COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0714-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL L. EICKERT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

BROWN, J. Paul L. Eickert appeals from an order denying his motion to modify sentence. Eickert claims that a witness' change in testimony is a new factor in light of which the court should modify his sentence by removing jail time. Because the court did not misuse its discretion in imposing the jail time or in its refusal to modify the sentence, we affirm.

Eickert pled no contest to charges of disorderly conduct and criminal damage to property pursuant to §§ 943.01(1) and 947.01, STATS. The charges stemmed from a bar fight on March 2, 1997. Eickert's friend, Derek Emmer, was also charged with and convicted of disorderly conduct as a result of the same events. Testimony differed on whether Eickert was involved in one, two or three fights that night and on who was the instigator of the fight or fights. At his own sentencing, Emmer testified that Eickert had started the fighting. Later, at Eickert's postconviction motion hearing, Emmer testified that it had been he, Emmer, who had started the fighting. The bartender picked Eickert out of a photo lineup as the individual who had started the fighting.

The court withheld sentencing on the property damage and placed Eickert on probation for one year. On the disorderly conduct charge, the court sentenced Eickert to ten days in jail. Eickert moved for modification of the ten days of jail time imposed, and the trial court denied his motion.[1]

Eickert claims the court erred in denying his motion to modify sentence. Specifically, he contends that the court should have modified his sentence because Emmer's new testimony, that Emmer had started the fighting and not Eickert, contradicted his previous testimony. Eickert argues that in

[1] Although neither party has raised it, there is a conflict between the oral pronouncement of sentence and the judgment of conviction. Orally, the court sentenced Eickert to ten days' jail time on the disorderly conduct charge and withheld sentence on the property damage, imposing one year of probation. The judgment of conviction lists probation for both charges. When there is a conflict between the oral pronouncement of sentence and the judgment of conviction, the oral pronouncement controls. *See* ***State v. Perry,*** 136 Wis.2d 92, 114, 401 N.W.2d 748, 758 (1987). Thus, Eickert's "Post-Conviction Motion for Modification of Conditions of Probation Based upon Newly Discovered Evidence," which objects only to the jail time, is a motion for modification of sentence.

imposing sentence the court gave great weight to the fact that Eickert had been the instigator, and thus should review his sentence in light of Emmer's changed story.

Sentencing is left to the discretion of the trial court, and we will not disturb sentencing decisions absent an erroneous exercise of discretion. *See* ***State v. Rodgers***, 203 Wis.2d 83, 93, 552 N.W.2d 123, 127 (Ct. App. 1996). We start with the presumption that the sentence is reasonable, and the burden is on the defendant to show a basis in the record to conclude otherwise. *See* ***Elias v. State***, 93 Wis.2d 278, 282, 286 N.W.2d 559, 560 (1980). The sentencing court properly exercises its discretion in imposing a sentence when it considers the character of the defendant, the gravity of the offense, and the need to protect the public. *See* ***Rodgers,*** 203 Wis.2d at 93, 522 N.W.2d at 127.

Once the court has imposed the sentence, it may not modify the sentence based solely upon reconsideration, reflection or a change of mind. *See* ***State v. Ambrose***, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). While the court does have the inherent power to modify a sentence it has imposed, any modification must be based on a new factor. *See* ***State v. Kaster***, 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989). A new factor is "a fact or a set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing ...." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Whether a particular fact constitutes a new factor is a question of law which we review de novo. *See* ***State v. Hegwood***, 113 Wis.2d 544, 547, 335 N.W.2d 399, 401 (1983). However, if there is a new factor, it is up to the discretion of the trial court whether it warrants modification of sentence. *See* ***id.*** at 546, 335 N.W.2d at 401.

Here, Emmer's change in testimony was not a new factor, as it was not "highly relevant to the imposition of sentence." ***Rosado***, 70 Wis.2d at 288, 234 N.W.2d at 73. While the court did mention Emmer's testimony, it had other sources to corroborate Eickert's role as the instigator. It referred to the information in the criminal complaint, the observations of the bartender and belligerent comments Eickert made to the investigating police officer. The information before the court led it to conclude that Eickert was "an aggressive person" who "had to spend some time in jail." Furthermore, the court did not find Emmer's new account trustworthy, stating that Emmer did "not have any credibility around here anymore." Thus, even if Emmer's original testimony had been the only factor in the original sentencing decision, his change in story would still be irrelevant, as the court found the new story unbelievable. The trial court is the ultimate arbiter of witness credibility. *See* ***State v. Wilson***, 179 Wis.2d 660, 683, 508 N.W.2d 44, 53 (Ct. App. 1993). There is more than ample support in the record for the court's findings and subsequent refusal to modify Eickert's sentence; accordingly, we will not overturn its decision on appeal. *See* ***Elias***, 93 Wis.2d at 282, 286 N.W.2d at 560.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.