COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2248-CR **Cir. Ct. No. 2005CF21**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM K. MCNEW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

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

¶1 PER CURIAM. William McNew, pro se, appeals an order denying his motion for sentence modification. Contrary to the circuit court's conclusion, McNew's motion was timely filed. However, we conclude he is not entitled to relief because none of the information he presents on appeal constitutes a "new

factor" warranting sentence modification. Accordingly, we affirm the circuit court's order, albeit on different grounds.

BACKGROUND

¶2 On April 6, 2005, McNew was convicted upon his ***Alford***[1] plea of first-degree sexual assault of a five-year-old relative, in violation of WIS. STAT. § 948.02(1) (2003-04).[2] The plea was entered pursuant to a plea agreement whereby the State agreed to recommend the sentence contained in the presentence investigation report (PSI), which totaled between twenty-one and twenty-six years. McNew did not object to the contents of the PSI, and he was sentenced to a total of thirty-five years, consisting of fifteen years' initial confinement and twenty years' extended supervision.

¶3 In February 2008, the circuit court granted McNew's postconviction motion seeking resentencing on the basis that the sentencing court failed to consider the applicable sentencing guidelines then in effect, contrary to WIS. STAT. § 973.017(2)(a) (2007-08). The PSI author testified at the resentencing hearing, but McNew did not raise any objection to the PSI's contents. The State recommended that the court reimpose its original thirty-five-year sentence, which the court did.

¶4 In June 2009, McNew moved for a second resentencing on the ground that the prosecutor's recommendation at the February 2008 resentencing

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] All future references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

breached the plea agreement. The circuit court vacated McNew's sentence and granted McNew's request for a resentencing hearing in front of a different judge.[3] At the second resentencing hearing on November 30, 2010, the circuit court imposed a sentence of the same length as in the previous two hearings. The court emphasized the gravity of the offense and McNew's criminal history, observing that the victims of McNew's crimes had become progressively younger and the present offense involved the abuse of a child family member while in his care. At the 2010 hearing, McNew again did not raise any objection to the contents of the 2005 PSI, although he did have a sentencing memorandum prepared on his behalf.

¶5 On June 29, 2015, McNew filed a motion for sentence modification in which he urged the circuit court to order a new PSI and to use its inherent authority to modify his sentence based on certain alleged "new factors," including McNew's alleged positive institutional adjustment. The circuit court, by letter order, denied McNew's motion as untimely under WIS. STAT. § 973.19. McNew appeals.

DISCUSSION

¶6 The State concedes the circuit court improperly denied McNew's motion as untimely under WIS. STAT. § 973.19. McNew's motion invoked the circuit court's inherent authority to modify a sentence based on new factors, and therefore was not governed by the ninety-day time limitation in § 973.19. *See* ***State v. Noll***, 2002 WI App 273, ¶¶5-6, 11-12, 258 Wis. 2d 573, 653 N.W.2d 895. However, the State argues McNew is not entitled to sentence modification because

[3] Judge Robert Rasmussen presided over the original sentencing and the first resentencing hearings. Judge Molly GaleWyrick presided over the second resentencing hearing.

he has not presented a "new factor," a question we decide as a matter of law.[4] *See* ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

¶7 "A new factor is a fact or set of facts both highly relevant to the imposition of sentence, and not known to the sentencing judge at the time of original sentencing." ***State v. Carroll***, 2012 WI App 83, ¶7, 343 Wis. 2d 509, 819 N.W.2d 343. The requirement that the defendant demonstrate the existence of a new factor "prevents a court from modifying a sentence based on second thoughts and reflection alone." ***Harbor***, 333 Wis. 2d 53, ¶36. "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.*** The existence of a new factor does not automatically entitle a defendant to sentence modification; rather, the circuit court must determine whether that new factor justifies modification of the sentence. ***Id.***, ¶37. However, if the defendant has failed to demonstrate, as a matter of law, that there is a new factor, the court need go no further to decide the defendant's motion. ***Id.***, ¶38.

Positive Institutional Adjustment

¶8 McNew argues his "positive institutional adjustment" constitutes a new factor. He argues that at the time of his 2010 resentencing, he was a "role model" prisoner with a positive work history and no negative conduct reports.

[4] Because the existence of a new factor is a question of law, it is appropriate for us to consider the merits of McNew's motion, even if the circuit court did not clearly or separately address all matters the motion raised on their merits. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (holding the court of appeals may affirm on grounds different than those relied on by the circuit court). Additionally, contrary to McNew's argument, the court in ***State v. Noll***, 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895, concluded remand was necessary in that case for the circuit court to exercise its discretion in determining whether a new factor justified sentence modification. *See* ***id.***, ¶7. However, if the defendant has failed to present any new factor, remand for this purpose is unnecessary.

However, McNew's positive conduct in prison cannot be a "new factor," even if overlooked by the circuit court, because McNew was presumably aware of his allegedly exemplary conduct at the time of his 2010 resentencing hearing. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673.[5] If McNew wished the circuit court to consider this information, it was incumbent upon him to present it at the resentencing hearing. Moreover, any postsentencing progress or rehabilitation does not, as a matter of law, constitute a new factor warranting sentence modification. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997); ***State v. Ambrose***, 181 Wis. 2d 234, 240-41, 510 N.W.2d 758 (Ct. App. 1993).

Inaccurate Information

¶9 McNew also claims his discovery of allegedly inaccurate and incomplete information in the 2005 PSI constitutes a new factor. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right is a constitutional issue that we review de novo. ***Id.*** A defendant who requests resentencing based on the use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the circuit court actually relied on the inaccurate information in the sentencing. ***Id.***, ¶26. "Once actual reliance on

[5] McNew relies on ***State v. Lentowski***, 212 Wis. 2d 849, 569 N.W.2d 758 (Ct. App. 1997). While ***Lentowski*** supports the proposition that a circuit court must consider any positive institutional adjustment during a defendant's resentencing, it does not establish that the court's failure to consider such information, if not raised by the defendant at sentencing, constitutes a "new factor" warranting sentence modification. *See* ***id.*** at 858.

inaccurate information is shown, the burden then shifts to the state to prove the error was harmless." ***Id.***

¶10 In ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, we stated that "[e]rroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was highly relevant to the imposed sentence and was relied upon by the trial court." ***Id.***, ¶9. However, the State notes the tension between ***Norton*** and the fact that the proper remedy for an unconstitutional sentence is resentencing, not sentence modification. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶¶26, 31. In ***State v. Wood***, 2007 WI App 190, 305 Wis. 2d 133, 738 N.W.2d 81, we observed our ***Norton*** decision had "inadvertently muddled the linguistic and legal waters with our mixing of distinctly different concepts." ***Wood***, 305 Wis. 2d 133, ¶9. "A new factor analysis … [is a] concept[] related to modification of the sentence to correct specific problems, not to resentencing when it is necessary to completely re-do the invalid sentence."[6] ***Id.***

¶11 In any event, assuming without deciding that an inmate may advance, through a motion for sentence modification, a constitutional challenge to his or her sentence based on inaccurate information, McNew's motion still fails. None of the twenty-six instances of inaccurate information McNew alleges, all of which arise from the 2005 PSI, entitle him to relief in this case. As to each instance, McNew has failed to demonstrate at least one of the necessary elements

[6] ***State v. Wood***, 2007 WI App 190, 305 Wis. 2d 133, 738 N.W.2d 81, also mentioned frustration of the purpose of the sentence. ***Id.***, ¶9. However, in ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, our supreme court clarified that "frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." ***Id.***, ¶48.

to obtain relief based on the existence of a new factor related to inaccurate information at sentencing.[7]

¶12 McNew first asserts the 2005 PSI author continuously referred to the victim as a blood relative, when in fact the victim was a relative by marriage. This distinction was not highly relevant to the sentence imposed in 2010; the important point was that McNew violated a family position of authority and trust. Moreover, the circuit court relied on the correct information in pronouncing the sentence, observing that the victim was not related by blood and that "[n]on-blood relatives in my experience tend to be victimized more than blood relatives." In addition, McNew admits the alleged error in the PSI was corrected by a sentencing memorandum he submitted in connection with his 2010 resentencing. The circuit court stated at McNew's resentencing that it had reviewed this memorandum. Accordingly, McNew cannot show that the correct information was unknown to the court.

¶13 The PSI stated that McNew's former spouse (his third) said she received a phone call from McNew after he absconded to Florida, in which he admitted to masturbating in view of the victim. McNew contends he never made

[7] Additionally, we observe that McNew does not argue the PSI was not provided to him prior to sentencing, and he did not challenge the contents of the PSI prior to any of the three sentencing hearings in this case. Presentence disclosure of the PSI is "important because a defendant has a due process right to be sentenced upon accurate information." ***State v. Melton***, 2013 WI 65, ¶29, 349 Wis. 2d 48, 834 N.W.2d 345. Our supreme court has acknowledged that, given the nature of the PSI and its requirements, some of the information contained therein may be unverified or inaccurate. ***Id.*** A defendant who believes the information is inaccurate or incomplete has the right to challenge the PSI. ***Id.*** At no time prior to 2010, his third sentencing hearing, did McNew do so. "Where the facts stated in a presentence report are not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider them." ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996).

any such admission and the district attorney could not locate a record of the call from the relevant Florida sheriff's office.[8] McNew also challenges other aspects of his former spouse's statements to the PSI author as "completely fabricated." However, the PSI author was not required to accept McNew's version of events, and he does not contest that his former spouse actually gave this information to the PSI author. Accordingly, he has not demonstrated the information was inaccurate.[9]

¶14 McNew contends the PSI author omitted his assertion that he gave the victim a "harsh scolding … for entering the bedroom without knocking first." Again, the PSI author was not required to accept McNew's version of events that the victim had walked in on McNew masturbating, and the allegedly omitted information was disclosed in McNew's 2010 sentencing memorandum. Moreover, the nature of the contact for which McNew was sentenced was not masturbating in view of the victim, but digital contact with the victim's genitals. Thus, any information relating to his reactions upon the victim observing him masturbating was not highly relevant to the sentence.

¶15 McNew claims the PSI report contains an "embellished" victim statement. However, in so arguing, McNew admits his suspicion that the victim

[8] McNew contends the PSI author conducted an inadequate investigation of his former spouse's statements before including them in the PSI. However, McNew does not cite any legal authority requiring a PSI author to independently corroborate information given by an interviewee. The information McNew challenges is located under headings in the PSI clearly indicating the information pertains, respectively, to the "victim's statement" and to the "family attitudes" toward McNew. As McNew acknowledges, this information is required to be included in the PSI. *See* ***Melton***, 349 Wis. 2d 48, ¶28.

[9] McNew also argues that certain sections of the PSI report related to his third wife "ha[ve] been twisted and incorrectly quoted." His argument in this regard is unclear, but information relating to his diminished sexual activity with his third wife is included in the PSI.

was coached into making the allegations at issue cannot be substantiated. McNew has failed to demonstrate the PSI author's recitation of the victim's version of events is inaccurate.

¶16 The PSI states the victim's parents, who are also McNew's family members, assert McNew sexually abused the victim more than once. McNew challenges this assertion, but acknowledges his challenge "all boils down to McNew's word against [his accusers']." McNew has not demonstrated the information provided by the victim's parents was inaccurate. Moreover, the alleged inaccuracy in the victim's parents' accounts was not highly relevant to his sentence. At the 2010 resentencing, the circuit court noted that under the terms of the plea agreement, it was prohibited from considering other charged sexual offenses involving the same victim for purposes of sentencing. The court explicitly stated it was "limited to a sentencing on one count."

¶17 McNew contends the 2005 PSI's recitation of his criminal history was "completely wrong." However, he does not dispute any of the relevant offenses, which included convictions for battery, lewd and lascivious assault on a female child, and trafficking in methaqualone, all of which occurred in the 1970s and 1980s. His arguments relate only to the sentences for those crimes (including whether he was given probation), their sequencing, and the date of a probation violation. The challenged matters were not relied upon by the sentencing court, were not highly relevant to the sentence imposed, and, in any event, by McNew's own admission were corrected by his 2010 sentencing memorandum.[10]

[10] McNew also challenges the PSI writer's statement that McNew denied the prior sexual assaults occurred and minimized his actions. However, McNew's discussion on this point fails to demonstrate any inaccuracy in the PSI writer's assessment.

