COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP5-CR **Cir. Ct. No. 2012CF002690**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAQUILLE ONEAL TROTTER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., and ELSA C. LAMELAS, Judges. *Affirmed*.

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

¶1 PER CURIAM. Shaquille Oneal Trotter appeals from a judgment of conviction for armed robbery with threat of force as party to a crime, *see* WIS. STAT. §§ 943.32(2) & 939.05, and from an order denying his postconviction

motion for sentence modification.[1] Because the circuit court properly exercised its discretion in determining that Trotter's ineligibility for the Challenge Incarceration Program (CIP) did not justify the modification of his sentence, we affirm.

I. BACKGROUND

¶2 According to the criminal complaint, Trotter and another man approached two victims from behind with a shotgun and demanded their personal property. Initially, Trotter was charged with one count of armed robbery with threat of force as party to a crime. The State subsequently filed an amended information adding a second count of armed robbery with threat of force as party to a crime and further charging Trotter with being an adjudged delinquent in possession of a firearm.

¶3 As part of a negotiated settlement, Trotter pled guilty to the original charge of armed robbery, and the State withdrew the amended information. Additionally, the State agreed to recommend twenty-four months of initial incarceration and thirty-six months of extended supervision.

¶4 At sentencing, the State abided by the terms of the negotiated agreement in making its recommendation. Trotter asked the circuit court to follow that recommendation. The circuit court, however, concluded that given Trotter's past record, the presentence investigation report writer's recommendation of four to five years was more appropriate:

[1] The Honorable Charles F. Kahn, Jr., who sentenced Trotter, retired from the bench while the postconviction motion was pending. The Honorable Elsa C. Lamelas decided the postconviction motion.

> Now, the presentence writer instead of imposing the whole 25 years of initial confinement I think was influenced by the plea negotiations that [Trotter's trial lawyer] was able to obtain on behalf of Mr. Trotter, and the proposal by the presentence writer is only a maximum of five, that is four to five years of initial confinement; and under these circumstances, I find that Mr. Trotter will be eligible for the Challenge Incarceration Program after three years from today's date. That is, he is eligible and it would be appropriate, but he needs some growing up time in prison before that would be sufficiently helpful to protect the public. Just in case there is any confusion about this, I am making a specific finding that without a substantial separation period, that is, Mr. Trotter being separated from the people of this community, without a substantial period of time during which Mr. Trotter is removed from the community, he would be and currently is dangerous to others. So after November 29, 2015, Mr. Trotter will be eligible for the Challenge Incarceration Program….
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> ….
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> Giving credit to Mr. Trotter for the insight and wisdom of the district attorney who has proposed this brief period of time of imprisonment and the credit to the wisdom of the presentence writer who also I believe took into account the negotiations that [Trotter's trial lawyer] had obtained for Mr. Trotter, the presentence writer is proposing only a maximum amount of five years of initial confinement, and I have just found that Mr. Trotter will be eligible for the Challenge Incarceration Program after three years from today, which is about three-and-a-half years of confinement time, and under these circumstances, the term of initial confinement then will be five years. The term of extended supervision is five years as well.
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> … The five years will give you an opportunity to be out before you are even 25 years old, before you are even 25 years old. The vast majority of your life is ahead of you. Take advantage of the opportunity, sir. I know you can do it. I know you can overcome these issues and do very well.

¶5 Upon learning that he was ineligible for CIP because he had asthma, Trotter filed a postconviction motion requesting a sentence modification on the ground that his ineligibility constituted a new factor.

¶6 In a written decision denying Trotter's postconviction motion, the circuit court explained that it was not clear to what extent Trotter's CIP eligibility impacted the sentence he received and even if Trotter's ineligibility did constitute a new factor, sentence modification was not warranted.

II. DISCUSSION

¶7 The sole issue on appeal is whether Trotter's ineligibility for participation in the CIP due to his asthma is a new factor justifying sentence modification.

¶8 A circuit court may, but is not required to, modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶¶35, 37-38, 333 Wis. 2d 53, 797 N.W.2d 828. 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 (citation omitted). A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. ***Id.***, ¶38. "The existence of a new factor does not automatically entitle the defendant to sentence modification." ***Id.***, ¶37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id.***

¶9 Though the existence of a new factor presents a question of law we review *de novo*, whether and to what degree a sentence should be modified is a discretionary determination for the circuit court. ***Id.***, ¶¶36-37. A circuit court's discretionary determination will be sustained if it examined the proper facts, applied the correct standard of law, and reached a reasonable conclusion using a

rational process. ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861.

¶10 Trotter submits that the circuit court "clearly made his eligibility for and expected participation in the [CIP] an important component of his sentence." Additionally, he asserts that the circuit court anticipated his participation in CIP would reduce his initial-confinement time.

¶11 We are not convinced that the circuit court's intent in structuring its sentence to account for Trotter's participation in CIP is as clear as Trotter suggests given that the circuit court ultimately sentenced Trotter to five years of initial confinement, stating "[t]he five years will give you an opportunity to be out before you are even 25 years old." This statement evidences that the circuit court was aware that there was a distinct possibility Trotter would serve the entire period of initial confinement.

¶12 As analyzed by the circuit court in denying Trotter's postconviction motion:

> In the instan[t] case, it is not clear from the record what relevance, if any, the defendant's participation in CIP had in the court's sentencing analysis. While the court determined that CIP would be "appropriate" for the defendant, nothing in the record definitely shows that the court based the length of the initial confinement term on the defendant's participation in the program. Arguably, the court considered the defendant's eligibility for CIP when it followed the presentence writer's maximum initial confinement recommendation of five years, confident that the defendant would serve *at least* three years of the five years of confinement that was intended to separate the defendant from the community.
>
> Nevertheless, even assuming that the defendant's ineligibility to participate in CIP would qualify as a new factor in this case, the court finds that a sentence modification is not justified under the circumstances. The

> defendant committed one of the most serious felony offenses in this state, punishable by up to 25 years of confinement. His conduct and its effect on the victims were extremely serious. Moreover he presented with a substantial criminal record for his young age (18 years), which included a number of serious offenses. Couple the defendant's extensive prior record with his difficult background, his lack of work history, his educational problems, behavioral and emotional issues and self-reported alcohol and marijuana use and it is clear to this court, as it was to Judge Kahn, that the defendant presents a considerable risk for reoffending. Judge Kahn was surprised by the district attorney's lenient sentencing proposal given the gravity of the defendant's conduct and his criminal history. He recognized that the defendant had substantial rehabilitative needs that needed to be addressed in a confined setting and that the defendant needed to be incarcerated for enough time to protect the community. Under the circumstances, this court finds that any length of confinement less than five years would be insufficient to accomplish the court's sentencing goals and therefore the court denies the defendant's request to modify the sentence.

(Emphasis in original; footnote omitted.) We agree. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.").

¶13 Insofar as Trotter takes issue with the circuit court's ruling on his postconviction motion, arguing that resolution of a motion for sentence modification based on a new factor "is not supposed to involve a fresh exercise of discretion," he is mistaken.[2] To the contrary: "[I]f a new factor is present, the

[2] For this proposition, Trotter cites ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498, which is inapposite.

circuit court determines whether that new factor justifies modification of the sentence. In making that determination, the circuit court exercises its discretion." ***Harbor***, 333 Wis. 2d 53, ¶37 (citations omitted).

¶14 Here, the circuit court properly exercised its discretion when it concluded that even if Trotter's CIP ineligibility constituted a new factor, modification was at odds with the court's intent at the time of Trotter's sentencing.

By the Court.—Judgment and order affirmed.

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