COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1996-CR **Cir. Ct. No. 1999CF4314**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AIRRY DAVID MASSEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Airry David Massey appeals an order denying him sentence modification. He claims that an alleged change in his mental health status constitutes a new factor warranting relief from his sentence for felony murder. We reject his arguments and affirm.

BACKGROUND

¶2 In July 1999, Massey and an accomplice robbed a Milwaukee Rent-A-Center. During the robbery, Massey's accomplice shot and killed a store clerk. Massey pled guilty to felony murder and faced a potential maximum sentence of sixty years in prison. While in jail awaiting sentencing, Massey provided information to law enforcement about criminal cases unrelated to his own. At sentencing, Massey and the State jointly recommended that he receive a thirty-year prison sentence. The sentencing court took into account Massey's cooperation with law enforcement, acknowledging that he had "risk[ed his] own safety in the county jail and potentially in the future in the prison system." After considering this and other factors, the sentencing court concluded that an indeterminate term of fifty years in prison was necessary to punish and rehabilitate Massey and to protect the community.

¶3 Massey exercised his postconviction and appellate rights, filing a motion for postconviction relief. He sought plea withdrawal and, alternatively, he sought resentencing or sentence modification on various grounds. As relevant here, he alleged that a new factor warranted relief from his sentence. He contended that, due to his assistance to law enforcement, prison authorities had placed him in solitary confinement to protect him from other inmates who had made threats against him, and his sentence therefore was harsher than the sentencing court intended. The same judge who sentenced him also entertained his postconviction claims and denied them after a hearing.[1] Massey appealed to

[1] The Honorable John J. DiMotto imposed sentence and presided over the proceedings addressing Massey's first postconviction motion. In this opinion, we refer to Judge DiMotto as the sentencing court.

this court. On appeal, Massey did not pursue plea withdrawal or renew his claim for sentence modification based on his cooperation with law enforcement. Instead, he limited his appellate arguments to claims that he was sentenced on the basis of inaccurate and undisclosed information concerning his role in the offense and the credibility of his accomplice. *See* ***State v. Massey***, No. 2001AP0877-CR, unpublished slip op. ¶1 (WI App Feb. 12, 2002) (***Massey I***). We affirmed. ***Id.*** The supreme court denied review.

¶4 In 2012, Massey launched his current round of postconviction litigation. He filed a new sentence modification motion, alleging that his mental health has deteriorated during his imprisonment. He contends that he now suffers from "reality based paranoia" and related conditions originating from his fear that other inmates are plotting to kill him in retaliation for his cooperation with law enforcement. He argues that his alleged mental illness, caused, he emphasizes, by his cooperation with the State, is a new factor warranting sentence modification. The circuit court rejected his claim and then denied his motion to reconsider.[2] He appeals.

DISCUSSION

¶5 A circuit court may modify a sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden of proving by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. A new factor is '"a fact or set of facts highly relevant to

[2] The Honorable Richard A. Sankovitz entered an interim order that denied Massey's 2012 postconviction motion but granted leave to request reconsideration. The Honorable Jeffrey A. Wagner denied Massey's motion to reconsider. We refer to both Judge Sankovitz and Judge Wagner as the circuit court.

the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis of the defendant's claim for relief. *See* ***id.***, ¶38. If the defendant shows that a new factor exists, the circuit court has discretion to determine whether the new factor warrants sentence modification. ***Id.***, ¶37.

¶6 The consequences of Massey's cooperation with law enforcement do not constitute a new factor here. The record shows that the sentencing court discussed Massey's cooperation on the record and recognized that, by cooperating, Massey placed himself at risk while in prison. Because the sentencing court took into account that Massey might face ramifications of his cooperation while in prison, the ramifications that Massey now describes were not "'overlooked'" at the time of sentencing. *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted).

¶7 Moreover, a convicted person's diminished health is normally not a new factor. *See* ***State v. Iglesias***, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994) (change in health not a new factor); *see also* ***State v. Ramuta***, 2003 WI App 80, ¶21, 261 Wis. 2d 784, 661 N.W.2d 483 (obesity-related health problems and shorter-than-normal life expectancy not new factors). Massey's current mental health status does not present an exception to the general rule because Massey's mental health status was not a fact "'highly relevant'" to the sentence imposed. *Cf.* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). As we discussed in ***Massey I***, the sentencing court considered many relevant and proper factors at sentencing including the gravity of the offense, the need to protect the public, "Massey's

employment record, educational background, character, family circumstances, involvement in the actual shooting, the interests of the community, and prior record." *See* ***Massey I***, No. 2001AP877-CR, unpublished slip op. ¶13 & n. 5 (some punctuation omitted). The sentencing court did not, however, mention Massey's mental health, as Massey frankly concedes on appeal.

