COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 15AP389-CR **Cir. Ct. No. 2013CF4644**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE VANTRELL DAVIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Tyrone Vantrell Davis appeals the amended judgment of conviction entered upon his guilty pleas to armed robbery, operating a vehicle without the owner's consent, and first-degree recklessly endangering safety, all as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 943.23(2),

941.30(1), & 939.05 (2013-14).[1] He also appeals the order denying his postconviction motion for sentence modification. Davis argues that the circuit court erred when it imposed a sentence contrary to statute and when it failed to rely upon information in the pre-sentence investigation (PSI) report in fashioning its sentence. Additionally, he claims the circuit court erred when it denied his postconviction motion after determining that neither his mental deficiency nor the State's purported failure to make a previously agreed upon sentencing recommendation were new factors for purposes of sentence modification. We affirm.

BACKGROUND

¶2 Davis was charged with armed robbery, armed burglary, taking hostages, operating a vehicle without the owner's consent, and first-degree recklessly endangering safety. All of the charges were as a repeater and as a party to a crime.

¶3 According to the complaint, which served as the factual basis for Davis's pleas, on August 15, 2013, C.A. and J.T. were returning to their home after picking up their four-year-old daughter, A.A. J.T. was driving and C.A. was in the front passenger seat. A.A. was in the rear passenger seat. As J.T. pulled the vehicle up to their garage, which was located in an alley, C.A. saw two unknown males run up. One of the men was masked and the other did not have his face covered. C.A. identified Davis as the unmasked man after looking at a photo array.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 C.A. told police that Davis ordered the three into the garage at gunpoint and demanded money. When C.A. said that he did not have any, Davis ordered C.A., J.T., and A.A. into their residence. Once inside, Davis ordered C.A. into a bedroom to retrieve his wallet. When Davis and C.A. returned, the masked man yelled that J.T. had taken the couple's daughter into another bedroom and had locked the door behind them. J.T. refused to open the bedroom door. As a consequence, Davis pistol whipped C.A. in the face. C.A. begged J.T. to come out of the room so that Davis would not shoot him.

¶5 Moments later J.T. and their daughter came out of the bedroom. As they did so, two additional masked co-actors entered the residence. Davis and the others proceeded to take a number of items from the home.

¶6 Davis ordered C.A. at gunpoint to carry his television to C.A.'s car. Once the television was inside the car, Davis ordered C.A. to drive to an ATM. After C.A. pulled into the parking lot near the ATM and put the vehicle in park, Davis fired one round from his handgun into C.A.'s hand. Davis ordered C.A. to withdraw $500 from the ATM. C.A. was only able to obtain $40, which he turned over to Davis. Davis then ordered C.A. to drive to and park in a nearby alley. Davis told C.A. he was going to take the car and directed C.A. to clean up his blood. Davis warned C.A. that if he told anyone, he and his family would be killed. Davis drove off in the vehicle.

¶7 J.T. told police that after Davis and C.A. drove to the ATM, she and her daughter were left with Davis's co-actors. After the co-actors finished taking items, they left the residence and J.T. called 911.

¶8 Pursuant to plea negotiations, Davis pled guilty to armed robbery, operating a vehicle without owner's consent, and first-degree recklessly

endangering safety, all as a party to a crime. In exchange, the State agreed to dismiss the penalty enhancer for being a repeater as to those charges and further agreed to dismiss and read in the charges of armed burglary and taking hostages. The circuit court accepted Davis's pleas.[2]

¶9 At the sentencing hearing, the circuit court stated that Davis had been convicted as a repeater.[3] Both attorneys and Davis himself agreed. Consequently, the circuit court sentenced Davis to a term that included an enhanced penalty for being a repeater on the charges of operating a vehicle without the owner's consent and first-degree recklessly endangering safety.

¶10 The Department of Corrections found the error and notified the court. After confirming that the penalty enhancers for being a repeater had been dismissed, the circuit court commuted Davis's sentence and entered an amended judgment of conviction. Davis was sentenced to the following: armed robbery, thirty years of imprisonment comprised of twenty years of initial confinement and ten years of extended supervision; driving without owner's consent, six years of imprisonment comprised of three years of initial confinement and three years of extended supervision; and first-degree recklessly endangering safety, twelve years and six months of imprisonment comprised of seven years and six months of initial confinement and five years of extended supervision. The sentences for armed robbery and first-degree recklessly endangering safety were ordered to run

[2] The Honorable William W. Brash, III, presided over the plea hearing.

[3] The Honorable Timothy G. Dugan sentenced Davis and entered the original and the amended judgments of conviction.

consecutively. The sentence for driving without owner's consent was to run concurrently.

¶11 After the amended judgment of conviction was entered, Davis filed a postconviction motion for sentence modification. He argued that the circuit court sentenced him contrary to statute when it improperly included the penalty enhancers on the charges of operating a vehicle without the owner's consent and first-degree recklessly endangering safety. Additionally, Davis argued that sentence modification was warranted because the circuit court "was not fully aware of the severity of [his] mental deficiencies" when it sentenced him and because the sentences he received were unduly harsh and unconscionable. Davis also argued in the motion that the existence of his mental deficiencies, as well as possible physical and sexual abuse issues stemming from his childhood that were "fully described" in the PSI report, should have triggered a more thorough analysis of his mental health and ability to comprehend the court proceedings. In a second supplement to his postconviction motion, Davis asserted that the State failed to make a previously agreed upon sentencing recommendation.

¶12 In response to the motion, the circuit court issued an order explaining that Davis's argument that he was sentenced contrary to statute was resolved when the court commuted his sentences. The circuit court entered a briefing schedule so that the remaining issues could be addressed. After reviewing the submissions, it denied Davis's motion.

DISCUSSION

I. *Sentence modification*

¶13 The circuit court may reduce a sentence if it concludes that the original sentence was "'unduly harsh or unconscionable,'" or if the movant shows the existence of a new factor that warrants sentence modification. ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶14 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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

A. Davis's mental deficiencies

¶15 Davis contends that his mental deficiencies present a new factor warranting sentence modification. He claims that the circuit court, at sentencing, was not fully aware of the severity of his mental deficiencies. In his reply brief, he expounds on his argument as follows:

> [I]t was never Davis'[s] contention that the Court was unaware of his mental deficiencies, rather the argument is that perhaps Davis did not understand criminal procedure

> or the gravity of the offenses due to his mental deficiencies. It is clear that the Court was aware of Davis'[s] mental deficiencies, but perhaps was not aware of how he was affected by the same.

¶16 Davis submits that his mental deficiencies, as well as possible physical and sexual abuse issues stemming from his childhood, should have triggered a more thorough analysis by the circuit court.[4] Specifically, he claims the circuit court should have ascertained whether Davis was able to comprehend the court proceedings at the time of sentencing and while his case was pending more generally.[5]

¶17 First, as Davis acknowledges, the circuit court was aware of his mental deficiencies. To the extent he argues that the court was unaware of how his mental deficiencies affected him, in its decision and order denying Davis's motion for sentence modification, the circuit court summed up one of the problems with this argument: "There is a great deal of speculation presented with these statements about the possibility of certain factors impacting on other factors." The State acknowledges there was some specific *additional* information in Davis's postconviction filings pertaining to Davis's receipt of social security benefits due to a learning disability and a diagnosis of an intellectual disorder as well as an organic mental disorder. This additional information does not, however, constitute a new factor. Moreover, Davis has not established that this

[4] We note that Davis denied he had ever been the victim of sexual abuse when he was interviewed for the PSI report.

[5] The State responded to this argument, in part, by seeking clarification as to whether Davis's attorney is arguing that Davis was incompetent to proceed at any point in this litigation, including this appeal. Davis did not reply on this point, so we conclude that this was not what he was arguing.

information was highly relevant to the imposition of sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

¶18 Additionally, Davis believes his sentences were unduly harsh and unconscionable, but this court is not convinced. He faced a maximum possible sentence of over 140 years on the charges set forth in the complaint. The total consecutive sentence ultimately imposed in the amended judgment of conviction is less than one-third of the time Davis originally faced.

B. The State's sentencing recommendation

¶19 Davis argues that at the time of sentencing, the circuit court was unaware of the initial offer made by the State. He references a letter his trial attorney received from the State shortly after the complaint was filed. In the letter, the State advised that if Davis pled guilty to counts one, four, and five (as charged), before the case was set for trial, the State would dismiss the penalty enhancers for being a repeater and would dismiss and read in counts two and three. Additionally, at sentencing the State would recommend nine years of initial confinement and six years of extended supervision consecutive to any other sentence Davis was serving. The letter expressly stated: "This is the State's first impression of what an appropriate disposition might be; relevant information provided by the defense—or the victim—might change this impression."

¶20 The agreement the parties ultimately reached four months later called for the State to recommend "significant prison," with no specific recommendation as to time. Despite this agreement, Davis claims he relied on the State's initial offer and that it was the primary reason he chose to enter the guilty pleas. He submits that the State's prior written recommendation "was quite different" than the recommendation it made at the time of sentencing.

¶21 During the plea hearing, the State advised the circuit court that pursuant to the plea negotiations, it would be recommending that Davis be sentenced "to a significant term in the Wisconsin State Prison System." Both Davis and his attorney confirmed for the court that this was their understanding of the agreement. Davis's trial counsel subsequently clarified: "I think defense used the term 'significant' prison or 'substantial' prison on the plea form, but it's the same equation."

¶22 At sentencing, the State summarized the plea negotiations for the court and stated it would make a sentencing recommendation of significant prison. This was the recommendation the State made after its sentencing statement.

¶23 In its decision denying Davis's motion, the circuit court "reject[ed] the defendant's argument that he thought the plea agreement was something other than what was stated at both the plea and sentencing hearing. The record speaks for itself." This court agrees.

II. *Other purported errors at sentencing*

¶24 In his opening brief, Davis argued the circuit court erred when it imposed a sentence contrary to statute. As set forth in the background section of this decision, the initial error in sentencing Davis as a repeater has been corrected. Davis's sentences were commuted by the circuit court in response to the letter from the Department of Corrections. *See* WIS. STAT. § 973.13 ("In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void … and shall stand commuted without further proceedings."). The State points this out in its response, and Davis concedes as much by failing to address the issue in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC***

Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶25 In his opening brief, Davis also argued the circuit court erred when it failed to rely upon information contained within the PSI at the time of sentencing. He submits that his mental deficiencies and possible physical and sexual abuse issues stemming from his childhood were fully described in the PSI report. This, again, he claims, "should have triggered a more thorough analysis of his mental health and ability to comprehend the court proceedings at the time of sentencing as well as throughout the pendency of the criminal matter."

¶26 The State highlights the contradiction in Davis's arguments: initially, Davis argued that his mental deficiencies present a new factor; and now, he argues the circuit court had the information before it, but did not fully take it into account in fashioning its sentences. Davis does not respond to this in his reply brief or develop why a more thorough analysis was needed of his ability to comprehend the court proceedings given that he never claimed he did not fully understand what he was doing—and instead accepted full responsibility for his actions. We reject Davis's contention that the circuit court erred when it failed to rely upon information contained within the PSI report at sentencing. *See generally* ***State v. Gallion***, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (weight to accord the presentence investigation rests entirely in the circuit court's discretion).

By the Court.—Judgment and order affirmed.

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