Yates*, ¶¶ 7-9, 11, 14, 23.

¶ 10 “[T]he determination of whether [a] crime is grave or serious depends on the facts and circumstances underlying the offense.” *People v. Hargrove*, 2013 COA 165, ¶ 12, *abrogated on other*

grounds by Wells-Yates, ¶¶ 16-17. The gravity or seriousness of an offense can be determined by considering the “harm caused or threatened to the victim or society, and the culpability of the offender.” *Solem v. Helm*, 463 U.S. 277, 292 (1983).

¶ 11 When considering the harshness of the penalty, “a great deal of deference is due to legislative determinations regarding sentencing.” *People v. Deroulet*, 48 P.3d 520, 523 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. Accordingly, “in almost every case, the abbreviated proportionality review will result in a finding that the sentence is constitutionally proportionate, thereby preserving the primacy of the General Assembly in crafting sentencing schemes.” *Id.* at 526.

¶ 12 If an abbreviated proportionality review reveals no inference of gross disproportionality, no further analysis is required. *Close*, 48 P.3d at 542. “The court need only conduct an extended proportionality review if the abbreviated proportionality review gives rise to an inference of gross disproportionality.” *People v. Strock*, 252 P.3d 1148, 1157 (Colo. App. 2010).

¶ 13 We review a trial court’s proportionality determination de novo. *People v. Gaskins*, 923 P.2d 292, 294 (Colo. App. 1996).

III. Analysis

¶ 14 Initially, we conclude that the postconviction court correctly considered the proportionality of each individual seven-year prison sentence, rather than the proportionality of the aggregate twenty-eight-year prison term. *See Wells-Yates*, ¶ 24 (“If there are multiple triggering offenses, the reviewing court must look at the sentence imposed for each such offense and engage in a proportionality review of that sentence because each sentence represents a separate punishment for a distinct and separate crime” and because, “[i]f the proportionality review assessed instead the cumulative effect of the sentences imposed on all the triggering offenses, it could result in an inference of gross disproportionality merely because the defendant committed multiple crimes.”); *Close*, 48 P.3d at 538-39.

¶ 15 First, the record supports the postconviction court’s finding that Sawano’s underlying theft and fraud convictions were serious due to the amount of money stolen and the number of victims who were harmed. Indeed, although we don’t have the benefit of the providency and sentencing hearing transcripts, the record reflects that Sawano lost millions of dollars of his clients’ money and misled

them for several years regarding the status of their investments.

See Melton v. People, 2019 CO 89, ¶ 25 (Whether theft is a grave and serious offense must involve “an individualized determination premised on the facts and circumstances surrounding the particular crime committed — i.e., based on consideration of the harm caused or threatened to the victim or society and the offender’s culpability.”); *see also People v. Gaskins*, 825 P.2d 30, 36 (Colo. 1992) (“In assessing the harm caused or threatened to society, relevant considerations include . . . the absolute magnitude of the crime (e.g., theft of a large amount usually can be viewed as more serious than theft of a small amount, other circumstances being the same).”), *abrogated on other grounds by Wells-Yates*, ¶¶ 55-56, 66; *cf. People v. Merchant*, 983 P.2d 108, 117 (Colo. App. 1999) (The defendant’s habitual criminal sentence wasn’t grossly disproportionate where, in part, “the gravity and seriousness of [the] defendant’s [triggering and predicate theft-related] crimes were enhanced by [the] defendant’s repeated abuse of the trust of his victims.”).

¶ 16 Moreover, Sawano’s seven-year prison sentences fall well within the statutory four-to-twelve-year presumptive sentencing

range for class 3 felonies, *see* § 18-1.3-401(1)(a)(V)(A), C.R.S. 2021, and the sentences are parole eligible, *see* § 17-22.5-403, C.R.S. 2021; *see also* *Wells-Yates*, ¶ 14 (“[W]hether a sentence is parole eligible is relevant during an abbreviated proportionality review because parole can reduce the actual period of confinement and render the penalty less harsh.”).

¶ 17 Accordingly, we aren’t convinced that an inference of gross disproportionality arises when Sawano’s legislatively authorized, parole eligible prison sentences are compared to the seriousness of his actions over several years that caused millions of dollars in losses to his investors. *See Deroulet*, 48 P.3d at 523, 526; *see also Rutter v. People*, 2015 CO 71, ¶ 16 (“[I]n non-capital cases, courts will rarely conclude that a defendant’s sentence is grossly disproportionate.”); *Merchant*, 983 P.2d at 116 (“Outside the capital punishment context, successful challenges to the proportionality of a particular sentence are extremely rare.”).

¶ 18 Lastly, we reject Sawano’s reliance on his age and inability to make restitution payments while incarcerated to support his assertion that the sentences are grossly disproportionate to the severity of his crimes. *See Valenzuela v. People*, 856 P.2d 805, 810

(Colo. 1993) (mitigating factors, such as a defendant's age, are irrelevant to determining whether a punishment is constitutionally proportionate to the crime).

IV. Conclusion

¶ 19 The order is affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.