COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP596-CR **Cir. Ct. No. 1994CF545**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY B. HERMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In 1995, Jeffrey B. Herman was convicted of sex crimes in violation of WIS. STAT. §§ 948.02(1), 948.02(2), and 940.225(3m)

(2013-14).[1] Shortly after completing a ten-year sentence, his probation was revoked and he began serving a ten-year imposed-and-stayed sentence. In 2014, he sought to have that sentence modified, asserting "new factors." He also moved to have Judge Kathryn W. Foster recuse herself from presiding over the sentence modification hearing on grounds of bias after she ordered his revocation file to be produced over his objection.[2] We affirm the order denying his motions.

Sentence Modification Motion

¶2 On review of a motion for sentence modification, we determine whether the sentencing court erroneously exercised its discretion in sentencing the defendant. ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. We review the decision to deny a motion for sentence modification under the same standard. ***Id.***

¶3 A trial court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A new factor 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 v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). "Erroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was

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

[2] Judge Marianne Becker, who presided over Herman's 1995 sentencing, died in 2003.

highly relevant to the imposed sentence and was relied upon by the trial court." ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656 (citation omitted).

¶4 Our review has two facets. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). The defendant first must demonstrate by clear and convincing evidence the existence of a new factor. ***Id.*** at 8-9. We review de novo the legal question of whether the defendant has made that showing. *See* ***id.*** at 8. If he or she surmounts that hurdle, then the defendant must show that the new factor justifies modification of the sentence. ***Id.*** at 8. We review for an erroneous exercise of discretion the trial court's decision whether or not to modify the sentence. ***Id.***

¶5 Herman contends the following are new factors that warrant modifying his sentence: the sentencing court's mistaken belief that he was eligible for the Department Intensive Sanctions (DIS) program; PSI inaccuracies, such as outdated demographic information about his family members and a "typo" suggesting there were two indecent exposure incidents; the prosecutor's "speculati[ve]" and "untrue" statements that he "got a thrill" both from the serial assaults and the resulting media notoriety, that he must have misrepresented his participation in Sexaholics Anonymous (SA), as he continued to reoffend, and that his remorse and empathy were not genuine; and changes to WIS. STAT. § 302.11, the mandatory release (MR) statute, the year before he was sentenced.[3] None of the points he raises constitute new factors warranting sentence modification.

[3] Herman also takes issue with his parole denial. That decision is not before us. The parole commission's refusal to grant discretionary parole is reviewable by common law certiorari. ***State ex rel. Britt v. Gamble***, 2002 WI App 238, ¶15, 257 Wis. 2d 689, 653 N.W.2d 143.

¶6 As to the DIS program, for example, the court stated when it sentenced Herman that it was "not willing" to declare him eligible at that time but that it would write a letter to the Department of Corrections authorizing DIS *if* the DOC wanted to consider him for the program, and only after he served "a substantial period of time." Herman contends this shows that the court plainly "inten[ded]" that he be paroled early to DIS such that his actual ineligibility due to the violent nature of his offenses presents a new factor. *See* WIS. STAT. § 301.048(2)(bm). We disagree.

¶7 As the court here recognized, it is for the DOC to determine whether an inmate ultimately can participate in a given program. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (after prison term selected, control over care of prisoners vested by statute in overseeing department). Even if the court missed that committing a "violent offense" under WIS. STAT. § 301.048(2)(bm) made Herman DIS ineligible, the court clearly knew it did not have the final word on whether the DOC would place him into the program.

¶8 We likewise reject Herman's suggestion that the court should have known he was DIS ineligible due to a 1993 memorandum the deputy administrator of DIS purportedly sent to all wardens instructing them not to consider for DIS inmates incarcerated for "assaultive offenses" like Herman's. Herman has not proved that the memo, which is not in the record, was relevant to his sentencing, as the court did not mention it. *See* ***Franklin***, 148 Wis. 2d at 14 (change in parole policy cannot be relevant to sentencing unless trial court actually considered it). His DIS eligibility was not highly relevant to the sentence imposed.

¶9 Any inaccuracies in the PSI or in the prosecutor's sentencing arguments also do not amount to new factors. The record does not support

Herman's claim that outdated PSI information led the court to think he was distant from his family and kept his arrest a secret from them. Herman's counsel corrected erroneous information and the court heard that Herman has a good relationship with his father, brother, and step-siblings and has built an effective support network with his family and others in the community. Herman also provided evidence of his SA progress, and his insight and victim empathy. Herman has not clearly and convincingly shown that the sentencing court actually relied on erroneous information.

¶10 The MR statute does not constitute a new factor warranting sentence modification either. Changes to parole policy implementing a presumptive MR date for those convicted of a "serious felony" took effect the year before Herman was sentenced. *See* 1993 Wis. Act 194, §1. The trial court neither referenced the MR statute at sentencing nor gave any indication that a parole date, mandatory or otherwise, factored into the term imposed. We reject Herman's unsupported assertion that the trial court "overlooked" the statutory change that made his MR date only presumptive, believed he was entitled to mandatory release on parole after serving two-thirds of his sentence, and "as a matter of policy took that into account when imposing sentence."

¶11 Our review of the sentencing transcript satisfies us that Judge Becker properly exercised her sentencing discretion. We agree with Judge Foster that Herman has not provided "anything remotely close to a new factor justifying modification" of his sentence.

Judicial Recusal Motion

¶12 Herman argues that Judge Foster engaged in ex parte communications with the State when she ordered prison officials to produce a

copy of his parole revocation summary to assist in deciding the sentence modification motion. We see the real issue as being whether procuring the records evinced judicial partiality such that Herman's due process rights were violated.

¶13 "Due process requires a neutral and detached judge." ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991) (citation omitted). We begin by presuming a judge is unbiased. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The party asserting judicial bias must show bias or prejudice by a preponderance of the evidence. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

¶14 In evaluating whether the presumption has been rebutted, we apply two tests, one subjective and one objective. ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Subjective bias, which Herman does not allege, refers to the judge's self-assessment of bias. ***Rochelt***, 165 Wis. 2d at 378. Objective bias occurs either when there is an appearance of bias to a degree that the judge "could not be trusted to 'hold the balance nice, clear and true' under all the circumstances," or when objective facts show that the judge "in fact treated [the defendant] unfairly." ***Goodson***, 320 Wis. 2d 166, ¶9 (citations omitted; alteration in original). We review de novo whether the judge's partiality, if any, violated the defendant's due process rights. ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991).

¶15 Herman contends that procuring his revocation file demonstrated Judge Foster's bias because "[p]ost-sentence conduct is not a new factor for sentence modification purposes," ***State v. Kaster***, 148 Wis. 2d 789, 804, 436 N.W.2d 891 (Ct. App. 1989), and she undertook her "unlawful investigation" to look for reasons to support a decision she already had made.

¶16 We again disagree. As Judge Foster explained, Herman's lack of forthrightness about his revocation led her to seek information that would aid her in ruling on his modification motion. Herman has not shown by a preponderance of the evidence that Judge Foster "could not be trusted to 'hold the balance nice, clear, and true,'" or, in fact, treated him unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9.

By the Court.—Order affirmed.

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