COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP1219-CR
2014AP1220-CR
2014AP1221-CR
2014AP1222-CR

Cir. Ct. Nos. 2012CF122
2012CF137
2012CF153
2012CF195

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. BIRK,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed and cause remanded with directions*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. John Birk appeals judgments convicting him of four counts of burglary and an order[1] denying his postconviction motion for resentencing or clarification of the sentences. He argues: (1) He is entitled to sentence modification because the sentences are harsh and unconscionable when compared to his co-defendants' sentences; (2) The sentence imposed on co-defendant Richard Michiels subsequent to Birk's sentence constitutes a new factor justifying a sentence reduction; and (3) The judgments of conviction should be amended to clarify when Birk becomes eligible for the Substance Abuse Program. We conclude there is no basis for resentencing, but remand the cases with directions to the clerk of the circuit court to amend the judgments of conviction to clarify when Birk will become eligible for the Substance Abuse Program.

BACKGROUND

¶2 Birk was charged with numerous offenses in five separate complaints involving four counties. The charges were later consolidated in Oconto County. Pursuant to a plea agreement, Birk entered guilty and no contest pleas to four counts of burglary. One additional burglary count was dismissed and read in, and the remaining counts were dismissed outright. In addition, fifteen uncharged burglaries and one theft were read in for sentencing purposes. The court imposed four consecutive sentences of five years' initial confinement and three years' extended supervision. The court also granted Birk eligibility for the Substance Abuse Program after serving fifteen years of his initial confinement.

[1] Judge Michael Judge entered the judgments of conviction. The clerk of the circuit court entered the order denying the postconviction motion after the motions were deemed denied pursuant to WIS. STAT. RULE 809.30(2)(i).

All references to the Wisconsin Statutes are to the 2013-14 version.

¶3 Co-defendant Sarah Farnsworth, whose role in the burglaries appears to be as a driver, entered no contest pleas to three counts of burglary as a party to a crime. One count of resisting or obstructing an officer and two counts of theft were dismissed and read in. The court imposed and stayed a six-year sentence and placed Farnsworth on probation for five years.

¶4 Co-defendant Cynthia Cook entered a guilty plea to one count of resisting or obstructing an officer. All other charges were dismissed and not used as read-ins. The court withheld sentence and placed Cook on probation for one year.

¶5 After Birk's sentence, co-defendant Richard Michiels entered guilty or no contest pleas to three burglaries, one count of conspiracy to commit burglary, two counts of theft and one count of obstructing an officer. Six uncharged burglaries were read in for sentencing purposes. The court sentenced Michiels to concurrent terms totaling five years' initial confinement and three years' extended supervision.

DISCUSSION

¶6 Birk has not established sufficient disparity in the sentences to justify resentencing. Mere disparity between the sentences of co-actors is not improper if the individual sentences are based on individual culpability and the need for rehabilitation. ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). This is especially true if the co-actors do not have substantially the same case history. ***Jung v. State***, 32 Wis. 2d 541, 553, 145 N.W.2d 684 (1966). From the number and types of charges and read-ins, and the disparity in the defendants' ages and criminal histories, the sentencing court appropriately concluded Birk was not similarly situated to his co-defendants. Birk had at least

fourteen prior convictions over a thirty-year span, including several failed probationary attempts, jail and prison terms. Farnsworth and Cook committed fewer crimes, and their role in the crimes was less serious than Birk's. The court found Birk was the "leader of the pack." Birk was not similarly situated to Michiels because Michiels had only two prior misdemeanor convictions and was much younger than Birk. Michiels turned himself in and cooperated extensively with the police and prosecutors. Birk, on the other hand, "just kept right on going until he was caught." Because the court found Michiels much more amenable to rehabilitation or deterrence than Birk, a much shorter sentence was justified.

¶7 Michiels' sentence imposed after Birk's sentence does not constitute a new factor justifying modification of Birk's sentence. 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. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Birk acknowledges that when a different judge later imposes a lesser sentence on an accomplice, it is not a new factor. *See* ***State v. Studler***, 61 Wis. 2d 537, 541, 213 N.W.2d 24 (1973). However, because Michiels was sentenced by the same judge, Birk contends the disparity in their sentences constitutes a new factor. To the contrary, we conclude that sentencing by the same judge is even more reason to reject the new factor claim. The court recited in detail the similarities and differences between the co-actors. It gave specific reasons for imposing a much greater sentence on Birk. None of the facts that led to the disparity in the sentences was overlooked by the sentencing court.

¶8 The Comments section of each judgment of conviction states: "Determinate sentence: total 8 years (confinement 5 years forthwith DCI, NOT

eligible for Challenge Incarceration Program but eligible for Substance Abuse Program ONLY after 15 years incarceration)(ES-Extended Supervision 3 years)."[2] In his postconviction motion, Birk indicated he had been told by an unnamed corrections employee that the Department of Corrections is interpreting the judgments to make him eligible for the Substance Abuse Program only after serving fifteen years incarceration on each count. Because Birk was sentenced to only five years' initial confinement and three years' extended supervision on each count, he would never qualify for the program. Therefore, Birk requests that each of the judgments be modified to state that he is eligible for the Substance Abuse Program "after serving 15 years total incarceration between his four consecutive sentences."

¶9 Although we conclude the judgments are not inconsistent with the sentencing court's intent and the suggested alternative interpretation is absurd, to avoid any possible confusion we will direct the clerk of the circuit court on remand to amend the judgments of conviction to make Birk eligible for the Substance Abuse Program after serving fifteen years' total incarceration between his four consecutive sentences.

By the Court.—Judgments and order affirmed and cause remanded with directions.

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

[2] The judgment in case No. 2012CF122 also awarded Birk jail time credit.