COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1322-CR **Cir. Ct. No. 2013CF3732**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERENCE DARRELL BREWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CAROLINA STARK, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Terence Darrell Brewer appeals from a judgment of conviction, entered upon his guilty pleas to four different counts, and from an order of the circuit court that denied his postconviction motion. Brewer contends he is entitled to sentence modification because of a new factor and disparity with

co-defendant Antonio Johnson's sentence, and to resentencing because the circuit court relied on inaccurate information. We reject Brewer's arguments and affirm.

BACKGROUND

¶2 After completing multiple drug sales to undercover police officers, Brewer was arrested and charged with three counts of manufacture or delivery of less than three grams of heroin, one count of manufacture or delivery of three to ten grams of heroin, one count of possession of a firearm by a felon, and one count of possession with intent to deliver between ten and fifty grams of heroin as a party to a crime. Brewer agreed to plead guilty to the latter four counts; two counts of manufacture or delivery of less than three grams of heroin would be dismissed and read in. The circuit court ultimately imposed concurrent sentences, the longest of which was ten and one-half years' imprisonment and four and one-half years' extended supervision for the possession-with-intent conviction.[1]

¶3 Brewer moved for sentence modification and/or resentencing on three grounds. First, he requested sentence modification based on "actions undertaken by defendant since his incarceration." Second, he sought sentence

[1] The judgment of conviction and Brewer's appellant's brief describe a sixteen-year sentence for the possession-with-intent offense, but that appears incorrect. The sentencing transcript reflects the following:

> And regarding Count 6, which I believe is the most serious of the offenses in terms of exposure, that being the Class [D] felony, the Court imposes a sentence *totalling 15 years … the term of initial confinement is ten years, six months*; time you would have on *extended supervision is four years, six months.*

(Emphasis added.) On remittitur, the circuit court should direct the clerk to amend the judgment of conviction accordingly. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

modification on the ground that his sentence was "unduly harsh or unconscionable" compared to that of co-defendant Johnson. Third, he sought resentencing, arguing the circuit court relied on incorrect information when imposing sentence.

¶4 The circuit court rejected these arguments. It noted that Brewer's accomplishments, "as commendable as they certainly are," might be relevant to the sentencing goal of rehabilitation, but not to other sentencing objectives like protection of the community, punishment, or deterrence. The circuit court further commented that ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988), "held that evidence of progress or … continuing rehabilitation while incarcerated are not reasons for a court to modify sentence[.]" It then explained the differences between Brewer and Johnson and explained why Brewer's sentence was not unduly harsh in comparison to Johnson's sentence. Finally, the circuit court addressed the alleged sentencing inaccuracy and explained that it had not relied on the inaccuracy. The circuit court thus denied the motion.[2] Brewer appeals, raising the same issues listed above.

[2] The postconviction motion also moved to vacate multiple DNA surcharges as *ex post facto* violations under ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. The circuit court first amended the judgment of conviction to impose only a single surcharge, then held the motion in abeyance pending a decision by this court in ***State v. Scruggs***, No. 2014AP2981-CR. This court's ***Scruggs*** decision, 2015 WI App 88, 365 Wis. 2d 568, 812 N.W.2d 146, *aff'd* 2017 WI 15 (Feb. 23, 2017), was released in October 2015. Upon that release, the circuit court in this matter concluded that ***Scruggs*** controlled to authorize a single mandatory surcharge, and it denied the motion to vacate the remaining surcharge.

As the propriety of the remaining surcharge is not raised on appeal, we consider it no further. *See* ***State v. Allen***, 2004 WI 106, ¶26 n.8, 274 Wis. 2d 568, 682 N.W.2d 433; ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

DISCUSSION

I. New Factor

¶5 Brewer first seeks sentence modification based on positive steps he has taken while incarcerated in a "never ending quest to better himself." These steps include helping others achieve sobriety, obtaining full-time employment, and pursuing a high school equivalency diploma. He presents his self-improvement "quest" as a new factor.

¶6 A circuit court has the inherent power to modify a sentence. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). This power may be exercised upon the showing of a new factor. *See* ***id.***; *see also* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is a fact or set of facts that is "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); *and see* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

¶7 Brewer is, in effect, asking for consideration of his rehabilitative efforts while in prison. However, "courts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentencing modification." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997); *see also* ***Prince***, 147 Wis. 2d at 136 ("Changes in attitude and prison rehabilitation are not new factors justifying

sentence modification.”). Accordingly, Brewer has failed to show a new factor as a matter of law.

¶8 In his reply brief, Brewer concedes that rehabilitation is not a new factor but argues nevertheless that his achievements “should be viewed in concert with the other factors supporting sentence modification.” But Brewer does not explain how his achievements constitute something other than rehabilitation.

¶9 Even were we to assume that Brewer’s efforts should be deemed a new factor as a matter of law, the next step is for the circuit court to determine, in an exercise of discretion, whether sentence modification is warranted. The circuit court did this when it concluded that Brewer’s efforts did not warrant modification because they did not address other sentencing objectives, like community protection or punishment, and because inmates are expected to make rehabilitative progress while imprisoned. The argument in Brewer’s main brief, however, is a near word-for-word recreation of his postconviction argument, so it fails to even identify the circuit court’s ruling, much less argue or show that the circuit court erroneously exercised its discretion. In any event, we are satisfied that the circuit court properly denied the motion for sentence modification on new-factor grounds.