¶18 McNew challenges the PSI's description of his explanation for his battery conviction, asserting his sentencing memorandum "explains [the incident] very accurately." However, McNew's accounts of the incident to the PSI author in 2005 and to the author of his 2010 sentencing memorandum are not materially different. According to the PSI author, McNew stated he "was in the process of divorce from his first wife when he attempted to have a sexual relationship with his 15-year-old babysitter." McNew stated he tried to prevent her from leaving his house, grabbed her hands, and would not let her go. McNew did not deny this account to the sentencing memorandum author. Rather, he merely added that he was very lonely and intoxicated at the time. According to McNew, his intentions were not sexual but he was aware his actions were interpreted that way, and he admitted "his behavior was inappropriate and he understands how [the victim] felt it was wrong." McNew has failed to demonstrate any inaccuracy in the PSI on this ground, and, in any event, any alleged inaccuracy related to his battery conviction cannot be a "new factor" given the information in the sentencing memorandum.

¶19 McNew also argues the PSI "does not give a clear picture of the situation" leading to the conviction for lewd and lascivious assault on a female child. According to the PSI, McNew stated he was dating two women at once; he decided to marry one of the women, and the other woman became jealous and claimed McNew performed oral sex on her thirteen-year-old daughter. McNew was arrested and charged; he denied any sexual contact with the minor but stated he took the plea agreement because the first woman was pregnant with his child and he wished to conclude the case. The information in McNew's sentencing memorandum, which he contends was more accurate, does not materially differ from the PSI's description of McNew's statements, and at sentencing the circuit

court specifically mentioned McNew's dismissing the incident "as a scorned lover who wanted to get back at you." The court stated if McNew's account was correct, his accuser in that case was "evil," but the court disbelieved McNew's explanation based on his history. McNew has not demonstrated any information related to the lewd and lascivious assault charge was inaccurate. In addition, the circuit court acknowledged McNew's explanation but found it incredible; accordingly, McNew cannot show the circuit court relied on his explanation contained in the PSI versus sentencing memorandum, and any minor variations in his explanations in those documents were not highly relevant to the sentence imposed. Finally, any allegedly inaccurate information cannot be a "new factor" given McNew's sentencing memorandum.

¶20 We reject several of McNew's other inaccurate information arguments as wholly without merit. McNew contends the PSI failed to "mention in detail" McNew's having nine half-sisters and one brother. He disputes the PSI's statement that he was adopted at "approximately age nine," asserting he was actually adopted at age eleven. He also challenges his sentence based on the PSI's allegedly inaccurate references to: (1) his working on his family ranch as a pilot between 1957 and 1965; and (2) the date or timing of his divorces from his first and second wives. McNew does not explain how any of this information in the PSI was relied upon by the circuit court or highly relevant to his sentence, and he admits the sentencing memorandum "corrects" the PSI.

¶21 McNew also contends the 2005 PSI omitted mention of certain psychotropic medications he was taking. The PSI indicated McNew had been taking Remron for depression since he was charged with first-degree sexual assault. The 2010 sentencing memorandum states McNew had "taken Trazadone in the past and had most recently been prescribed Mirtazapine." McNew has

failed to demonstrate the information in the 2005 PSI was inaccurate. Moreover, the circuit court did not actually rely on any information regarding McNew's postcharging medication at sentencing, nor was such information highly relevant to his sentence.

¶22 McNew faults the PSI writer for stating McNew did not accept responsibility for his crimes. McNew contends this statement is inaccurate because he "did in fact accept responsibility for masturbating while a child was in … his home." Again, McNew's crime in this case was not merely masturbating in front of a child; the factual basis for the offense was McNew's digital contact with the victim's genitals. Thus, McNew has failed to demonstrate the information in the PSI related to his failure to accept responsibility was inaccurate.

¶23 McNew also faults the PSI writer for failing to use the sentencing guidelines when making a sentencing recommendation. However, McNew has already received a resentencing hearing based on the circuit court's initial failure to consider the applicable sentencing guidelines. McNew therefore cannot now claim the PSI author's omission of any mention of the applicable sentencing guidelines represents a "new factor" warranting sentence modification. Furthermore, any such omission does not support a claim based on inaccurate information, as the circuit court at the 2010 resentencing specifically mentioned the applicable guidelines. The fact that the PSI writer and the author of the sentencing memorandum recommended different sentences is immaterial for purposes of McNew's present claim.

