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May 15, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP767-CR State of Wisconsin v. John T. Luckett (L.C. # 2006CF5111)

Before Kessler, P.J., Brennan and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John T. Luckett, *pro se*, appeals an order denying postconviction relief. He claims a new factor warrants modification of the sentence he received in 2007 following his conviction for felony murder. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

According to the criminal complaint, on the night of July 7, 2006, Luckett, Corey E. Young, and Alfonzo E. Washington were together in a car that Luckett was driving when the conversation turned to their desire "to do a robbery." Soon thereafter they saw a pedestrian, subsequently identified as Kevin Bohannon, and Luckett said, "there goes somebody." He parked the car, and Young and Washington got out and attacked Bohannon. When Bohannon resisted, Young shot Bohannon in the head and stomach. Young and Washington then robbed Bohannon of twenty-five dollars, a few personal items, and some clothing, and ran back to the car. Luckett drove the three men away from the scene, where Bohannon died of his wounds. Luckett, Young, and Washington later sold some of the stolen clothing and divided the spoils of the robbery among themselves.

In September 2006, Young's girlfriend revealed to law enforcement that she had heard Luckett, Young, and Washington discussing the shooting. Each of the three men subsequently gave an inculpatory statement to police. The State charged Luckett with felony murder, and he pled guilty. He also agreed to cooperate in the prosecution of his codefendants, but ultimately the charges against them were resolved short of trial.

At sentencing in March 2007, the prosecutor discussed Luckett's failure to come forward on his own with information about the homicide. Defense counsel responded that Luckett did not independently report the crime because he feared "retaliation by the two codefendants or

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

people that knew ... them ... against not necessarily himself but his family." The sentencing court considered this contention and acknowledged Luckett's concerns, telling him: "I understand fear, because these [coactors] have now participated not only in a robbery but in a homicide. Could you have feared? Yeah. I don't find it amazing that you could have feared for your own safety at this point in time."

The sentencing court went on, however, to consider numerous other factors, particularly noting that Luckett committed the crime while serving a period of probation for a prior offense, that he had several prior criminal convictions even though he was only twenty-four years old, and that the community needed protection from "senseless" and "outrageous" criminal behavior. The sentencing court explained to Luckett that he must be confined for a period sufficient to punish him, to protect the public, and to send a message that the kind of violence that occurred in this case "will not be tolerated." The sentencing court therefore rejected Luckett's request for a term of initial confinement not exceeding seven years and instead imposed eighteen years of initial confinement and ten years of extended supervision.

In 2018, Luckett filed the motion for sentence modification underlying this appeal. He asserted that he had new evidence supporting the fear of retaliation he had described during his March 2007 sentencing. With the motion, he submitted a police report documenting an incident that occurred in April 2007. The police report reflects that three men appeared in the alley outside the home of Luckett's father, John Luckett, Sr.[2] Luckett, Sr., spoke to the men through the window and one of them asked if he had "some weed." Luckett, Sr., responded that he "was

[2] In the remainder of this opinion, we refer to the appellant as Luckett and to his father as Luckett, Sr.

not into that stuff." Next, one of the men asked, "are you John Luckett?" After Luckett, Sr., said yes, he backed away from the window and then heard four or five gunshots. He did not see who fired the gun. Nonetheless, he told police that the incident might have occurred because his son had "testified against two other subjects and received a lesser penalty." The circuit court denied Luckett's motion for sentence modification, rejecting Luckett's claim that the April 2007 incident constituted a new factor.[3] Luckett appeals.

A new factor for purposes of sentence modification 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." *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, the defendant must satisfy a two-prong test. *See* ***id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents a question of law, which we review *de novo*. *See* ***id.***, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** If a defendant fails to satisfy one prong of the test, a court need not address the other. *See* ***id.***, ¶38.

Luckett fails to satisfy the first prong of the new-factor test because he has not presented new facts that are "highly relevant to the imposition of [his] sentence." *See* ***id.***, ¶40. As the

[3] The Honorable Jeffrey A. Conen presided over the postconviction proceedings as the successor to the calendar of the original sentencing court. We refer to Judge Conen as the circuit court.

circuit court accurately observed when denying his postconviction claim, nothing substantiates Luckett's assertion that the incident involving his father has any connection either to the crime that Luckett committed or to his accomplices. Indeed, the record indicates that law enforcement never identified the person or persons who shot into Luckett, Sr.'s home, and the statements made by the unknown actors immediately before the shooting do not reflect any tie to Bohannon's murder. The incident therefore is not "highly relevant" to Luckett's sentencing for that murder.

Moreover, the record refutes Luckett's contention that "the [sentencing] court was unaware of how dangerous Luckett's predicament was should [Luckett] be responsible for" putting his codefendants in legal jeopardy. To the contrary, the sentencing court accepted Luckett's claim that he was afraid of retaliation should he cooperate with law enforcement and did not doubt that he "could have feared for his safety" in light of the violence exhibited by Washington and Young. The sentencing court, however, emphasized other factors that it viewed as more significant to the sentencing decision. Accordingly, were we to assume that the attack on Luckett's father was somehow tied to Washington and Young—and we reiterate that the record does not demonstrate such a tie—we would nonetheless remain convinced that the incident was not "highly relevant to the imposition of sentence." *See* ***id.***

Because Luckett does not satisfy the first prong of the new-factor analysis, we need not consider the second. *See* ***id.***, ¶38. For the sake of completeness, however, we observe that the circuit court properly exercised its discretion when denying sentence modification here. The circuit court observed that, during the original sentencing proceeding, the sentencing court emphasized Luckett's criminal history and the need to protect the community. Luckett's fear that his codefendants might retaliate against him if he revealed their crimes—even if that fear

was justified—did not offset his past conduct or suggest that, in the future, he would pose less of a danger to the public. Accordingly, the circuit court reasonably declined to modify Luckett's sentence based on the postsentencing information Luckett presented.

For all of the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals