COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP683-CR **Cir. Ct. No. 2015CM3569**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. ST. PETER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

¶1 BRASH, J[1]. Thomas G. St. Peter appeals from the judgment of conviction and order denying his motion for sentence modification, following his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

conviction of a misdemeanor charge of obstructing an officer, contrary to WIS. STAT. § 946.41(1). St. Peter argues that the trial court violated his due process rights because his sentence was based on the court's misunderstanding of the facts. He further argues that the trial court erroneously exercised its discretion at the time of sentencing by not addressing relevant factors for sentencing as established in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), and confirmed in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. We affirm the judgment, but reverse the order and remand the case for resentencing.

BACKGROUND

¶2 On September 25, 2015, St. Peter reported to the Milwaukee Police Department that his car had been carjacked. He stated that an armed black male had gotten into his vehicle through an unlocked passenger door, and forced him to drive to a gas station at 3708 West North Avenue, Milwaukee, Wisconsin. Once there, St. Peter said he was told to get out of the car, and the man then drove away in St. Peter's car without his consent.

¶3 During the investigation into this incident, police officers reviewed video surveillance from the gas station. The car was subsequently found two days after the incident in the area of the 2700 block of North 48th Street, Milwaukee, Wisconsin. The police recovered fingerprints from the car, which were identified as those of Cortez Wright.

¶4 The police interviewed Wright. He asserted that he had not robbed St. Peter; instead, he claimed that Peter owed him money for drugs. Wright stated that they had completed a drug transaction in St. Peter's car, and then had driven to the gas station, where Wright had asked St. Peter to go inside and buy a cigar for him. When St. Peter left the vehicle, Wright moved into the driver's seat and

drove away, without St. Peter's consent. Wright was arrested and charged with operating a vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(3).

¶5 The police then confronted St. Peter about Wright's version of the incident. St. Peter admitted that he had fabricated the portion of his story relating to the armed robbery. St. Peter was charged with obstructing an officer, and spent four days in jail before he was released on bail.

¶6 St. Peter subsequently agreed to enter into a guilty plea for this charge. At the plea and sentencing hearing, the State noted that it had agreed to a joint recommendation for sentencing of time served along with a fine. The State further stated that St. Peter's "bogus" report of an armed robbery was a serious offense because the investigation had utilized police time and resources unnecessarily.

¶7 During that statement to the trial court, the State first referred to St. Peter as the defendant but then changed terminology, using the term "victim" when referring to St. Peter; the State then began using the term "defendant" to refer to Wright instead of St. Peter, even though the hearing was for St. Peter's plea and sentencing.

¶8 Defense counsel addressed that confusing terminology in his statement to the trial court, noting that St. Peter was the defendant in the current prosecution, and that Wright was being prosecuted for taking St. Peter's car without consent during the incident and was scheduled to be sentenced in January or February 2015. The defense explained that St. Peter was a heroin addict, and had lied to the police about the nature of the incident because he did not want to admit that he had been trying to buy drugs from Wright. The defense further

disclosed that St. Peter was on probation at the time of the incident for a previous drug charge in 2013 related to his heroin use.[2] St. Peter's probation had not been revoked as a result of this incident; instead, he had spent sixty hours in a drug rehabilitation program at Rogers Memorial Hospital.

¶9 The defense also noted that St. Peter had lost his job at We Energies as a result of this incident, where he had been employed for twenty-three years, and that he was in the process of a divorce. St. Peter then made his own statement to the trial court, apologizing for his actions and asserting his desire to stay on his current path to recovery from his addiction.

¶10 The trial court rejected the recommended sentence of time served and a fine, and instead sentenced St. Peter to forty-five days in the House of Correction as straight time, without Huber privileges. The trial court initially referred to Wright as a "totally innocent person" who was framed for an offense and had done nothing wrong to St. Peter; this inaccuracy was corrected by defense counsel. Nevertheless, the trial court opined that St. Peter's allegation against Wright was a misuse of the criminal justice system for "personal vengeance" against "someone [who] ha[d] victimized [St. Peter] in some other way," and that

[2] While the details of St. Peter's previous drug charge are not in the record, we take judicial notice of the CCAP records in that action, which were referenced in the transcript of the sentencing hearing as well as referenced by St. Peter in his brief. *See* WIS. STAT. § 902.01; ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff.).