¶8 In Massey's view, his allegedly diminished mental health is nonetheless highly relevant here. Massey contends:

> [h]e helped law enforcement solve and prosecute other violent crimes. Because of that good deed, he has been threatened by other inmates, and the threats have led to a constellation of debilitating psychological problems that logically should affect the sentencing calculus.
>
> ....
>
> Massey's mental illness informs all three community interests [that] the [sentencing] court identified.
>
> First, it informs rehabilitation and community protection.... Massey's mental illness suggests that he will be less likely to return to a life of crime, because his time in prison has been extremely unpleasant, more so than would be the case for a typical inmate. The anguish he has experienced as a result of prison will act as a substantial deterrent to him committing crimes again.
>
> Second, Massey's mental illness informs the amount of prison time necessary for punishment.... His mental illness prevents him from participating in many of the positive pleasurable activities available in prison, such as recreation and socializing with other inmates. Instead he faces isolation and intense psychological distress on a day-to-day basis, which likely will only compound in the future. Because of this mental illness, he suffers much more than the average prison inmate. The knowledge of that distress logically would have affected the sentencing court's calculus as to how much prison time constituted adequate punishment.

¶9 The foregoing arguments are entirely speculative. The record offers no support for the suggestion that the sentencing court would have sentenced Massey differently had it known about his alleged impending mental health problems and their claimed effect on his experience in prison. Indeed, the sentencing court entertained and rejected arguments markedly similar to those presented here during the postconviction proceedings underlying ***Massey I***. In those proceedings, Massey asserted:

> the nature of his confinement is dramatically different than that anticipated by the parties at the time he was sentenced. Through no fault of his own and indeed, as a result of his attempt to cooperate with the State in this case, defendant Massey has been held in a segregation unit and subject to all the restrictions applicable thereto.... His terms of incarceration, therefore, are dramatically different than those applicable to general population inmates, and certainly not that type of confinement envisioned by the court at time of sentencing....
>
> It is unlikely that the court envisioned that not only would Mr. Massey be punished for the crime he was convicted of, but that in addition to this he would be punished more severely as a result of having cooperated with the authorities in helping to solve other crimes in the Milwaukee County area....
>
> The very nature of Mr. Massey's punishment has changed dramatically. It could not have been anticipated that because Mr. Massey had done a good thing, having provided significant cooperation to the State, that he would be punished as a result. This change in the nature of Mr. Massey's imprisonment constitutes a new factor.

¶10 The sentencing court was not persuaded. It explained that it had "carefully laid out the sentencing factors [and] how [the court] gave weight to particular factors," and the sentencing court made plain that the terms under which Massey was spending his confinement were simply "n[o]t facts highly relevant to the imposition of this sentence." Although the sentencing court acknowledged that "it really is unfortunate that in essence he's being punished for the

cooperation he gave to the State," nonetheless, the sentencing court unequivocally "felt that the 50 year term of incarceration was correct then [and that] it's correct now." Thus, the sentencing court's remarks during the first postconviction proceeding confirm what is evident from the original sentencing hearing: the quality of Massey's correctional experience was not a factor highly relevant to the sentencing decision.[3]

¶11 The sentencing court, not the parties or this court, determines the factors that are relevant at sentencing. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentencing court here might have discussed Massey's mental health and the impact it would have on his correctional experience in some or all of the ways that Massey discusses the issue in his appellate briefs. The sentencing court did not do so. Its silence on the matter reflects that Massey's mental health was not a highly relevant sentencing factor in this case.

¶12 Massey asserts that we should not consider whether the sentencing court discussed a factor when we determine its relevance to his sentencing. We cannot agree. Wisconsin courts have long recognized that a sentencing court demonstrates the relevance of a factor to a sentencing decision when the court expressly relies on that factor during sentencing. *See* ***State v. Franklin***, 148 Wis. 2d 1, 14-15, 434 N.W.2d 609 (1988). In ***Franklin***, the supreme court determined that a change in parole policy is not a new factor when the sentencing court did not mention the original parole policy in fashioning the sentence. *See* ***id.***

[3] Massey's appellate briefs do not include a discussion of the postconviction proceedings that preceded Massey's direct appeal.

Similarly here, where the sentencing court did not mention Massey's mental health status in determining an appropriate sentence, Massey's mental health status is not "highly relevant" to the sentence chosen, and a change in that status does not constitute a new factor.

¶13 Massey argues that his current mental health conditions "create a disincentive for [Massey] to commit further crimes" and provide "good reason [for Massey] to avoid returning to prison." Relatedly, he argues that "his likelihood of re-offense is thus substantially less now than it was at the time of his crime." These contentions are best assessed by the Department of Corrections and the parole board. "Changes in attitude and prison rehabilitation are not new factors justifying sentence modification. Rather, deliberation on these subjects lies solely with the parole authorities." ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988). We affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).