COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP811-CR **Cir. Ct. No. 2013CF1192**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. MCDOWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Matthew A. McDowell appeals from a judgment of conviction entered upon his guilty pleas to first-degree reckless homicide and hiding a corpse, and from an order denying his postconviction motion for sentencing relief. McDowell argues that the sentencing court relied on inaccurate

information concerning a prior domestic incident with an ex-girlfriend, and that the medical examiner's preliminary hearing testimony concerning the nature of the victim's injuries constitutes a new factor. Because McDowell has failed to establish the inaccuracy of any information presented at sentencing or the existence of a new factor, we affirm.

¶2 McDowell was originally charged with first-degree intentional homicide and hiding a corpse in connection with the death of his girlfriend. According to the complaint, McDowell admitted that during an argument, he pushed the victim onto a bed and placed his hands on her face and neck. He stated she was choking and that he heard a crack and realized the victim was no longer breathing. The medical examiner determined the cause of death to be blunt neck trauma due to assault and the death was ruled a homicide. Pursuant to a plea agreement, McDowell pled guilty to an amended count of first-degree reckless homicide and to the original charge of hiding a corpse. On the homicide, the trial court imposed a thirty-nine year bifurcated sentence, including twenty-nine years of initial confinement. On count two, the court imposed a consecutive four-year bifurcated sentence.

¶3 McDowell filed a postconviction motion alleging that the trial court relied on inaccurate information at sentencing, namely, reports concerning a prior incident of domestic violence with a different victim, J.P., and the medical examiner's written report which, McDowell alleged, was qualified by the examiner's testimony at the preliminary hearing. He requested either a resentencing or, in the alternative, a sentence modification on grounds that the

inaccurate information constituted a new factor.[1] The trial court denied the motion, stating it had not relied on the allegedly inaccurate information at sentencing and the factors it considered were "totally different than … [those] argued in the motion."

¶4 McDowell's first claim is that he was sentenced on the basis of inaccurate information concerning his history with an ex-girlfriend, J.P. Prior to sentencing, McDowell submitted various letters and a report for the court's consideration. In response, the State filed a packet of documents designed to rebut any suggestion that the victim's death was purely an "accident" or that McDowell "is a nonviolent person." Included in the State's packet was a police report concerning a domestic incident between McDowell and his ex-girlfriend, J.P., along with J.P.'s statement, in which she said that McDowell had placed his hand around her throat. In its sentencing argument, the State characterized the homicide and the incident with J.P. as having "something of a similar nature [.]" As in his postconviction motion, McDowell contends that the information presented at sentencing concerning his altercation with J.P. was inaccurate. In support, he points to the fact that J.P. was cited with assault and battery and ultimately "convicted" in connection with the incident, and that McDowell filed a restraining order against J.P..

¶5 A criminal defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d

[1] McDowell's briefs often conflate the separate legal concepts of a due process right to be sentenced on the basis of accurate information, for which the remedy is resentencing, and the existence of a new factor justifying a sentence modification. We analyze the claims involving J.P. under the rubric of McDowell's right to be sentenced on the basis of accurate information. We interpret the issue of the medical examiner's testimony as a claimed new factor.

179, 717 N.W.2d 1. To establish that he or she is entitled to resentencing on this basis, a defendant must prove by clear and convincing evidence[2] that (1) inaccurate information was before the sentencing court, and (2) the trial court actually relied on the inaccurate information at sentencing. ***Id.***, ¶¶2, 26. Once the defendant has made this showing, the burden shifts to the State to prove that the error was harmless. ***Id***., ¶¶3, 26.

¶6 McDowell has failed to establish that the information presented at sentencing concerning the incident with J.P. was inaccurate. ***State v. Travis***, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491 (whether information is inaccurate is a threshold question). J.P.'s statement submitted to the trial court included the following:[3]

> At approximately 5:00 p.m., I received a call from Officer Diedrich from the Milwaukee Police Department. She asked what happened. I explained what happened and Officer Diedrich said [McDowell] told them a different story and he was pretty beat up at the hospital. Officer Diedrich said it didn't look good for me and I would be receiving citations in the mail. I received one citation in the mail sometime in January 2012. I didn't have proof that [McDowell] did any harm to me, so I paid the citation.

[2] The standard of proof for both prongs is clear and convincing evidence. ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 406.

[3] The State's brief asserts that J.P.'s statement was provided to the trial court. In his reply brief, McDowell asserts, "This is simply not true [,]" and that "Nowhere in the record on appeal or before the trial court, does it indicate, in any way, that the information regarding [J.P.'s] conviction for the assault and battery" was provided to the sentencing court. McDowell is wrong. J.P.s statement, excerpted below, including her admission that she "paid the citation," was provided to the trial court and defense counsel before sentencing, and appear in the record at Index No. 35.

J.P.'s submission also expressly stated:

> On January 24, 2012 …, [a Deputy] served me a Temporary Restraining Order. Since I paid the citation, I didn't think going to Court would make a difference. On 2/6/13 …, I was served an injunction—Domestic Abuse (Order of Protection) by [a Deputy].

¶7 The information provided to the trial court about the strained relationship between J.P. and McDowell was complete and accurate. As was evident to the court, J.P.'s statement was simply her version of events. McDowell does not point to any relevant omitted facts. The prosecutor's reliance on J.P.'s version to argue that McDowell had a prior history of domestic abuse did not violate McDowell's right to be sentenced on accurate information. *Cf.* ***State v. Draize***, 88 Wis. 2d 445, 454, 456, 276 N.W.2d 784 (1979) (in the context of closing argument, a prosecutor is allowed considerable latitude and may comment on the evidence, draw just inferences from the evidence, and argue from the evidence to a conclusion) (citation omitted).

¶8 Next, McDowell argues that the preliminary hearing testimony of the medical examiner concerning the victim's lower extremity injuries constitutes a new factor. In support, he highlights that at sentencing, after referring to the medical examiner's written report which stated there was trauma to the victim's head, neck, and lower extremities, the trial court said, "So there are other injuries. We're talking about trauma." According to McDowell, the trial court's comment suggests a mistaken belief that McDowell inflicted injuries to the victim's lower extremities which is contradicted by the examiner's testimony that "[t]he contusions of the lower legs and abrasions of the lower legs are relatively minor injuries that could be incurred during everyday living."

¶9 A new factor is a set of facts highly relevant to the imposition of a sentence but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. ***Id.***, ¶38.

¶10 We conclude that McDowell has failed to establish a new factor warranting the modification of his sentence. Whether a new factor exists presents a question of law that this court reviews independently. ***Id.***, ¶36. Even assuming that the trial court did not review the preliminary hearing transcript before sentencing, facts unknowingly overlooked by the court cannot be a new factor unless the defendant was unaware of them as well. ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. McDowell and both of his attorneys were present at the preliminary hearing and aware the transcript existed. The medical examiner's testimony is not a new factor because it was not unknowingly overlooked by all the parties.

¶11 Further, even if the examiner's testimony could be considered a new factor, it was not highly relevant to the trial court's sentence. "The existence of a new factor does not automatically entitle the defendant to sentence modification." ***Harbor***, 333 Wis. 2d 53, ¶37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id.*** At the postconviction hearing, the trial court explained the factors it relied on in determining an appropriate sentence, pointing out they were "totally different" than those argued in McDowell's motion. The court noted that McDowell was convicted of reckless conduct and stated, "So I don't think it's a big issue for the

Court as to exactly what [the medical examiner] stated as to the cause of death." The trial court's finding that the examiner's testimony was not highly relevant to its sentence is implicit in its oral ruling and supported by the record. The medical examiner's written report, which was referred to at sentencing, made clear that the injuries to the victim's legs were merely "[m]inor … contusions and abrasions." It is not reasonable to believe that the trial court misconstrued these minor scrapes and bruises as contributing to the victim's death which, according to the report, was caused by blunt force trauma to her neck that dislocated her neck bones and injured her spinal cord.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).