II. Disparate Sentences

¶10 Brewer next argues for sentence modification, believing his sentence was unduly harsh and unconscionable compared to that of co-defendant Johnson. Brewer was charged with six offenses stemming from sales to undercover police officers on four different days. As noted above, Brewer pled to four of those six charges and, on the most serious charge of possession with intent to deliver between ten and fifty grams of heroin as a party to a crime, he was sentenced to ten and one-half years’ initial confinement and four and one-half years’ extended

supervision. Because Brewer's sentences are concurrent, this fifteen-year sentence, as the longest sentence, is also the sentence controlling the total length of imprisonment.

¶11 Johnson was observed with Brewer for only the final transaction, which resulted in the men's arrests. Johnson was charged with three offenses as a result: possession with intent to deliver between ten and fifty grams of heroin as a party to a crime, possession of tetrahydrocannabinols as a second or subsequent offense, and possession of a firearm by a felon. Johnson pled guilty to the heroin and firearm charges; the THC count was dismissed and read in. Johnson was sentenced to consecutive terms totaling eleven years' imprisonment; the specific sentence for the heroin offense was four years' initial confinement and three years' extended supervision.

¶12 Brewer complains that Johnson's eleven-year total sentence "is staggering when compared to Brewer's sentence" of fifteen years. Brewer also complains that on the heroin charge, Johnson "received 40% of the initial confinement that Brewer received."

¶13 Wisconsin recognizes the importance of "individualized sentencing." *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Defendants do not receive the same punishment simply because they are convicted of the same offense. Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). In order to establish that a sentencing disparity is improper, a defendant must show that the circuit court "based its determination upon factors not proper in or irrelevant to sentencing, or

was influenced by motives inconsistent with impartiality." ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). Additionally, we review a circuit court's conclusion that a sentence it imposed was not unduly harsh for an exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A sentence given to a similarly situated defendant is relevant, but not controlling. *See* ***id.*** at 220-21.

¶14 Here, the circuit court explained why Brewer and Johnson received different sentences: in short, they are not similarly situated. On the shared offense of possession with intent to deliver between ten and fifty grams of heroin as a party to a crime, the State argued that Brewer had a leadership role and that Johnson was more of a follower. The circuit court believed that to be true, though it noted that if Brewer was not the leader, he was at least as culpable as Johnson. More basic, however, was the simple fact that Brewer had been charged with and convicted of more offenses than Johnson, and many of Brewer's offenses did not involve Johnson.

¶15 Brewer's main appellate brief does not describe the circuit court's ruling in any substantive fashion. There is no attempt to show that the sentencing disparity was based on improper or irrelevant factors; indeed, the only difference pointed out is the mathematical difference between the two sentences on the possession-with-intent convictions.

¶16 In his reply brief, Brewer asserts that the circuit court relied only "on the number of charges the individual defendants received" and that the "State and circuit court's arguments fails to explain the discrepancies in sentence" for the shared possession-with-intent crime. Aside from the fact that we typically do not consider arguments made for the first time in the reply brief, *see* ***Northwest***

Wholesale Lumber v. Anderson, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995), we have already noted that defendants do not receive the same sentence merely because they are convicted of the same crime. Brewer ignores the circuit court's determination that he was likely the leader of the drug sale, ignores his pattern of selling heroin without Johnson in the days before the events leading to the possession-with-intent charge, and conveniently omits any mention of the fact that he had absconded in this matter while released on bond. We discern no erroneous exercise of discretion by the circuit court in concluding that Brewer's sentence is not unduly harsh compared to Johnson's sentence.[3]

III. Inaccurate Information

¶17 Finally, Brewer seeks resentencing on the ground that the circuit court relied on inaccurate information when imposing his sentence. Specifically, the circuit court referred to a prior possession-with-intent conviction when the conviction was actually only for simple possession.

¶18 "[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the

[3] We also reject any implicit suggestion that the fifteen-year sentence was somehow unduly harsh on its own: Brewer was facing a maximum of sixty-two and one-half years of imprisonment, and the total sentence he received was less than a quarter of that. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (An erroneous exercise of sentencing discretion "will be found only where the 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.").

sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the circuit court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, or that the information 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

¶19 The circuit court, in denying the motion, first quoted the relevant portion of the sentencing transcript:

> [THE COURT:] I acknowledge those mitigating factors, but I find that the aggravating factors here to significantly outweigh the mitigating factors here and that you have a prior conviction for a drug related offense from 2006, which was possession with intent, albeit not heroin, so you already have a taste of what life is like in prison. Even when you did that extended supervision successfully, those two years, that wasn't enough to convince you not to engage in that again, I think, is an aggravating factor.

The circuit court went on to explain that it had not been "focused on the intent element of the offense but rather that he had spent time in prison and on extended supervision for that offense and that it was not sufficient to deter him from committing additional drug related crimes." It acknowledged an inaccurate description of the offense of conviction but stated that it "did not rely on the specific nature of that conviction[.]"

¶20 Brewer contends it "strains credibility that a court would discuss the prior intent to deliver crime—calling the crime an aggravating factor. Then assert that it did not rely on said factor, only that … Brewer had spent time in prison."

¶21 The only thing we would describe as strained is Brewer's argument. It is evident, in viewing the sentencing transcript, that the aggravating factor the

circuit court identified was Brewer's failure to be deterred by prior confinement and supervision for a drug-related conviction. It did not, nor did it need to, rely on the precise description of the prior conviction.[4] Resentencing is not warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[4] We note that while Brewer pled guilty to and was convicted of a simple possession charge in his prior case, he was originally charged with possession with intent to deliver between fifteen and forty grams of cocaine.