

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-2034-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD A. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

SNYDER, P.J. Richard A. Thomas appeals from a judgment of conviction and an order denying his postconviction motion for sentence reduction. He claims that the trial court erred when it “misinterpret[ed] critical facts concerning [his] criminal history.” He also argues that his probation revocation,

which resulted in a five-year stayed sentence being imposed three days after sentencing in the instant case, constitutes a new factor warranting a reduction in his sentence. We are not persuaded by Thomas' appellate arguments and consequently affirm.

In order to understand the issue before the court, the following background information is necessary. In January 1994, Thomas was released on parole supervision to the Department of Intensive Sanctions (DIS). In August of that year he stole two checks from a DIS office, forged endorsements on them, cashed them and deposited the money in a checking account. This resulted in his parole being revoked and he was returned to prison in September 1994. In July 1995, Thomas was again released on parole. That October he was arrested and charged with theft and forgery of the DIS office checks. He was convicted of forgery in November 1995 and sentenced to five years in prison, stayed, and placed on four years' probation. During this time he remained on parole supervision as well.

In October 1996, Thomas committed the offenses which underpin this appeal. Thomas was stopped by a police officer who had received a citizen report that a "male on a bicycle in the Open Pantry parking lot was carrying a handgun." Thomas admitted to the officer that he had a gun and the officer recovered a loaded semi-automatic handgun as well as a box of live rounds for the weapon. After his arrest, Thomas pled no contest to charges of possession of a firearm by a felon and carrying a concealed weapon. Thomas' previous presentence investigation report (PSI) was updated for the trial court before it proceeded to sentencing. After a review of the PSI, the court sentenced Thomas to consecutive terms of two years on the possession of a firearm charge and one year

on the concealed weapon charge. The trial court also stated that the sentences were to “run consecutive to the revocations [Thomas is] now serving.”

As a result of the weapon charges, the Division of Probation and Parole had already revoked Thomas’ parole supervisions. Thomas was ordered to serve one year, three months and fifteen days on the two revocations. The parole revocations and the resulting imposition of time to be served occurred before sentencing in the instant case. Three days after he was sentenced on the weapon charges, his probation for the DIS checks conviction was revoked, resulting in the imposition of the stayed five-year prison sentence. The result of the revocations of parole and probation, coupled with the sentence imposed by the court on the weapon charges, was an aggregate sentence of eight years.

First, Thomas contends that at the time of sentencing the trial court misconstrued information in the PSI which led it to conclude that probation and parole authorities had treated Thomas too leniently in the past. Because of this, Thomas contends that the trial court imposed a longer sentence than it otherwise would have. Second, Thomas argues that the revocation of his probation three days after sentencing in the instant case was a new factor which “significantly affected [his] sentence structure.” On the basis of these two arguments, Thomas appeals.

We begin with recognition of the fact that Wisconsin law utilizes a presumption that a trial court acted reasonably in exercising its sentencing discretion. *See State v. Mosley*, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). There is a strong public policy against interfering with the sentencing discretion of a trial court. *See id.* If this court determines from the record that the trial court’s reasoning was based upon legally relevant factors, the sentence will be

upheld. *See id.* The burden is on a defendant to show some unreasonable or unjustifiable basis for the sentence imposed. *See id.*

The sentencing court must state its reasons for imposing the sentence chosen. *See id.* The trial court's decision should be primarily based on the following factors: the gravity of the offense, the character of the offender and the need for protection of the public. *See id.* at 43-44, 547 N.W.2d at 809. A defendant who seeks to challenge a sentence must show that specific information was inaccurate and that the court actually relied on the inaccurate information at the sentencing. *See id.* at 45, 547 N.W.2d at 810.

Thomas' first claim is that the trial court "misunderstood or misinterpret[ed] critical facts concerning [his] criminal history" when it imposed sentence. He argues that the trial court believed that his parole supervision had not been revoked in response to his theft and forgery of the DIS checks.¹ He maintains that "the court principally relied on [his] prior record and his conduct on parole as the reason for exceeding the sentencing recommendations of both the prosecutor and the defense attorney." Because of the importance the court attached to this misinformation, he claims that his sentence constitutes an erroneous exercise of discretion. We are not persuaded.

