COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP501-CR **Cir. Ct. No. 2001CF454**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARRELL E. HURLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Jarrell E. Hurley appeals pro se from a circuit court order denying his motion for sentence modification. We agree with the circuit court that it did not impose an illegal sentence and that Hurley did not demonstrate

the existence of a new factor warranting sentence modification. Hurley's ineffective assistance of counsel claim is waived and, if not waived, lacks merit.

¶2 In 2001, Hurley pled guilty to three counts of failure to support his children contrary to WIS. STAT. § 948.22(2) (1995-96). The circuit court imposed and stayed three consecutive two-year sentences. The court then imposed three concurrent five-year terms of probation with ninety days of jail time as a condition of probation on count one.

¶3 In 2003, after his Wisconsin probation was revoked and the previously stayed prison terms began, Hurley moved the circuit court to modify his sentence on the grounds that a previous term of probation in Colorado[1] amounted to a new factor for his Wisconsin sentence. He also claimed that the Wisconsin sentence was illegal under ***State v. Maron***, 214 Wis. 2d 384, 571 N.W.2d 454 (Ct. App. 1997). ***Maron*** prohibits the imposition of a sentence consecutive to a term of probation or to jail time imposed as a condition of probation. ***Id.*** at 395. Hurley contended that because he was on probation in Colorado when the Wisconsin court sentenced him in 2001, the Wisconsin sentence was consecutive to the Colorado probation term in violation of ***Maron***.

¶4 The circuit court disagreed with Hurley, finding that the Wisconsin probation terms commenced and were intended to commence on the date they

[1] Hurley was on probation in Colorado at the time the Wisconsin circuit court withheld sentence and imposed three concurrent five-year terms of probation for failure to support. Hurley's Colorado probation was revoked in January 2002, and Hurley returned to prison in Colorado. After his release to parole in Colorado in 2002, Hurley returned to Wisconsin, where his Wisconsin probation was revoked in January 2003 and the three consecutive two-year terms of the stayed sentence began. On certiorari review, which is not within the scope of this appeal, the circuit court upheld the revocation of Hurley's Wisconsin probation.

were imposed in 2001 and that they were served concurrently with the Colorado probation, not consecutively to the Colorado probation. Therefore, the Wisconsin sentence structure was legal at the time it was imposed. Furthermore, the Wisconsin court was never informed of the existence of the Colorado probation at the time of the 2001 sentencing, and therefore the Colorado probation did not constitute a new factor, i.e., a matter which frustrated the circuit court's sentencing intent or which was relevant to sentencing. The Wisconsin court intended to and did place Hurley on probation to enable him to pay his child support arrearages, but Hurley's subsequent conduct resulted in revocation of that probation. Hurley appeals.

¶5 We agree with the circuit court that the probation imposed on the three counts of failure to support did not constitute an illegal sentence under ***Maron***. The circuit court found that the Wisconsin probation terms commenced on the day they were imposed and Hurley was on probation in Colorado at the time. The finding that the Wisconsin probation terms were concurrent with the Colorado probation is supported in the record and was echoed in the hearing examiner's decision revoking Hurley's Wisconsin probation. We reject all of Hurley's arguments to the extent they are premised on his contention that the Wisconsin probation terms were consecutive to the Colorado probation.

¶6 We also reject Hurley's contention that the circuit court improperly ordered the sentences for counts two and three to be served consecutively to the ninety days of jail time imposed as a condition of probation in count one. The amended judgment of conviction states that the terms of probation are to be served concurrently, and the consecutive two-year sentences were imposed and stayed in favor of probation. Neither the terms of probation nor incarceration were ordered to be served consecutively to condition time.

¶7 Hurley argues that his trial counsel was ineffective for not arguing that his Wisconsin probation terms violated ***Maron***. This argument is waived. It is well settled that a claim of inadequate trial counsel must be raised in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Hurley did not do so. Even if the issue were not waived, it would lack merit. The ineffective assistance claim is based on the ***Maron*** argument, which we have already rejected.

¶8 We also agree with the circuit court that Hurley's probation status in Colorado did not constitute a new factor requiring sentence modification. The new factor analysis was recently restated by our supreme court:

> We define a new factor as "an event or development which frustrates the purpose of the original sentence," and recognize it to be more than a change in circumstances since the time of sentencing. Specifically, we have held:
>
> > [T]he phrase "new factor" refers to 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.
>
> As previously noted, to qualify for a sentence modification based on a new factor, the defendant must show: (1) a new factor exists; and (2) the new factor warrants modification of his [or her] sentence.

State v. Trujillo, 2005 WI 45, ¶13, ___ Wis. 2d ___, 694 N.W.2d 933 (citations omitted). The new factor must be the thing that frustrates the circuit court's original intent. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). The existence of a new factor is a question of law that we review de novo. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶9 The fact that Hurley was on probation in Colorado was not unknowingly overlooked by all the parties. Hurley knew he was on probation in Colorado, but that information was not provided to the circuit court at the 2001 sentencing. Hurley admits in his appellant's brief that he intentionally withheld this information from the circuit court at sentencing. Information about which the defendant is aware at sentencing cannot constitute a new factor. ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673.

¶10 The revocation of Hurley's probation in Colorado and Wisconsin does not constitute a new factor. *See* ***State v. Ramuta***, 2003 WI App 80, ¶20, 261 Wis. 2d 784, 661 N.W.2d 483, *review denied*, 2004 WI 114, 273 Wis. 2d 655, 684 N.W.2d 136 (WI May 12, 2004) (No. 2002AP1431-CR).[2] Furthermore, the circuit court found that its sentence was not frustrated by the probation revocation.[3]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

[2] We distinguish ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, upon which Hurley relies to argue that probation revocation can amount to a new factor. In ***Norton***, the circuit court specifically considered the defendant's probation status in imposing sentence. ***Id.***, ¶13. Here, Hurley's probation status was not within the circuit court's knowledge or consideration.

[3] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").