COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP144-CR **Cir. Ct. No. 2000CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARLAN M. SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Harlan Schwartz appeals an order denying his sentence modification motion without a hearing. He contends he established new factors consisting of his offer to assist in the prosecution of a co-participant in his crimes, Michael Tucker, and the State's rejection of the offer, resulting in no

prosecution of Tucker. The circuit court denied the motion, concluding a rejected offer to assist in the prosecution of a third party does not constitute a new factor. Because we conclude Schwartz failed to establish a new factor as a matter of law, we affirm the order.[1]

¶2 In 2000, a jury convicted Schwartz of two counts of arson and one count of possession of a fire bomb, all as a party to a crime. The crimes arose out of the fire bombing of a house and garage owned and occupied by the district attorney, Daniel Blank. At the sentencing hearing, Blank complained that a "code of silence" allowed a third party to walk the streets. Neither the prosecutor nor the defense informed the court of Schwartz's offer to assist in Tucker's prosecution. The court imposed consecutive and concurrent prison terms totaling thirty-seven years' initial confinement and eighteen years' extended supervision.

¶3 In 2001, Schwartz filed postconviction motions requesting a new trial and sentence modification based on prosecutorial misconduct, a biased presentence investigation report, and a sentence based on incorrect information. The circuit court denied the motions. This court affirmed the order, and the Wisconsin Supreme Court denied a petition for review.

[1] Because we reach this conclusion, we need not address several arguments raised by each of the parties. We will not address the State's argument that the motion was procedurally barred by the rule against successive postconviction motions set out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or that it is barred by laches. We will not address Schwartz's argument that the circuit court was required to conduct an evidentiary hearing before making its discretionary decision that, even if Schwartz established a new factor, the court would not modify the sentence. Resolution of the discretionary decision is unnecessary when a new factor is not established. ***State v. Harbor***, 2011 WI 28, ¶¶37-38, 333 Wis. 2d 53, 797 N.W.2d 828. Finally, to preserve the issue for further appeal, Schwartz argues his post-sentencing participation in a program to deter crime constitutes a new factor. He concedes this court's rejection of that argument in ***State v. McDermott***, 2012 WI App 14, 339 Wis. 2d 316, 810 N.W.2d 237. Because this court is bound by the decision in ***McDermott***, we will not address the merits of that argument.

¶4 In 2006, Schwartz filed a motion under WIS. STAT. § 974.06, resulting in correction of an error in the judgment of conviction and granting additional sentence credit, but denying claims of ineffective assistance of counsel and a request to compel prison officials to allow an interview with another inmate. This court affirmed that order, and the Wisconsin Supreme Court denied a petition for review.

¶5 In 2014, Schwartz filed the present motion alleging new factors. Citing ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, he argued "sentence modification should be available to those already sentenced who possess and can provide valuable information to law enforcement in ferreting out and curtailing crime." The motion was supported by a statement from Schwartz's trial counsel that, prior to trial, he relayed to the prosecutors Schwartz's offer to testify against Tucker, and the prosecutor's rejection of that offer. The State responded, contending ***Doe*** applies only after a defendant has provided "actual assistance," and many of the factors identified in ***Doe*** for judging the quality of the defendant's assistance cannot be applied when the State rejects the offer. The circuit court agreed with the State's position.

¶6 We need not determine whether, in every instance, a rejected offer to assist in the prosecution of a third party does or does not constitute a new factor. In this instance, it does not constitute a new factor because it is not new. 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). A fact is not unknowingly overlooked by all of the parties when it existed and was known by the defense at the time of sentencing.

See ***State v. Crockett***, 2001 WI App 235, ¶¶13-14, 248 Wis. 2d 120, 635 N.W.2d 673. By Schwartz's own account, the facts he now relies upon are identical to those that existed at the time of sentencing. His offer and the State's rejection, resulting in no prosecution of Tucker, are unchanged.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).