At the sentencing hearing, the trial court considered Thomas' "significant record." It detailed Thomas' convictions for burglary, receiving probation for a firearm charge, twenty-four minor and ten major conduct reports while institutionalized, and his refusal to participate in AODA treatment while

¹ The record of the sentencing hearing shows that the assistant district attorney informed the court that Thomas was already serving time on revocation. This information was subsequently reiterated by defense counsel at the same hearing.

incarcerated. The trial court then noted that “[he] didn’t do very well on any of the programs that they had there.” The trial court also took into account other instances which showed Thomas’ difficulty in adapting to institutional life, including his escape from the Kenosha Correctional Center. The trial court outlined its reasoning before sentencing Thomas:

During this term of parole supervision, your conduct was absolutely terrible. The only thing good [the parole agent] said is you reported for scheduled appointments You’ve been evasive to the agent. You haven’t kept the agent informed of your whereabouts, your activities. On two occasions apprehension requests were issued because the agent didn’t know of your whereabouts. You violated your parole supervision by having a positive [urinalysis] for THC. Obviously you were caught with this pistol.

....

This is a crime against persons and the community. It’s aggravated. You’re on every type of supervision that can be given to you. You’re on parole, you’re on DIS. You’ve gone through every system, and every time you failed. This time you fail in a major legal fashion. You have this weapon with 10 shells in it, and then you have 43 shells in your pocket. You know you’re not supposed to have any firearms, and you arm yourself to the teeth.

Your degree of culpability is absolutely total. Criteria applicable in every case is protection of the public. You have no business with a gun.... Obviously the public has a right to protect itself from people like yourself who are going to blatantly disregard the law and then put the public in danger.

Your rehabilitative needs are myriad. They’re not being serviced too well, because you’ve not been very cooperative in all of your different types of progress through the system. This is a very serious offense.

I find confinement is necessary to protect the public from further criminal activity on your part. That you are in need of correctional and rehabilitative [services] which can most effectively be provided if you were confined. It would unduly deprecate the seriousness of this offense if a sentence of probation were imposed.

The court sentenced Thomas to two years on the possession of a firearm charge and one year on carrying a concealed weapon, and then noted that “both of these offenses shall run consecutive to the revocations you’re now serving.”

Consideration of the trial court’s comments at sentencing convinces us that the trial court properly exercised its sentencing discretion. Although the trial court did comment on Thomas’ theft of two DIS checks from the desk of a DIS supervisor, when read in context, this indicated the court’s disbelief that an individual who had already been given the benefit of release to DIS would commit such a blatant act. The court thoroughly detailed its reasoning for the sentence it imposed and those remarks, included above, make it apparent that the sentencing court considered the three primary factors in determining an appropriate sentence for Thomas. *See id.* at 43-44, 547 N.W.2d at 809.

The second claim Thomas makes is that his probation revocation in a separate case which occurred after he was sentenced in the instant case should have been considered a “new factor” when it was brought to the court’s attention at the postconviction proceedings and should have resulted in the reduction of his sentence. In *State v. Thompson*, 208 Wis.2d 253, 254, 559 N.W.2d 917, 917 (Ct. App. 1997), we considered the question of whether a trial court could impose a sentence consecutive to another imposed but stayed sentence when a defendant’s probation had not been revoked at the time of the sentencing. The defendant in that case had his probation revoked approximately two months after the sentencing. The revocation required that the defendant serve a four-year prison term. *See id.* at 255, 559 N.W.2d at 917. His appellate argument was that “the trial court erred when it imposed sentences ... to run consecutive to previously imposed but stayed sentences in a prior case, where probation had not yet been revoked.” *Id.* at 254, 559 N.W.2d at 917.

We concluded that the plain language of § 973.15(2), STATS., permitted this: “[T]he legislature intended to allow trial courts to impose sentences consecutive to previously imposed sentences even in the situation where the previous sentence was stayed and the defendant was placed on probation and the probation had not yet been revoked at the time of the current sentencing.” *Thompson*, 208 Wis.2d at 257-58, 559 N.W.2d at 918. We are now asked to consider whether a sentence which runs consecutive to a later revocation requires a trial court to consider the later revocation a “new factor.”