¶24 Lastly, McNew claims there was a conflict of interest between the PSI author and a probation and parole agent who staffed McNew's case. He asserts he "strongly believes" these individuals were related "either by marriage or

as relatives." This contention appears to be based solely on the fact that the two individuals have the same last name. While the circuit court explicitly relied on the PSI during sentencing, nothing McNew has presented demonstrates that the integrity of that document was compromised by the unspecified relationship. *See* ***State v. Thexton***, 2007 WI App 11, ¶5, 298 Wis. 2d 263, 727 N.W.2d 560. As such, the information he presents was not highly relevant to his sentence, nor does it entitle him to resentencing on the basis of inaccurate information.

¶25 McNew also contends that the allegedly inaccurate and incomplete PSI has "hindered his rehabilitation [efforts] with the Wisconsin Department of Corrections' employees and prison staff members, which constitutes … a new factor." This argument presents no cognizable basis for sentence modification. In ***State v. Bush***, 185 Wis. 2d 716, 519 N.W.2d 645 (Ct. App. 1994), the defendant sought to correct the PSI long after the entry of judgment and original sentencing, asserting the allegedly inaccurate PSI adversely affected his parole and program reviews in the prison. ***Id.*** at 720-21; *see also* ***State v. Melton***, 2013 WI 65, ¶58 & n.20, 349 Wis. 2d 48, 834 N.W.2d 345. We held that while the circuit court could "appropriately modify Bush's sentence based on erroneous information in the PSI, because the PSI is now under the Department of Corrections' control, a motion to correct the information contained in the PSI should be directed to that agency." ***Bush***, 185 Wis. 2d at 723. Circuit courts should not exercise their jurisdiction to correct PSIs for reasons solely related to the Department of Corrections' administration. ***Id.*** at 724.

Appearance of Bias

¶26 McNew also appears to argue Judge GaleWyrick was biased against him. We deem his argument on this point undeveloped, *see* ***State v. Pettit***, 171

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), even under the liberal standards we apply to filings by pro se litigants, *see* ***Amek bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). McNew appears to believe Judge GaleWyrick, in denying his motion for sentence modification, exhibited bias against him for three reasons: (1) she was the same judge who resentenced him in 2010; (2) she stated at his 2010 resentencing she had reviewed all documents in his file, including the transcript of the 2008 resentencing hearing at which the prosecutor breached the plea agreement; and (3) she denied his sentence modification motion as untimely and did not render a decision on the merits of the majority of his claims. Although McNew cites the correct standard for bias, *see* ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385, none of these facts support McNew's supposition that a reasonable person would believe Judge GaleWyrick "took the claim [for sentence modification] personally." Nothing McNew has presented persuades us that he has rebutted the presumption that Judge GaleWyrick acted fairly, impartially, and without bias. *See* ***id.***, ¶8.[11]

Inherent Authority/New PSI

¶27 Finally, McNew contends that the circuit court that heard his motion for sentence modification should have used its "inherent authority" to order a new PSI or to require that his sentencing memorandum be submitted to the Department

[11] Specifically with regard to McNew's claim that Judge GaleWyrick exhibited bias against him because she reviewed the 2008 sentencing hearing transcript, we observe McNew did not object when she stated she had reviewed this information, nor does he develop any argument that her consideration of the transcript was legally improper. His argument is limited to the notion that the "taint" of the prosecutor's breach at the hearing in 2008 also infected the 2010 resentencing. That argument is not supported by the record.

of Corrections to "override" the allegedly inaccurate PSI. Again, if McNew believes the Department of Corrections is relying on inaccurate information in administering his sentence, he must pursue relief through the agency, not the courts. *See* ***Bush***, 185 Wis. 2d at 723-24. Neither the circuit court nor this court may exercise its "inherent authority" to order a new PSI for administrative purposes or to tell the Department of Corrections how it may use a PSI. *See* ***Melton***, 349 Wis. 2d 48, ¶57 (holding that "inherent authority," which permits courts to ensure their efficient and effective functioning, "would not sustain incursions of this magnitude into the operations of a separate branch of government").

By the Court.—Order affirmed.

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