COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2571-CR **Cir. Ct. No. 1996CF961019C**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN P. TATE, A/K/A SHAWN P. TATE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Sean P. Tate, a/k/a Shawn P. Tate, *pro se*, appeals an order denying his motion for sentence modification without a hearing. He also appeals an order denying his motion for reconsideration. Tate argues: (1) that he was improperly sentenced to a much longer prison term than his co-defendants;

(2) that a change in the law pertaining to mandatory release dates that took effect several years before his sentencing is a "new factor" entitling him to sentence modification; (3) that he is entitled to relief because the presentence investigation report contained incorrect information regarding his Minnesota criminal record; and (4) that the circuit court should not have denied his motion without an evidentiary hearing. We affirm.

¶2 Tate was sentenced to an indeterminate term not to exceed sixty years of imprisonment in 1996 for felony murder. On direct appeal, we affirmed his judgment of conviction. Since his direct appeal, Tate has sought collateral postconviction relief and sentence modification *pro se* in the circuit court and in this court. Most recently, Tate moved to modify his sentence on October 23, 2012. The circuit court denied the motion.

¶3 Tate argues that the circuit court improperly imposed a sentence on him that was much longer than the sentences imposed on his co-defendants. "[E]qual protection of the laws requires substantially the same sentence for substantially the same case histories." ***Drinkwater v. State***, 73 Wis. 2d 674, 679, 245 N.W.2d 664 (1976). Tate contends that the circuit court's sentence was improper because he is similarly situated to his co-defendants but for one thing—he exercised his constitutional right to go to trial. We disagree. Tate is *not* similarly situated to his co-defendants. One of Tate's co-defendants was convicted of armed robbery and another co-defendant was convicted of armed robbery while concealing identity. Neither was convicted of felony murder. Tate was convicted of felony murder with a concealed identity, with armed robbery while masked as the predicate offense. Tate's crime is more serious and carries a stiffer penalty. Tate and his co-defendants also differed in terms of their character and other factors pertinent to sentencing. The circuit court found Tate to be

unrepentant and angry, and said that he blamed others for his actions. Tate's equal protection rights were not violated by his sentence as compared to his co-defendants because he was not similarly situated to them.

¶4 Tate argues that the circuit court should modify his sentence due to a "new factor," a change in the sentencing laws that took effect several years before he was sentenced. The 1993 amendment to WIS. STAT. § 302.11 provided that, for prisoners who committed serious felonies, there would be a *presumption* that they should be released to community supervision after they served two-thirds of their sentence, rather than outright release as provided before the amendment.

¶5 A "new factor" is "a fact or set of facts highly relevant to 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation and quotation marks omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. Tate has failed to meet this burden. The change to which Tate refers occurred several years *before* he was sentenced. Tate has presented absolutely no support for his claim that the trial court, the district attorney and his attorney all were unaware of this change and thus unknowingly overlooked it. The 1993 amendment to WIS. STAT. § 302.11 is not a new factor.

¶6 Tate next argues that he is entitled to relief because the presentence investigation report contained incorrect information regarding his Minnesota criminal record. "'A defendant has a due process right to be sentenced based on accurate information.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39,

756 N.W.2d 423 (citation omitted). "The defendant requesting resentencing must prove, by clear and convincing evidence, both that the information is inaccurate and that the trial court relied upon it." ***Id.***

¶7 Tate argues in his brief that the sentencing court was forced to "guess and/or make assumptions … as to whether [he] had 6 felony convictions or not" due to incorrect information from Minnesota. The sentencing transcript belies this claim. The circuit court stated at sentencing that Tate's prior record included three or four felonies "and at least three other convictions that are misdemeanors or possibly felonies." Contrary to Tate's assertion, the circuit court did not assume that he had six prior felonies. Moreover, the circuit court asked Tate at sentencing whether he had time to review the presentence investigation report. Tate's lawyer responded that he and Tate had reviewed the report at the jail the day before and "there are no corrections for the record according to the defendant himself." Tate may not affirmatively state that there are no errors in the presentence investigation report and then later assert that the information relied on by the circuit court was inaccurate. *See* ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207.[1]

[1] Tate contends that the circuit court violated SCR 60:04(1)(g) by taking judicial notice of additional electronic records from Minnesota before deciding Tate's postconviction claim that the presentence investigation report contained inaccurate information about his Minnesota criminal record. In a footnote in its decision, the circuit court stated: "Performing even a cursory search of the defendant's record on the internet, the court discovered much of the same information set forth by the presentence writer. The court located [four felony thefts and two misdemeanors]." We need not decide whether the circuit court erred in researching Tate's record because we have not considered the records in reaching our decision. Therefore, any potential error was harmless. *See* ***State v. Vanmanivong***, 2003 WI 41, ¶35, 261 Wis. 2d 202, 661 N.W.2d 76.

¶8 Finally, Tate argues that the circuit court should not have denied his motion for sentence modification without holding an evidentiary hearing. The circuit court must hold an evidentiary hearing if a postconviction motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The issues Tate has raised in his motion are unavailing as a matter of law. Stated differently, Tate cannot prevail on his claims regardless of whether he proves the facts he alleges in his motion. Therefore, the circuit court properly denied Tate's motion without a hearing.

By the Court.—Orders affirmed.

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