A trial court cannot modify a sentence unless the modification is based on a new factor. *See State v. Ambrose*, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). Thomas accepts the definition of “new factor” set forth in *State v. Rosado*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975), when he argues that the fact of the revocation was “highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing ... [and] it was unknowingly overlooked by all the parties.” He suggests that because defense counsel “specifically told the court at sentencing that [his] probation was *not* being revoked,” that “the trial court could only have anticipated that its imposition of a consecutive, three-year sentence would cause [him] to serve an aggregate term of *four years, three months and fifteen days*” (this includes the amount of time he was already serving on the two parole revocations). His argument then concludes that “the actual effect of the court’s sentence is to incarcerate [him] for nearly *twice* the period which the court could have anticipated, and likely intended, when sentence was imposed.”

What Thomas was seeking at the postconviction hearing was a sentence modification, which is a two-step process. *See State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). As a first step, a defendant must

demonstrate that there is a new factor which justifies a motion to modify a sentence. *See id.* A new factor, as explained in *Rosado*, 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.” *Rosado*, 70 Wis.2d at 288, 234 N.W.2d at 73. Whether a particular fact constitutes a new factor is a question of law which may be decided without deference to the trial court’s determination. *See Franklin*, 148 Wis.2d at 8, 434 N.W.2d at 611. A defendant must demonstrate the existence of a new factor by “clear and convincing evidence.” *Id.* at 9, 434 N.W.2d at 611.

If a defendant is able to demonstrate the existence of a new factor, then the trial court must undertake the second step—to determine whether the new factor justifies modification of the sentence. *See id.* at 8, 434 N.W.2d at 611. Such a determination is committed to the sound discretion of the trial court and we review this under a misuse of discretion standard. *See id.* In this case, however, we do not reach the second step of the process because we conclude that the revocation of Thomas’ probation, leading to the imposition of a stayed five-year prison term, was not a new factor warranting sentence modification.

While the trial court could not know that Thomas would subsequently be revoked at the time it imposed its sentence, the court was aware that Thomas had an imposed but stayed sentence attached to his probation.² In fact, the trial court specifically commented on the fact that Thomas had received a

² As a matter of law, “violations of conditions of probation or parole are sufficient grounds for revocation.” *State v. Jefferson*, 163 Wis.2d 332, 338, 471 N.W.2d 274, 277 (Ct. App. 1991).

stayed sentence of five years for the theft of the DIS checks. This belies Thomas' claim that the five-year sentence was not considered by the trial court and was a fact "not known to the trial judge." See *Rosado*, 70 Wis.2d at 288, 234 N.W.2d at 73.

As outlined earlier, the trial court placed extensive reasons in the record for the sentence it imposed on Thomas. It outlined Thomas' inability to function within the strictures of his previous supervision and detailed its belief that "the public has a right to protect itself from people like [Thomas] who are going to blatantly disregard the law and then put the public in danger." It is also apparent from the trial court's comments at both the sentencing hearing and the postconviction hearing that its intention was to incarcerate Thomas for an extensive period of time in order to protect the public. In fact, when the trial court was apprised at the postconviction hearing of the additional five-year sentence that had been imposed, it responded, "[A]s far as the Court [is concerned], it wouldn't have made any difference to the sentencing."

Reading the trial court's comments in context, it is apparent that the trial court was interested in imposing a lengthy sentence for a number of reasons. Its objective was to punish Thomas and it perceived him as an individual who had exhibited very little respect for the system. It took very seriously his latest infraction, that of carrying a loaded weapon after a felony conviction. The trial court's remarks at the postconviction hearing reaffirmed its determination that based on Thomas' past history he required a lengthy incarceration.

Based on the facts before us, Thomas has failed to show by clear and convincing evidence that his later parole revocation was a new factor highly relevant to the court's sentencing decision. We are not persuaded that the trial

court misinterpreted any “critical facts” and we uphold its exercise of sentencing discretion. We therefore affirm Thomas’ sentence and conclude that under these facts the later parole revocation and imposition of a stayed sentence do not provide a basis for his claim that a new factor requires modification of the original sentence.

By the Court.—Judgment and order affirmed.

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