According to the CCAP records for the 2013 charge, Milwaukee County Case No. 2013CF005613, St. Peter pled guilty to the manufacturing, distributing, or delivery of heroin, contrary to WIS. STAT. § 961.41(1)(d)2. In June 2013, the trial court stayed a sentence of four years, consisting of two years of initial confinement and two years of extended supervision, and instead placed St. Peter on probation for three years. He was to obtain drug counseling and treatment, and maintain absolute sobriety.

it would not be permitted. The trial court's other comments during sentencing were analogies to situations where a person hits another person who happens to be a police officer or a judge, and that it is not permissible for the officer or judge to advocate for a more serious charge (e.g. from simple battery to an aggravated felony) if the perpetrator was not aware of the victim's position until after the fact.

¶11 After the plea and sentencing hearing, St. Peter filed a motion seeking bail pending this appeal, which was granted. On March 4, 2016, he filed a motion for sentence modification, requesting the trial court to adopt the original joint recommendation of time served and a fine or, alternatively, for a lesser amount of jail time with Huber privileges to search for employment and to continue drug treatment and counseling. He argued that there had been confusion with regard to the underlying facts of the case, as indicated in the record by the trial court's inaccurate statements about the facts surrounding the incident, as well as the State's use of both "defendant" and "victim" to describe St. Peter. Additionally, St. Peter contended that State and defense statements at the sentencing hearing had been "quick," with the expectation that the sentencing recommendation would be accepted by the court. As a result, there was "important factual information" relevant to the sentencing analysis that was not presented to the trial court.

¶12 The trial court denied the motion. It stated that St. Peter did not explain the nature of the "important factual information" that had allegedly not been presented to the trial court at the sentencing hearing. Moreover, the trial court maintained that it did not rely on inaccurate information at sentencing, as the record shows that the confusion was clarified prior to its imposition of the sentence. This appeal follows.

DISCUSSION

¶13 St. Peter's appeal appears to interchangeably use the terms "sentence modification" and "resentencing"; however, these are actually "distinctly different concepts." ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81. To explain, St. Peter's postconviction motion was entitled "Defendant's Motion for Modification of Sentence." A sentence modification motion may be granted "upon a showing of a new factor." ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A "new factor" is defined as:

> [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). This analysis is designed to "correct specific problems" of a sentence. ***Wood***, 305 Wis. 2d 133, ¶9.

¶14 On the other hand, the primary argument advanced by St. Peter in this appeal is that his sentence was based on inaccurate information and that the trial court relied on this inaccurate information during sentencing, which is a basis upon which a court may grant resentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Resentencing is appropriate "when it is necessary to completely re-do the invalid sentence." ***Wood***, 305 Wis. 2d 133, ¶9. Indeed, the consideration of relevant sentencing factors as set forth in ***Gallion*** and ***McCleary*** is the foundation for determining whether a sentence is a "prima facie valid sentence." ***Gallion***, 270 Wis. 2d 535, ¶1.

¶15 The central focus of St. Peter's arguments, in our assessment, is the correlation between the facts of this case and the sentencing factors that should have been considered by the trial court. Nevertheless, we recognize that as part of his due process argument, St. Peter also asserts that there is a new factor related to sentencing: that Wright was arrested and charged with armed robbery in January 2016, shortly after the incident with St. Peter, with a very similar set of facts. St. Peter requests that we take judicial notice of the CCAP records of that case. S*ee* WIS. STAT. § 902.01; ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff.). As previously stated, a "new factor" analysis is generally related to a request for a sentence modification. *See* ***Wood***, 305 Wis. 2d 133, ¶9. However, St. Peter fails to explain how Wright's case relates to his case, and we decline to develop his argument for him. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Additionally, we note that the charges against Wright in that case were dismissed.

¶16 We further point out that St. Peter's concluding paragraph in his brief, after his discussion of relevant sentencing factors as set forth in ***McCleary*** and ***Gallion***, specifically requests that the case be remanded for *resentencing*. Therefore, for all of the foregoing reasons, we analyze St. Peter's arguments based on the criteria for resentencing, and not for sentence modification.

