COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1777-CR **Cir. Ct. No. 1991CF914515**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY LEE FARROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Gregory Lee Farrow appeals from an order of the circuit court that denied his new-factor sentence modification motion. We discern no erroneous exercise of discretion by the circuit court, so we affirm the order.

BACKGROUND

¶2 In December 1991, Farrow tracked down his ex-fiancée at her friend's house and killed her, shooting her multiple times while she was curled up in a defensive position in a closet. In May 1992, a jury convicted Farrow on one count of first-degree intentional homicide with a dangerous weapon, one count of armed burglary, and one count of possession of a firearm by a felon, all as an habitual criminal. For the homicide, he was sentenced to life imprisonment with parole eligibility after fifty-nine years, when Farrow will be about ninety years old.[1] He was also given a consecutive twenty-year sentence for the armed burglary and a concurrent five-year sentence for the firearm possession.

¶3 In March 2015, Farrow filed a motion for sentence modification, asking to have his parole eligibility date changed to 2018 because of a new factor. The basis for this motion was a psychological evaluation completed in 2011 by Dr. Bronson Levin, a clinical and forensic psychologist. Levin determined that Farrow was at a low risk to recidivate, a risk further minimized because Farrow does not have antisocial personality disorder, psychopathy, or persistent aggressiveness. Further, according to Levin, Farrow had acted so violently only because he was "under strong emotional upset" at the time of the murder.[2] Levin concluded that, "[a]bsent extreme emotional upset, [Farrow] is not a violent man."

[1] The Honorable Michael D. Guolee presided over the trial and imposed sentence. The Honorable Stephanie G. Rothstein denied the sentence modification motion that is the subject of this appeal.

[2] Levin's report does not, however, assert that Farrow was not guilty by reason of mental disease or defect because of this "emotional upset."

¶4 The circuit court denied the motion, concluding that Levin's report was not a new factor and that, even if it were, sentence modification was not warranted. The circuit court explained that the sentencing court had viewed punishment as a major component of the sentence and had intended to keep Farrow from being released. As such, his psychological state and recidivism risk were irrelevant. Farrow appeals.

DISCUSSION

¶5 A new factor is a fact or set of facts that is highly relevant to the imposition of sentence but was unknown to the sentencing court at the time of the original sentencing either because it was not then in existence or because, even though it was in existence, it was unknowingly overlooked by all of the parties. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. A new-factor analysis asks two questions: is there a new factor and, if so, does that new factor warrant sentence modification? *See* ***State v. McDermott***, 2012 WI App 14, ¶9, 339 Wis. 2d 316, 810 N.W.2d 237.

¶6 The defendant has the burden to demonstrate the existence of a new factor by clear and convincing evidence. *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451. Whether the defendant has met that burden is a question of law we review *de novo*. *See* ***McDermott***, 339 Wis. 2d 316, ¶9. If the defendant does demonstrate a new factor, the question of whether that new factor warrants sentence modification is left to the circuit court's discretion. *See* ***id.*** We will not overturn a circuit court's discretionary decision on sentence modification unless the circuit court erroneously exercised that discretion. *See* ***Ninham***, 333 Wis. 2d 335, ¶90.

¶7 Farrow argues that Levin's evaluation is a new factor because neither trial counsel nor the presentence investigation report (PSI) offered any evidence of Farrow's psychological condition at the time of the offense, and neither source contained any objective analysis of his recidivism risk. Thus, the circuit court erroneously exercised its discretion[3] when it assumed the sentencing court intended for Farrow to be confined until 2051 regardless of his psychological profile.

¶8 The circuit court was not persuaded and adopted by reference the State's analysis concluding Levin's report was not a new factor. That analysis noted that Levin's conclusions were based on information that was already known at the time of sentencing, including the police reports, the PSI, and correspondence between Farrow and the homicide victim.

