COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2579-CR **Cir. Ct. No. 2012CF2510**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS L. PAYNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Demetrius Payne appeals a judgment, entered upon his guilty plea, convicting him of substantial battery, as domestic abuse, while using a dangerous weapon. Payne also appeals the order denying his postconviction motion for resentencing. Payne raises no challenge to his

conviction but, rather, argues that the sentencing court's reliance on inaccurate information entitles him to resentencing. Payne alternatively contends that new factors warrant sentence modification. We conclude that to the extent the sentencing court relied on inaccurate information, any error was harmless. We also reject Payne's arguments for sentence modification based on new factors. Therefore, the judgment and order are affirmed.

BACKGROUND

¶2 The State charged Payne with substantial battery, as domestic abuse, while using a dangerous weapon; two counts of possession of a firearm by a felon; and three counts of endangering safety by use of a dangerous weapon (pointing). The charges arose from allegations that Payne attempted to choke his girlfriend and threatened to kill her while holding a handgun to her head. The complaint further alleged that after Payne's girlfriend got away from him, Payne started fighting with his sister, pointed the handgun at her head and proceeded to "pistol-whip" her until she was unconscious. While beating his sister, witnesses allegedly saw another gun—a revolver with a short barrel—fall from his pocket. It was also alleged that Payne placed the handgun against the head of a third individual who attempted to intercede while Payne was beating his sister.

¶3 In exchange for Payne's guilty plea to the substantial battery charge, the State agreed to dismiss and read in the remaining counts, thus reducing Payne's potential exposure by more than twenty years. Out of a maximum possible seven and one-half year sentence, the court imposed a seven-year sentence consisting of five years' initial confinement and two years' extended supervision, to run consecutive to any sentence Payne was already serving.

Payne's postconviction motion for resentencing was denied and this appeal follows.

DISCUSSION

¶4 Payne contends he is entitled to resentencing because the circuit court relied on inaccurate information when imposing the sentence. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. ***Id.*** A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the trial court actually relied on the inaccurate information. ***Id.***, ¶31.

¶5 Actual reliance is demonstrated if the circuit court gave "explicit attention" or "specific consideration" to the inaccurate information, such that the inaccurate information "formed part of the basis for the sentence." ***Id.***, ¶28. The defendant must prove both components by "clear and convincing evidence." ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. "Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless." ***Tiepelman***, 291 Wis. 2d 179, ¶26. "An error is harmless if there is no reasonable probability that it contributed to the outcome." ***Payette***, 313 Wis. 2d 39, ¶46 (quoted source omitted); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶6 First, Payne takes issue with the following comments made by the sentencing court:

> You, then, supervised on adult—your adult escape, you are revoked twice, both times involving guns.
>
> You could have been charged with a felon in possession of a weapon on either one of those times but they revoked you. They give you a chance. They give you an alternative. They revoked you again.
>
> They've given you many, many chances, and you keep showing up with guns. You had guns as a juvenile, guns while you're on supervision, and reportedly, two guns on this day.
>
> I mean, if we just add up all of those guns, the two earlier—that's—that's, like, forty years you could be serving. And you're back.
>
> Guns have played a real role in your life. The first time is '03. … It's nine years of problems with guns, even though you've been under juvenile and adult supervision. It's not a pretty picture.

Payne argues the court's comments were inaccurate because he could not have been charged as a felon in possession of a firearm for either of the referenced revocations.[1]

¶7 Payne also contends the sentencing court relied on inaccurate information regarding whether Payne sought substance abuse treatment and whether he complied with the rules of his extended supervision. Specifically, the court stated:

[1] In one of the revocations, Payne was alleged to have been in possession of a BB gun, which does not constitute a "firearm." *See* ***State v. Rardon***, 185 Wis. 2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994) ("[T]he term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly."). In the other revocation, the presentence investigation report indicated that a reliable source identified Payne as the person in possession of a firearm, but it was never determined whether Payne was "actually" in possession of a firearm.

> They sent you to drug treatment. You did – you missed January – March 30th 2012; April 19th, 2012; April 24, 2012. You don't show up for any of your intakes.
>
> If alcohol is the problem, it's only [an] important problem to you since you've been in custody. It wasn't important to you when you were out then.
>
> And THC … You were smoking daily, all day, every day, you said. Smoking daily, all day, every day, while you're on extended supervision.
>
> You know what your rules are, and I don't see one that you didn't violate.

According to Payne, he showed up for treatment intake on April 26, 2012, and complied with "some" of the conditions of his extended supervision.

¶8 Even assuming the sentencing court relied on this trivial inaccurate information, we conclude any error was harmless. Payne implies that his sentence was harsher than it would have been had the court not relied on inaccurate information. We are not persuaded. When viewing the totality of the court's statements, we conclude the sentencing court imposed a near-maximum sentence based on the violent nature of the offense and read-in charges; Payne's propensity for possessing guns; and the already significant reduction in his exposure to potential confinement via the plea agreement. Because there is no reasonable probability that the cited errors contributed to the outcome at sentencing, the circuit court properly denied Payne's motion for resentencing.

¶9 Payne alternatively asserts that these mistakes of fact, as well as his completion of the intake process for alcohol abuse treatment, constitute new

factors justifying sentence modification.[2] A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶36-37.

¶10 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 ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. Whether a new factor justifies sentence modification, however, is reviewed for an erroneous exercise of discretion. ***Id.*** "An erroneous exercise of discretion occurs when the circuit court does not consider the facts of record under the relevant law or does not reason its way to a rational conclusion." ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

¶11 As noted above, the cited inaccuracies did not contribute to the outcome at sentencing. It follows, therefore, that these harmless errors are not "highly relevant to the imposition of sentence." ***Id.***, ¶40. Turning to Payne's completion of alcohol treatment intake, the circuit court reasonably concluded that

[2] With respect to his claim that the cited inaccuracies constitute new factors warranting sentence modification, Payne concedes he did not raise this particular argument in the circuit court. Although issues not raised in the circuit court are generally deemed forfeited, the rule of forfeiture is one of judicial administration and does not limit the power of an appellate court, in the exercise of its discretion, to consider issues raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 609, 563 N.W.2d 501 (1997). While we could ignore this argument, we elect to address it as if it had been preserved.

this factor did not warrant sentence modification because it did not "mitigate the danger [Payne] presents to society." Moreover, rehabilitation is not a "new factor" for purposes of sentence modification. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). The court, therefore, properly exercised its discretion by denying sentence modification.

By the Court.—Judgment and order affirmed.

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