COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP414-CR **Cir. Ct. No. 2009CF42**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN DOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. John Doe[1] appeals from a judgment of homicide by intoxicated use of a vehicle and from an order denying his postconviction motion

[1] Because of the nature of this case, this court, on its own motion, has amended the caption to shield the defendant's identity. We also order that this court's file be sealed.

for sentence modification. The defendant argues that assistance provided to law enforcement in a separate case was a new factor warranting reduction of his sentence. We affirm.

BACKGROUND

¶2 In 2009, the defendant was convicted of homicide by intoxicated use of a vehicle for the death of his sister. The defendant received a ten year sentence, consisting of five years' initial confinement and five years' extended supervision. The conviction resulted in the revocation of the defendant's extended supervision in prior cases, thus his ten year sentence was consecutive to his other sentences.

¶3 On August 15, 2011, the defendant filed a motion for sentence modification, based on his assertion that his cooperation with the State pertaining to the investigation and prosecution of two murders constitutes a new factor. Specifically, the defendant stated that while in custody (from the time of his arrest until sentencing), the defendant obtained information implicating his cellmate at the Milwaukee County Jail in two murders. The defendant stated that he shared information regarding his cellmate with the police and the district attorney's office; that his cellmate was later charged with two counts of first-degree intentional homicide; and that he (the defendant) was held as a material witness in the consolidated cases against his cellmate. The defendant also stated that he received multiple threats from his cellmate as a result of his cooperation with law enforcement. Although the defendant was held at the Criminal Justice Facility as a material witness, the State did not call the defendant to testify against his cellmate.

¶4 The State, in opposition to the motion for sentence modification, argued that because it chose not to call the defendant to testify, the defendant did

not provide any actual assistance to the State and therefore was not entitled to sentence modification. At a hearing on the motion, the trial court denied the defendant's request, finding that the defendant was a non-credible witness whose testimony would have hurt the State's case against the cellmate, thereby leading the State to forgo the defendant's testimony. As such, the trial court found that the defendant "wasn't much of a help to anyone under any of the circumstances." This appeal follows.

DISCUSSION

¶5 A trial court may, in its discretion, modify a sentence if the defendant shows that a new factor exists. *See* ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact or 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). "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the defendant must "demonstrate by clear and convincing evidence the existence of a new factor," which is a question of law. ***Id.*** Second, if a new factor is present, the trial court must determine "whether that new factor justifies modification of the sentence." ***Id.***, ¶37.

¶6 Whether something constitutes a new factor is a question of law we review *de novo*, without deference to the trial court; however, whether "a new factor, if there is one, warrants sentence modification is left to the trial court's discretion." ***State v. Torres***, 2003 WI App 199, ¶6, 267 Wis. 2d 213, 670 N.W.2d

400. In ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, we addressed "whether post-sentencing substantial assistance to law enforcement is a new factor." ***Id.***, ¶8. We observed that there is a federal rule which "expressly authorizes a reduction in a sentence if 'the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.'" ***Id.*** (citation and footnote omitted).

¶7 We adopted five factors, derived from the federal sentencing guidelines, to assist "in determining whether the post-sentencing assistance constitutes a new factor[.]" ***Id.***, ¶9.

> The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

Id. (citation omitted).

¶8 The defendant asserts that the trial court erred in not finding that his assistance to law enforcement was timely, meaningful and of value. The defendant also contends that his willingness to testify exposed him to the risk of harm, including threats to his life and his family's safety, and should have weighed heavily in favor of sentence modification.

¶9 It is undisputed that the defendant alerted law enforcement as to his knowledge of his cellmate's crimes and was willing to testify against his cellmate. However, we agree with the trial court that the defendant has not met the burden of showing a new factor warranting sentence modification. At the modification hearing, the prosecutor for the case against the defendant's cellmate testified that he chose not to call the defendant to testify because two other witnesses had also obtained incriminating statements from the cellmate and because the prosecutor believed the defendant would be a non-credible witness based upon the defendant's conduct during the investigation of the vehicular homicide case in which the defendant was convicted. The trial court then considered the ***Doe*** factors. Although the trial court did not apply the factors *seriatim*, it considered them in its explanation as to why, the defendant's cooperation notwithstanding, sentence modification was not warranted. Specifically, the trial court found that because the defendant did not testify in the case against his cellmate, he did not render substantial assistance in the cellmate's prosecution. The trial court stated:

> [T]he long and short of it is, is that [the defendant] came forward, gave information that may or may not have been true that the State believed was consistent with other matters and information that they had, but [the defendant] made himself useless as a witness afterwards by becoming incredible in his underlying case and by lying to the police originally and dragging the matter out with the lies that he did.

¶10 The trial court also recognized the risks taken by the defendant for his willingness to testify; however, the overriding factor in the trial court's evaluation was the minimal role the defendant's information appears to have played. The trial court is the sole judge of the weight to be given to the facts it finds regarding sentencing. *See* ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971) (If "facts are fairly inferable from the record, and the [trial

court's] reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed."). We conclude that the trial court properly exercised its discretion because it explained its reasons for determining that, notwithstanding the fact of the defendant's assistance, modification was not warranted because other facts weighed heavily against modification.

¶11 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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