¶9 We are also unpersuaded that Levin's report is a new factor. The circuit court already knew that Farrow was characterized as a low-risk for recidivism. While Farrow counters that Levin's conclusion is based on "empirical evidence" rather than "general recidivism factors," he does not explain how the difference in arriving at the same conclusion amounts to a new factor. *See* ***Harbor***, 333 Wis. 2d 53, ¶57 ("[A]ny fact that was known to the [circuit] court at the time of sentencing does not constitute a new factor."). Additionally, Farrow had already tried to explain the homicide as an accident, an explanation the sentencing court outright rejected. This is similar to Levin's opinion that "the

[3] Farrow repeatedly asserts that the circuit court abused its discretion. However, the supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" nearly twenty-five years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewer. Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

most logical explanation for the number of shots fired is that, in the emotional intensity of the moment, once the gun went off the first time, he automatically kept pulling the trigger."

¶10 But whether Levin's report is or is not a new factor, the circuit court concluded that punishment was the sentencing court's primary concern. Therefore, sentence modification based on Levin's report was not warranted because Farrow's psychological state and recidivism risk were not particularly relevant to that objective. Farrow argues on appeal that the sentencing court's main objective was actually protection of the community. We are not convinced.

¶11 If the sentencing court's objective was community protection, then Levin's report undermines any claim that resentencing is warranted. Levin claimed that "absent extreme emotional upset," Farrow is not violent. However, no part of Farrow's brief explains to us just what his "extreme emotional upset" was, and Farrow did not simply kill his ex-fiancée during a heated argument: he tracked her down at a friend's house, threatened the friend and others in the house with his gun, pulled his victim into a bedroom, killed her, then warned the others present not to say anything. Arguably, then, Farrow still presents a danger to the community, as he is apparently prone to unpredictable and prolonged periods of violent and unlawful behavior when he experiences whatever constitutes "extreme emotional upset." Additionally, though Levin characterized Farrow as a low risk for recidivism, Farrow had a prior criminal record and was, as the circuit court observed, "already a recidivist when he committed the instant offenses."

¶12 Moreover, Farrow utterly ignores the circuit court's conclusion that punishment was a major concern to the sentencing court and does not explain why the circuit court was incorrect to so conclude. We discern no error in the circuit

court's characterization of the sentencing's court's concern—indeed, we agree with it. The sentencing court had stated, in relevant part:

> [The victim's mother] made a comment--I think it really highlights what happened here--that he stalked her, and he shot her like an animal. That she was huddled in a closet. That's what it was.
>
> Now this idea that it was an accident. It's almost laughable to think that you can fire a pistol five times accidentally.… She was crowded in that closet in a fetal position protecting herself. And you put five bullets in her body.…
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> … And when you have a case where it meets a criteria that shocks the [conscience] of our community, it's not an accidental offense or some, an offense that we can kind of understand. But when it's a senseless killing, a violent killing, as talking, a murder, in the true sense of the word, let's make some sense out of this. Judge, when you say you are saying sentence somebody for life, make it life under those particular cases.…
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> Now, it's also, I think there has been a cry, concerns by some people that we have the death penalty here. And Wisconsin hasn't had the death penalty for a number of years.… But people are saying, and I think the legislature is saying and the courts, have to look at this. We will not execute Mr. Farrow. But what can we do when we say life? Does that mean life?
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> ….
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> … [T]his was a cowardly act. In the true sense of the word--coward. A man arming himself after this young lady and going in stalking her and shooting her five times as she lays defenseless. And it appears that you wanted to continue to control her. That you have this selfish nature about you.
>
> Now why do I say those things? … This is a person that is dangerous. He is a danger to the community--this attitude of selfishness. This concern only about his own needs and wants.

> … [T]here are certain crimes for which a person should not see the streets again. They should die in prison.… There is no place for them on the street. And so I am going to try to fashion a sentence that will make sure that he will never see the streets again.
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> ….
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> … And I really believe that I think the community calls for that. I think this crime calls for that--that this man never be on the street again.

¶13 Although the sentencing court acknowledged that Farrow was a danger to the community, it is evident, particularly given the discussion of the death penalty and the meaning of a life sentence, that the sentencing court rejected any notion that the shooting was anything other than intentional and intended to punish Farrow by imposing a life sentence that would, truly, amount to life imprisonment. We thus discern no erroneous exercise of discretion in the circuit court's conclusion that, in light of the sentencing court's punishment objective, Levin's report did not warrant sentencing modification, even if it satisfied the definition of a new factor.

By the Court.—Order affirmed.

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