COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2425-CR **Cir. Ct. No. 1997CF1087**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT R. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Higginbotham, JJ.

¶1 PER CURIAM. Robert Taylor, pro se, appeals a circuit court order that denied Taylor's motion for sentence modification. Taylor contends that he is entitled to sentence modification based on: (1) a change in parole policy; (2) a disparity between his sentence and the sentence of his co-actor; (3) the circuit

court's reliance on inaccurate information at sentencing; (4) Taylor's inability to currently participate in the Earned Release Program (ERP); and (5) Taylor's cooperation with law enforcement. We conclude that Taylor is not entitled to sentence modification. We affirm the circuit court order denying sentence modification as a proper exercise of the court's discretion.

Background

¶2 In 1998, Taylor was convicted, following a jury trial, of armed robbery as party to a crime. He received a fifty-year prison sentence.

¶3 Taylor filed a postconviction motion claiming ineffective assistance of counsel, and the circuit court denied the motion. Taylor appealed, and we affirmed the order and the judgment of conviction and sentence. ***State v. Taylor***, No. 2000AP486-CR, unpublished slip op. (Wis. Ct. App. Feb. 14, 2001). Taylor then filed a series of three postconviction motions under WIS. STAT. § 974.06 (2011-12).[1] Taylor argued ineffective assistance of counsel, prosecutorial misconduct, newly discovered evidence, and that the criminal complaint was defective. The circuit court denied each of the motions, and we affirmed. ***State v. Taylor***, No. 2002AP1723, unpublished slip op. (WI App Apr. 9, 2003); ***State v. Taylor***, No. 2005AP1833, unpublished slip op. (WI App Aug. 16, 2006); ***State v. Taylor***, No. 2009AP725-CR, unpublished order (WI App Mar. 3, 2010).

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Taylor then filed the motion for sentence modification underlying this appeal, arguing new factors justifying sentence modification. The circuit court denied the motion. Taylor appeals.

Standard of Review

¶5 We review a circuit court decision on a motion for sentence modification under a two-part standard of review. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, we review de novo the legal question of whether the defendant has demonstrated the existence of a new factor to support sentence modification. ***Id.*** Next, if the defendant has established a new factor, we review the circuit court's decision as to whether or not to modify the sentence for an erroneous exercise of discretion. ***Id.***

Discussion

¶6 A new factor for sentence modification purposes 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.'" ***Id.*** (quoted source omitted). A defendant must establish the existence of a new factor by clear and convincing evidence. ***Id.*** at 8-9. Here, Taylor asserts five separate "new factor[s]" in support of sentence modification. We address each in turn.

(1) *Change in Parole Policy*

¶7 Taylor contends that, following his sentencing, there has been a change in parole policy so that Taylor will not be eligible for parole until he has served forty-five years of his fifty year sentence. Taylor points out that, at the sentencing hearing, the State indicated that Taylor would be eligible for parole

after serving twelve years in prison. Taylor contends that, under the new Presumptive Mandatory Release policy, Taylor now must serve forty-five years before the parole board will consider Taylor for parole.

¶8 First, Taylor has not established a change in parole policy affecting his potential release on parole. Taylor asserts that there has been a change, but does not provide any specific details as to what that change was. Nor does Taylor provide any citations or supporting material as to the claimed change in parole policy.

¶9 In any event, we conclude that, assuming there has been a change in parole policy, that change does not constitute a new factor justifying sentence modification. The supreme court has explained that a change in parole policy will not constitute a new factor to support sentence modification "unless parole policy was actually considered by the circuit court." ***Id.*** at 13-14. Here, the circuit court did not make any reference to parole eligibility in its sentencing comments. Rather, the court relied on the nature of the crime in this case and Taylor's criminal record and personal characteristics.

¶10 Taylor contends that the court did consider parole, because the State identified Taylor's parole eligibility and the court followed the State's recommendation. However, as the supreme court has explained, "[i]t would be improper to impute the thoughts of the prosecutor to the sentencing judge." ***Id.*** at 15. Because the circuit court did not expressly rely on Taylor's parole eligibility in imposing sentence, a change in parole policy does not constitute a new factor justifying sentence modification. *See* ***id.***

(2) *Sentence Disparity*

¶11 Taylor contends that the lesser sentence received by his co-actor, John Brinker, constitutes a new factor entitling Taylor to sentence modification. Taylor points out that Brinker was the one who actually entered the credit union and committed the robbery, while Taylor was the driver of the getaway car, and that Brinker had a more extensive criminal history than Taylor. Taylor argues that the fact that Brinker received a sentence of ten years is a new factor justifying modification of Taylor's fifty-year sentence to correct the unwarranted disparity between the sentences. He also contends that his sentence is unduly harsh and excessive, and shocks the conscious. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶12 At sentencing, the circuit court acknowledged that Taylor's counsel and the independent presentence investigation report author recommended a sentence comparable to the sentence received by Brinker. The court also acknowledged that Brinker had gone into the credit union and committed the robbery while Taylor remained in the car. The court also noted, however, that Brinker had provided a statement that implicated Taylor in the robberies, and testified for the State at Taylor's trial.

