OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 1, 2015

To:

Hon. John S. Jude
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Eileen W. Pray
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Devontre L. Cottingham, Sr., #337418
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

You are hereby notified that the Court has entered the following opinion and order:

2014AP648-CR State of Wisconsin v. Devontre L. Cottingham, Sr.
(L.C. #1997CF826)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Devontre L. Cottingham, Sr. appeals pro se from a 2014 order denying his postconviction motion challenging the sentence imposed in 1998. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

In 1997, seventeen-year-old Cottingham masterminded a plan to rob a random person. He drove Antoine Murphy and Maurice George around until Cottingham spotted a likely mark.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Cottingham supplied the gun but remained in the car as Murphy and George held up the man and Murphy shot him in the stomach. A jury found Cottingham guilty of armed robbery with use of force and party to the crime of attempted first-degree homicide with use of a dangerous weapon.

Judge Emmanuel J. Vuvunas sentenced Cottingham to consecutive terms of thirty years' imprisonment on the armed robbery and twenty-five years' imprisonment on the attempted homicide. Judge Vuvunas sentenced George to an identical sentence but later reduced his sentence by seven years based on George's willingness to testify against Murphy.

In 2013, Cottingham sought sentence modification. He argued that a change in parole policies constituted a new factor because they frustrated the court's sentencing goals, and that, because he and George were similarly situated, the reduction in George's sentence rendered his sentence harsh and unconscionable and a violation of equal protection. The postconviction court, Judge John Jude presiding, concluded that Judge Vuvunas considered the appropriate factors and properly exercised his sentencing discretion. Judge Jude denied Cottingham's motion for sentence modification in both regards. Cottingham appeals.

A sentence may be modified if a defendant can demonstrate that a "new factor" justifies the modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is a fact highly relevant to sentencing, "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, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A fact known to the court at sentencing cannot be a new factor. ***Id.***, ¶57. A defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether a fact constitutes a new factor

presents a question of law. ***Id.*** Finally, "whether [a] new factor justifies sentence modification is committed to the discretion of the circuit court, and [appellate courts] review such decisions for erroneous exercise of discretion." ***Id.***, ¶33.

Cottingham contends that changes in parole policy constitute a new factor.[2] He cites a single comment by Judge Vuvunas as proof that then-current policy formed the basis for the sentence imposed:

> Quite frankly, I'm disturbed that I have to, that the Court has to give a young man of your age so much time, Mr. Cottingham, but again, you're the person who is going to make the determination as to whether you can get out—when you get out by impressing the parole board.

We do not read the comment as driving the sentencing rationale. Nor did Judge Jude. First, the parole board has not been abolished. Second, Judge Vuvunas explained that it was the "wantonness" of the offenses that demanded "not less than a very serious sentence."

> Mr. Cottingham, quite frankly, I looked for ways to try to cut you some slack and cut you a break, but, you know, taking this whole situation into effect, it's very difficult for the Court. It's very, very difficult for the Court. Because of the incredible seriousness of this charge, the incredible wantonness and the incredible crassness and just picking out any individual who happened to be on the street.

We agree with Judge Jude that Cottingham did not establish by clear and convincing evidence that Judge Vuvunas tied the sentence to the parole policies, philosophy, or protocol in effect at the time or to any expectation that he would be paroled after serving a particular length

[2] Cottingham also claims that a 1994 letter from former Governor Tommy Thompson to the secretary of the Department of Corrections constitutes a new factor and violates the ex post facto clause. Those arguments have been put to rest. ***State v. Delaney***, 2006 WI App 37, ¶¶16-18, 22-24, 289 Wis. 2d 714, 712 N.W.2d 368, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

of time. "[A] change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the circuit court." ***Franklin***, 148 Wis. 2d at 14.

Cottingham also contends that, compared to George's reduced sentence, his now is overly harsh and violates equal protection. He argues that he played a less aggressive role than George, was not given the opportunity to testify against the shooter, as George was, and, in effect, is being punished for going to trial instead of pleading.

The equal protection clauses require that persons similarly situated be accorded similar treatment. *See* ***Treiber v. Knoll***, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987). "[M]ere disparity in sentencing does not constitute a denial of equal protection of the law." ***Ocanas v. State***, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). Disparity in the sentences between codefendants is permissible if the sentences are based on the relative culpability and individual characteristics of the codefendants. ***State v. Toliver***, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994).

Cottingham and George are not so similarly situated as to demand equal sentences. Judge Vuvunas noted that Cottingham's "culpability [was] absolutely total," in that he actively selected "a pretty likely and helpless victim," supplied the gun, and drove the getaway car; that, unlike George, he had an extensive criminal record; and that he expressed no remorse, while George accepted responsibility for his crime by pleading. Cottingham has not shown that the seven-year difference "was arbitrary or based upon considerations not pertinent to proper sentencing discretion" or that his sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185, 187.

We affirm the postconviction court's refusal to modify Cottingham's sentence.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals