COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP678 **Cir. Ct. No. 2007CF54**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP G. NELSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Philip Nelson, pro se, appeals an order denying sentence modification. Nelson argues new factors justify resentencing. We reject his arguments and affirm.

¶2 Nelson was convicted of five felonies after a significant crime spree in northwest Wisconsin. Pursuant to a plea bargain, Nelson pleaded to three counts of burglary and two counts of forging checks, all as party to the crime. Numerous other crimes were read in. The circuit court imposed an aggregate sentence of fourteen years' initial confinement and ten years' extended supervision.[1]

¶3 No direct appeal was filed. Nelson filed a pro se petition for writ of habeas corpus, based upon a claim of ineffective assistance of counsel. The petition alleged that although Nelson opted to have his counsel file a no-merit report, counsel failed to do so. The petition was denied on the basis that Nelson's assertions were belied by "contemporaneous correspondence indicating otherwise." A motion for reconsideration was also denied.

¶4 Nelson filed a motion for sentence modification pursuant to WIS. STAT. § 974.06,[2] or alternatively, a motion for sentence modification based upon a "new factor" under WIS. STAT. § 973.19(1). The circuit court summarily denied the motion as untimely, and also because it lacked merit. This appeal follows.

¶5 Nelson insists a new factor exists in this case, and "the otherwise applicable timeliness requirements do not apply."[3] At the core of Nelson's

[1] The court withheld sentence as to count five and imposed seven and one-half years' probation, consecutively.

[2] References to Wisconsin Statutes are to the 2011-12 version unless noted.

[3] We construe Nelson's arguments to be a concession that his motion was untimely under WIS. STAT. § 973.19(1). In any event, Nelson fails to develop an argument that his motion was timely under that statute and we therefore shall not further consider the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

argument is the assertion that the circuit court sentenced him based upon "false and inaccurate information." Specifically, Nelson contends the court was unaware of Nelson's employment status, and stated on several occasions during the sentencing hearing that Nelson was "unemployed," "doesn't have any prospect for employment," "he's homeless," and "has an ongoing child support obligation. No income, no assets." Nelson argues, "None of that information was true at the time of sentencing. Nevertheless, the sentencing court clearly relied on this false information when determining Nelson's sentence."

¶6 A sentence may be modified if the defendant shows the existence of a "new factor." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. 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 the 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).

¶7 The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. Whether a new factor exists is a question of law this court reviews independently. ***State v. Scaccio***, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. A new factor does not automatically entitle the defendant to sentence modification. ***Harbor***, 333 Wis. 2d 53, ¶37. If a new factor exists, the circuit court exercises its discretion to decide whether to modify the sentence. ***Id.***

¶8 We conclude Nelson fails to establish the existence of a new factor, much less by clear and convincing evidence. Indeed, the record belies Nelson's

assertions. Attached to the presentence investigation report was a handwritten "version of events," in which Nelson openly described himself and his crimes. Nelson candidly admitted his crime spree was the result of his addiction to crack cocaine:

> [I]n 2004 I started to hang with a guy who introduced me to crack and from the first hit I was done and I did whatever it took to stay high lost everything friends, respect, I went from a superstar to a[n] addict homeless ….

¶9 Nelson's counsel also stated at the sentencing hearing that "Mr. Nelson is an addict, addicted to crack …." Nelson further conceded in his allocution to the court:

> At the time when I was doing these crimes, I know it was wrong. I didn't put a face with the crime though. I don't want to blame it on my addiction to drugs …. This past year I have been glad that I have been locked up, because I do believe it probably saved my life because of the volume of drugs that I was using.

¶10 The PSI author stated, "He told this author that while on his crime spree for the instant offenses, due to his drinking and drug use he was at a point in his life that he 'didn't give a shit.' He stated that during their crime spree he kept telling his co-defendants that they were going to get caught, but the drugs and alcohol kept them going."

¶11 The PSI author further stated:

> The defendant is currently unemployed due to his incarceration for the instant offenses, the crime spree and his lifestyle …. The defendant reports no income and no assets, losing everything that he had due to his drug use and lifestyle over the last few years. He reports that his only major liability is child support delinquency in Sherburne County Minnesota accruing at about $1250.00 per month.

¶12 On appeal, Nelson contests the accuracy of the PSI. He insists trial counsel failed to afford him the opportunity to review the PSI prior to the sentencing hearing. Nelson also alleges his trial counsel was ineffective for failing to "investigate the accuracy of crucial mitigating information contained in Nelson's PSI," and failing to "present that mitigating evidence to the court." This argument is unsupported and undeveloped and will not be further considered. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶13 Nevertheless, we note at the sentencing hearing Nelson did not mention that he did not have an opportunity to review the PSI. Instead, he stood silent when his trial counsel represented to the court that he had no additions or corrections to the PSI. Nor did Nelson speak up during the hearing when the court allegedly discussed inaccurate information, including his employment status, which would have been known to him. He will not be heard to do so now.

¶14 Nelson claims "the record shows that Nelson did speak up, but was shushed by counsel." Nelson relies upon a document appended to his brief, purportedly an affidavit from "Sandy Nelson," stating she heard Nelson's trial counsel respond, "shhh.. Just be quit [sic] !! We already got a deal."

¶15 A party may not use the brief's appendix to supplement the record. ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). Nelson provides no citation to the record on appeal concerning this purported evidence, and we will not search the record for evidence to support a party's arguments. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. The argument will therefore not be further considered.

¶16 In any event, Nelson's employment status was not highly relevant to the imposition of his sentence. *See* ***Rosado***, 70 Wis. 2d at 288. As the circuit court properly concluded, Nelson's "parsing of the record misconstrues the full extent of the court's rationale for imposing the sentence in this case."

¶17 At Nelson's sentencing, the circuit court considered the proper sentencing factors, including Nelson's character, the seriousness of the offenses and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court stressed Nelson's "significant crime spree across Northwestern Wisconsin leaving multiple victims." The court also noted the very serious nature of the crimes, and how the crimes significantly disrupted the victims' lives. The court also considered Nelson's low character, including his criminal record spanning almost thirty years, interrupted only by the period of time he was in custody or on supervision. On this basis, the court concluded a long prison sentence was appropriate.

¶18 Nelson insists his employment status was a highly relevant factor. Nelson contends:

> The only reason why Nelson had not worked since June of 2007 is because Nelson was in custody. Nelson did have a job. The correct understanding … is that Nelson was not able to be present physically, or actually show up and perform his duties as a result of him being in custody. Nelson's employer clearly stated that if Nelson had received probation he could have returned to his position as a carpet installer. [Emphasis omitted]. [4]

[4] In this regard, Nelson relies upon other purported affidavits attached to his appendix. However, he fails to provide record cites for this purported evidence and it will not be considered. *See* ***M.C.I.***, 146 Wis. 2d at 244-45.

¶19 However, the court specifically rejected probation as a sentencing option, noting the multi-county string of criminal behavior on which the five counts were based, along with the multiple read-in offenses, which was a "significant reason this is almost a maximum sentence on Counts 1 and 2 and as well it's consecutive as to Counts 1 and 2 …."

¶20 The record conclusively shows that Nelson was not entitled to relief. Nelson fails to demonstrate a new factor, much less by clear and convincing evidence. The circuit court properly exercised its discretion by denying his postconviction motion.

By the Court.—Order affirmed.

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