¶13 The court then considered: Taylor's criminal history and pattern of criminal and violent behavior; trial testimony indicating that Taylor was behind the robbery of the credit union, and manipulated others to commit the robbery so that Taylor could maintain his distance by remaining in the car; Taylor's age of 44; and Taylor's lack of remorse or cooperation. The court then explained that it sentenced Taylor to the maximum based on the nature of the crime, Taylor's

criminal record, and Taylor's personality and ability to manipulate others to commit criminal acts.

¶14 Taylor's argument that Brinker's lesser sentence constitutes a new factor justifying sentence modification fails for two reasons. First, the circuit court was aware of the lesser sentence received by Brinker and specifically referred to Brinker's lesser sentence at Taylor's sentencing. Thus, Brinker's sentence is not a fact that was unknown to the circuit court at the time of the original sentencing in this case. Second, the sentencing transcript indicates that Brinker's lesser sentence is not a fact highly relevant to the circuit court's sentencing of Taylor. The circuit court expressly distinguished Brinker's cooperation with law enforcement and willingness to testify from Taylor's lack of remorse. The court noted that the evidence indicated that Taylor was manipulative and was the person who was really behind the robbery in this case even though he did not enter the credit union. Accordingly, there is no indication that the circuit court intended Taylor to receive a sentence similar to Brinker's, or that Brinker's ten-year sentence is highly relevant to the sentence the circuit court determined was appropriate for Taylor in this case. Taylor's sentence of the maximum allowable was reasonably based on the facts adduced at trial and sentencing, and we cannot conclude it was so disproportionate to the offense as to shock the conscious, even in light of the lesser sentence received by Taylor's co-actor. *See* ***id.***

(3) *Inaccurate Information*

¶15 Taylor contends that the circuit court sentenced him based on inaccurate information. He argues that the circuit court relied on outdated information from a presentence investigation report (PSI) prepared for an earlier

case. So far as we can tell, the only specific claims of misinformation that Taylor alleges are: that Taylor had four prior prison sentences, while Taylor claims he only had two prison sentences in Illinois; that Taylor had not done well on parole, which Taylor disputes; that Taylor had a fiancé, while Taylor asserts he had married his fiancé prior to sentencing; and that Taylor had failed to pay child support, while Taylor asserts he was never ordered to pay child support.

¶16 We determine that Taylor has failed to show by clear and convincing evidence that any of the claimed misinformation constitutes a new factor justifying sentence modification. As to Taylor's prior convictions, at the time of sentencing, the court noted there was a dispute as to the number of Taylor's prior convictions, "but it's clear you have a substantial record, and on at least three occasions in the past you have been sentenced to prison for substantial periods of time, perhaps four … and obviously that in and of itself is quite a record to amass in your lifetime." The court also noted the convictions were for robbery.

¶17 In support of his motion for sentence modification, Taylor provided a one-page FBI printout, which appears to be dated September 28, 1987, showing that Taylor had two Illinois convictions that resulted in a prison sentence, one for armed robbery and one for robbery. However, that printout does not establish by clear and convincing evidence that, at the October 1998 sentencing in this case, Taylor had received a total of only two prison sentences.

¶18 In any event, whether Taylor had received two or four prison sentences was not highly relevant to the circuit court's sentencing determination. What was highly relevant was the fact that Taylor had already received multiple prison sentences for similar criminal activity and yet persisted in that type of activity, indicating that Taylor needed close rehabilitative control.

¶19 As to Taylor's adjustment to parole, the court noted that Taylor disputed that he had problems on parole, and that the information that Taylor had not adjusted well was just based on the records available to the PSI author at the time the report was prepared. Taylor does not provide any details or supporting material indicating that he did, in fact, successfully complete his parole. In any event, that fact, too, was not highly relevant to the court's sentencing determination. Whether or not Taylor successfully completed his parole, he clearly persisted in the criminal activity that led to his prior sentences and his conviction in this case.

¶20 As to Taylor's marital status, defense counsel pointed out to the court at sentencing that Taylor had married his fiancé, and the court acknowledged that fact. As to Taylor's failure to pay child support, Taylor asserts only that he was never obligated to pay support, without further explanation or support. In any event, we again determine that this issue was not highly relevant to sentencing. As we have explained, the court relied on the nature of the crime in this case, Taylor's criminal history and personal characteristics, and Taylor's lack of remorse in imposing the maximum sentence. The court did not place any particular emphasis on the child support issue, and it does not appear to have played a role in the court's sentencing determination.

(4) *ERP*

¶21 Taylor argues that the Department of Corrections has made him eligible for parole, but that he will be unable to participate in ERP until he is within three years of his mandatory release date. Taylor acknowledges that ERP was not in existence at the time of his original sentencing, but seeks to reduce his sentence to allow his participation in the program. However, because this issue

was not addressed by the circuit court at the time of sentencing, it cannot be a fact highly relevant to the court's imposition of sentence.

(5) *Cooperation with Law Enforcement*

¶22 Finally, Taylor contends that he cooperated with law enforcement in this case, and the court failed to consider that fact. However, the circuit court noted at the sentencing hearing that "[y]ou have not *to some extent* been cooperative." (Emphasis added.) Thus, the court recognized that Taylor may have cooperated with law enforcement to some extent. However, as noted above, Taylor did not cooperate to the extent of his co-actor, who provided a statement to police and then testified against Taylor at trial. In contrast, Taylor continued to deny any involvement and showed no remorse for his actions. The court properly weighed Taylor's relative level of cooperation in imposing sentence. We affirm.

By the Court.—Order affirmed.

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