COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2327-CR **Cir. Ct. No. 2010CF4700**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONIVER ANTONIO JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and J.D. WATTS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Doniver Antonio Johnson appeals from a judgment of conviction for one count of being a felon in possession of a firearm as

a repeater, contrary to WIS. STAT. §§ 941.29(2) and 939.62(1)(b) (2009-10).[1] He also appeals from an order that denied his motion for sentence modification or resentencing.[2] Johnson argues that he is entitled to "a new sentencing hearing because key information was not provided at the hearing that would have [a]ffected the outcome" and because the trial court "did not note on the record [its] reasoning" for ordering that Johnson's sentence be served consecutive to his sentence in another case. (Bolding omitted.) We affirm.

BACKGROUND

¶2 Johnson was charged with being a felon in possession of a firearm, as a repeater. The criminal complaint indicates that in April 2009, an officer investigating a report of shots fired approached Johnson, who fled and discarded a gun as he ran. At the time of the incident, Johnson was on extended supervision for two previous cases.

¶3 Johnson was originally charged in state court, but the charge was dismissed without prejudice when he was indicted in federal court for the same offense. The federal charges were later dismissed and the case was refiled in state court. During the time that the charges were being dismissed and refiled, Johnson's extended supervision in a prior case was revoked and he was reconfined

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

[2] Johnson's notice of appeal did not reference the postconviction order, but the issues he raises on appeal relate to that order. It also did not indicate that the judgment was amended. We infer that Johnson is appealing from both the amended judgment and the October 15, 2012 order.

for twenty-five months.[3] Johnson finished serving his reconfinement time in May 2011, shortly before he went to trial in this case.

¶4 A jury found Johnson guilty. At sentencing, the State asked the trial court to sentence Johnson to only six years of imprisonment, which was significantly less than the fourteen years Johnson was facing.[4] The State did ask, however, that the sentence be imposed consecutive to another sentence for which Johnson would be serving time on extended supervision.[5] The State explained its reasoning:

> If the defendant didn't have extended supervision for the next approximately 5 years, I would be likely asking for a lengthier period of extended supervision, but the fact of the matter is he's going to be on supervision for the next 5 years.
>
> ….
>
> … I do think that the only appropriate sentence is a prison sentence just because of his previous record, [and] the fact[s] and circumstances here. I'm not asking that the Court use … the repeater time. The reason I'm not asking for that is, is I do take into account some consideration, the fact that the defendant did serve almost 2 years on his reconfinement before we even did the trial in this specific case, so I've taken some time off the top considering that, but I am asking that this be a consecutive sentence.
>
> I'm specifically asking for a total of 6 years. Broken into 4 years of initial confinement and 2 years extended supervision. I am asking that that run consecutive as I indicated because I did take that into consideration.

[3] The Honorable Jean A. DiMotto ordered the reconfinement.

[4] The Honorable Rebecca F. Dallet presided over the jury trial and sentencing.

[5] As noted, Johnson was on extended supervision for two cases at the time of this offense. The record indicates that the case for which Johnson will serve five years of extended supervision is different than the case for which he served reconfinement time.

> Determining the fact that he had already spent some time on this specific matter in regards to a reconfinement [sic].

¶5 Trial counsel asked the trial court to consider imposing a sentence of less than two years or probation.

¶6 The trial court discussed the seriousness of Johnson's crime, noting that he was on extended supervision at the time of the offense, had a loaded gun when he was forbidden to have any firearms, and ran from the officer. The trial court also recognized that because Johnson was convicted as a repeater, he was facing up to fourteen years of imprisonment. The trial court commented both on Johnson's criminal history and his revocations after release to the community, which the trial court calculated to be "at least three, and maybe four including [his] current one." The trial court said that it would follow the State's recommendation, explaining:

> I don't see how I could possibly put you on supervision again given you were on supervision at the time and given how poorly you've done on supervision in the past. I think the only sentence is a prison sentence. And I believe that -- I understand that you do still have the time -- the supervision time that's -- that you are going to have still, so I do think that based on all of that, the State's recommendation is appropriate.
>
> I don't feel the need to impose the repeater. Although I certainly could. I think that [the State's] recommendation is significant, as the punishment should be, but also is -- gives you a chance to get out and make something better of your life, Mr. Johnson.
>
> So I will impose the 4 years [of] initial confinement, 2 years [of] extended supervision. That's consecutive to your current sentence.

¶7 Johnson subsequently filed a motion and a supplemental motion for sentence modification or resentencing.[6] He presented two primary arguments. First, he argued that he should get "a resentencing hearing based on the completion" of several classes after sentencing (*i.e.,* a reentry program, a welding class, and a custodial class), noting that "[i]f there had not been a cash bail on his pending case, he would have … potentially had access to these classes and other programming while he was incarcerated waiting for his trial and later sentencing." Second, he argued that he should be resentenced because at sentencing, "there [wa]s no discussion on the record that the entire basis for that revocation and resulting sentence are the facts of the case Mr. Johnson was being sentenced for that day." As a result, he argued, he "ultimately received punishment twice for the same set of facts."

¶8 The trial court denied the motion for sentence modification or resentencing in a written order.[7] The trial court began by noting that "[r]esentencing is the remedy to cure an illegal sentence," and said that Johnson had not alleged that the sentence was illegal. Thus, the trial court considered whether there was a basis for sentence modification, which requires the existence of a new factor that is relevant to the sentence imposed. The trial court concluded that Johnson's "completion of the vocational and reentry programs … is important for his rehabilitation and his ultimate return to the community; however, it is not

[6] Johnson's motion also sought additional sentence credit. The trial court granted Johnson additional credit, but subsequently reduced the credit awarded in response to a communication from the Department of Corrections regarding duplicate credit. On appeal, Johnson does not challenge the amount of sentence credit he was ultimately awarded, so we will not further discuss the sentence credit issue.

[7] The Honorable J.D. Watts decided the postconviction motions.

highly relevant to the sentence imposed and would not have materially affected the court's sentencing decision had those programs been completed prior to sentencing." Therefore, the completion of those classes was not a new factor.

¶9 As for Johnson's argument that he was punished twice for the same facts, the trial court noted that "revocation proceedings are not intended as punishment" and that the issue before the court that decided to reconfine Johnson was whether Johnson should continue his rehabilitation for his prior crime in the community or in prison. The trial court concluded that there were no grounds for sentence modification or resentencing. This appeal follows.

ANALYSIS

¶10 On appeal, Johnson does not pursue the argument that his successful completion of programming after sentencing justifies sentence modification or resentencing. Instead, he focuses on two arguments. First, he argues that he is entitled to "a new sentencing hearing because key information was not provided at the hearing that would have [a]ffected the outcome." (Bolding omitted.) Second, he asserts that the trial court "did not note on the record [its] reasoning for imposing a consecutive sentence."

¶11 We begin with Johnson's assertion that the trial court "was not made aware on the record that Johnson had received the maximum revocation sentence for the same behavior that [it] was sentencing him for." Johnson argues that he "was not sentenced on accurate information" and cites legal authority from cases where sentencing courts relied on inaccurate information. However, because Johnson is alleging that the trial court was not aware of the length and basis for the revocation sentence—rather than alleging that the trial court relied on erroneous

information about the revocation sentence—we agree with the State that Johnson's allegations are best analyzed "pursuant to a new factor analysis."

¶12 Specifically, a defendant may be entitled to sentence modification if he or she can prove, by clear and convincing evidence, the existence of a new factor, which 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Harbor, 2011 WI 28, ¶¶36, 40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation and quotation marks omitted). Whether the facts proffered by the defendant constitute a new factor presents a question of law that this court reviews *de novo*. ***Id.***, ¶33.

¶13 We conclude that Johnson has not demonstrated a new factor. The sentencing transcript belies his claim that the trial court was not informed about the reconfinement. As noted above, the State told the trial court that Johnson "did serve almost 2 years on his reconfinement before we even did the trial in this case," and it also noted that Johnson "had already spent some time on this specific matter in regards to a reconfinement." Further, as the State points out, Johnson personally wrote to the trial court before the jury trial and said that he had "been revoked on allegations of this charge and now have served 2 years." In short, Johnson has not shown that the length or basis for his reconfinement in another case were unknown to the trial court.

¶14 To the extent Johnson is arguing that the trial court should have been made aware of more specific details of the revocation or the exact length of the

reconfinement, we are unconvinced that those additional facts were "'highly relevant to the imposition of sentence.'" *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Moreover, those facts were known to Johnson and his trial counsel, and neither elected to highlight them for the trial court during the sentencing hearing. We cannot conclude that those facts were "'unknowingly overlooked by all of the parties.'" *See* ***id.*** (citation omitted). For the foregoing reasons, we conclude that Johnson has not established a new factor that would support his request for sentence modification.

¶15 The second issue Johnson raises is whether the trial court failed to adequately explain why it imposed the sentence consecutive to Johnson's prior sentence. Johnson asserts that the trial court "did not note on the record [its] reasoning for imposing a consecutive prison sentence to the two years and one month that had previously been imposed [by another judge] for the same set of facts." We note that Johnson's argument is only one paragraph long and contains no case law—it is unclear whether he made this assertion simply in support of his other argument or whether he intended to challenge the trial court's exercise of sentencing discretion. Further, we note that, contrary to Johnson's assertion, the record indicates that his sentence was imposed consecutive to a different sentence than the one for which he was reconfined. In any event, we are satisfied that the trial court did, in fact, indicate on the record its reason for making the new sentence consecutive to Johnson's prior sentence.

¶16 As detailed above, the State's sentencing recommendation took into consideration the fact that Johnson was subject to extended supervision for the next five years based on a prior case, as well as the fact that Johnson served two years of reconfinement time after he was arrested in this case. The State indicated why it was recommending a consecutive sentence, but also a lower sentence than

it might otherwise recommend. The trial court explicitly adopted that recommendation, indicating that it had considered the fact that Johnson would be on supervision in another case. Further, it explained that because the State's "recommendation is significant," the trial court did not believe it needed to impose additional time for Johnson's repeater status. The trial court then repeated the sentence and stated that it would be imposed "consecutive to your current sentence." This explanation was more than adequate.

By the Court.—Judgment and order affirmed.

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