COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP244-CR **Cir. Ct. No. 2012CF002859**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFTON LEE WILLIAMS, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Clifton Lee Williams, Jr., appeals a judgment of conviction entered upon his guilty pleas to second-degree reckless homicide with use of a dangerous weapon as a party to a crime and two counts of felon in possession of a firearm. *See* WIS. STAT. §§ 940.06(1), 939.63, 939.05,

941.29(2)(a) (2009-10).[1] He also appeals an order denying his postconviction motion seeking sentence modification. He argues that the circuit court erroneously exercised its discretion when it sentenced him to thirty years of initial confinement and twenty years of extended supervision. We disagree and affirm.

BACKGROUND

¶2 Williams was originally charged with felony murder and with two counts of possession of a firearm, all as a repeater. The charges stemmed from Williams's involvement in an armed robbery that left one person dead. The State amended the information twice, replacing the felony murder charge with second-degree reckless homicide with use of a dangerous weapon as a party to a crime and adding a count of armed robbery with use of force as a party to a crime.

¶3 Pursuant to negotiations, Williams pled guilty to second-degree reckless homicide with use of a dangerous weapon as party to a crime and to two counts of felon in possession of a firearm. In exchange, the State moved to dismiss the repeater enhancers and to dismiss and read in the armed robbery charge.

¶4 The State further agreed to recommend "a substantial period of imprisonment," with the length left to the discretion of the circuit court. However, the State's offer was contingent on Williams providing the police with information regarding the co-actors involved in the shooting. The State explained:

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> It is expected that the defendant [will] be willing to tell the Milwaukee police the truth as to who was involved, what the plan was and who did the shooting.
>
> The [S]tate, as represented by myself, … will decide whether the debriefing given by the defendant is, in fact, the truth.
>
> So essentially for Mr. Williams to hear, I am the sole arbiter as to whether or not he's being truthful.
>
> And essentially that's important, judge, because the relevance of this offer letter states that if the [S]tate believes the defendant is not telling the truth, the [S]tate will be free to make any recommendation at the time of sentencing, including the right to recommend the maximum period of 30 years of confinement followed by 20 years of extended supervision.

The circuit court accepted Williams's pleas.

¶5 At the sentencing hearing, the State concluded that it was free to make a sentencing recommendation because it believed Williams had not been truthful during his debriefing with the police. The State explained that Williams had "once again changed his story and essentially lied as to who was involved in this case." Given that this was "repeated conduct by Mr. Williams throughout the investigation of this case," the State recommended that the circuit court impose the maximum sentence of thirty years of initial confinement followed by twenty years of extended supervision. The circuit court adopted the State's sentencing recommendation.

¶6 Williams subsequently asked the circuit court to modify his sentence, arguing that it was unduly harsh and excessive and based, in part, on inaccurate information. The circuit court denied the motion in a written order.

ANALYSIS

¶7 Williams is displeased with his sentence, arguing that the circuit court erroneously exercised its discretion when it sentenced him to maximum and consecutive sentences on the three convictions. He contends that a more appropriate sentence would have been in "the neighborhood of 8-12 years of initial confinement." Specifically, he asserts that the charge of second-degree reckless homicide and one count of possession of a firearm by a felon "constituted two convictions for essentially the same conduct," which the circuit court neglected to account for when it sentenced him to consecutive rather than concurrent sentences on those charges. Additionally, he argues that the circuit court erred when, in its remarks, it noted that he had been revoked four times rather than three.

¶8 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "[W]e afford a strong presumption of reasonability to the [circuit] court's sentencing determination because the court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶9 A circuit court has the inherent authority to modify a sentence when it determines that the sentence was "unduly harsh." ***State v. Harbor***, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828. A sentence is unduly harsh if it is "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶10 Here, Williams has not established that his sentence is unduly harsh or excessive. The circuit court considered the proper sentencing factors when it concluded that the maximum time was warranted. In rejecting the sentencing recommendation of Williams's trial attorney, which would have given Williams more opportunity for rehabilitation, the circuit court explained:

> [I]f you had wanted to make that change, your opportunity to do it was when [the State] gave you the opportunity to tell the truth. Telling the truth is the absolute beginning of any rehabilitation. No progress can be made in one's life until we're honest. So that was your first opportunity.
>
> It was your opportunity to get a lesser sentence and to demonstrate to the State and to the Court and to the community represented by these individuals here and everyone else out there that, "Yes, give me another chance because I'm ready to turn over a new leaf," and you haven't demonstrated any of those things.

The circuit court also noted the credit Williams had received "just by virtue of the negotiations, dismissals, and amendments."

¶11 Williams's sentence was within the permissible range established by statute. He had the opportunity to reduce his exposure by truthfully assisting police, and he failed to do so. The maximum sentences imposed were justified in this case and neither shock public sentiment nor are disproportionate to the offenses committed. Williams does not show that the circuit court fashioned its sentences on the basis of some improper or unreasonable factor. He shows only that the circuit court exercised its discretion differently than he had hoped. That is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.").

¶12 As for Williams's argument that the circuit court erred when it remarked that his probation had been revoked four times, we agree with the State that whether it was three or four times was immaterial. A circuit court has an opportunity to further clarify its sentencing decisions when they are challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Here, the circuit court explained in its order denying Williams's postconviction motion:

> [E]ven though the court may have misspoken during sentencing about the number of times the defendant was revoked (four vs. three), the difference in numbers did not cause the court to impose a longer sentence. The fact that the defendant committed crimes at all while on supervision was enough to conclude he was a danger to the community due to his complete inability to abide by the rules.

(Footnote omitted.)

¶13 In a motion alleging that the circuit court relied on inaccurate information, the defendant "must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information."[2] *See* ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis.

[2] We note that this facet of Williams's argument—a claim that he was sentenced on the basis of inaccurate information—seemingly amounts to a request for resentencing, not sentence modification. *See generally* ***State v. Wood***, 2007 WI App 190, ¶¶4-6, 305 Wis. 2d 133, 738 N.W.2d 81 (discussing differences between a request for sentence modification and a request for resentencing). In any event, if Williams is attempting to assert that this purported error in the sentencing court's remarks constitutes a new factor warranting sentence modification, the argument still fails. He does not address how the distinction between three and four revocations was relevant to the imposition of his sentence. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (clarifying that a new factor is, by definition, "'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'" (citation omitted and emphasis added)). Consequently, we do not address this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments).

2d 179, 717 N.W.2d 1. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citation omitted). While "[a] circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance," it is supported in this case by our independent review of the record of the sentencing hearing. *See* ***State v. Travis***, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491. Williams has not otherwise established that the distinction between his having four prior revocations rather than three was a basis for his sentence.

¶14 Based on the foregoing, we conclude the circuit court properly denied Williams's postconviction motion.

By the Court.—Judgment and order affirmed.

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