¶17 It has long been recognized that the trial court exercises discretion in imposing a sentence. ***Gallion***, 270 Wis. 2d 535, ¶17. "'[S]entencing decisions of the [trial] court are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.***, ¶18 (citation omitted; first set of

brackets in ***Gallion***). "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." ***McCleary***, 49 Wis. 2d at 281.

¶18 Still, defendants have "a constitutionally protected due process right to be sentenced upon accurate information." ***Tiepelman***, 291 Wis. 2d 179, ¶9. To establish a violation, a defendant "'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" ***Id.***, ¶26 (two sets of quotation marks and citations omitted). Whether a defendant has been denied this right is a constitutional issue that we review *de novo*. ***Id.***, ¶9.

¶19 St. Peter asserts that the trial court based his sentence on inaccurate information which is a violation of his due process rights. The record clearly indicates that the trial court displayed a certain amount of confusion about the facts of this case at the beginning of the proceedings. Specifically, the trial court initially referred to Wright as a "totally innocent person," and further stated that "whatever things he may have done wrong in his life, he didn't rob [St. Peter], okay?" This statement by the court was clearly inaccurate, as Wright was a drug dealer and not a "totally innocent person," and he had essentially "robbed" St. Peter by stealing his vehicle.

¶20 The record reflects that defense counsel attempted to correct the court during a sidebar conference that was called immediately after the court's inaccurate statement. Additionally, both defense counsel and the State, in their statements to the trial court during the proceedings, discussed the circumstances under which St. Peter's car was stolen from him by Wright. Defense counsel at that time also attempted to clarify any confusion that may have occurred after the

State referred to St. Peter as the "victim" and used the term "defendant" to refer to Wright, even though St. Peter was the defendant in this case.

¶21 Yet, even after the information was clarified by counsel, the trial court seemed to continue along this same line of reasoning. To explain, the trial court first demonstrated its confusion right after the plea colloquy, when it stated that it was "very skeptical about this time-served disposition given that he accuses a totally innocent person" of armed robbery. As noted, this inaccuracy was subsequently corrected at a sidebar conference. However, immediately after the sidebar the State began its confusing statement to the court using the term "defendant" to describe the man who stole St. Peter's car, continuing the misunderstanding of the facts of this case.

¶22 These perplexing exchanges culminated with the trial court stating just prior to imposing the sentence that it was "not sympathetic at all with the idea of people who essentially frame someone." To be clear, Wright, the person who the trial court declared had been "framed," was a drug dealer who had already confessed to stealing St. Peter's car. In fact, when police questioned St. Peter after interviewing Wright, St. Peter immediately admitted to embellishing the part of his story relating to the manner in which his car had been stolen. Thus, there was never any danger of Wright being charged with the more serious offense of armed robbery, because the police discovered immediately that this part of St. Peter's claim had been fabricated.

¶23 Based on these circumstances, the trial court's description of Wright having been "framed" does not comport with the facts. Rather, it appears to have been borne from the trial court's initial misunderstanding as to the facts of the case, as well as the State's misguided statement to the court. Furthermore,

although counsel attempted to correct these misperceptions, the trial court continued to make statements that inaccurately reflected the facts of the case, and this seems to have had an impact on the sentence imposed. Therefore, we conclude that the trial court was still relying on the above-described inaccurate information regarding this case when it sentenced St. Peter and, as a result, a due process violation occurred.

¶24 St. Peter also argues that the trial court erroneously exercised its discretion when it sentenced St. Peter, in that it did not address the relevant sentencing factors as required by ***McCleary*** and its progeny. We agree.

¶25 For a sentence to be deemed valid, it must include "a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." ***McCleary***, 49 Wis. 2d at 281. The primary factors that are to be considered, as set forth in ***McCleary***, are "the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

¶26 Furthermore, the courts have "delineated additional and related factors" that may be considered during sentencing, including:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentence and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id. at 623-24 (citation omitted).

¶27 When imposing jail or prison, the trial court "shall explain why the duration of incarceration should be expected to advance the objectives it has specified." ***Gallion***, 270 Wis. 2d 535, ¶45. In other words, courts are required "by reference to the relevant facts and factors[] [to] explain how the sentence's component parts promote the sentencing objectives." ***Id.***, ¶46. The purpose of "stating this linkage on the record" is to ensure that courts "produce sentences that can be more easily reviewed for a proper exercise of discretion." ***Id.*** In fact, the ***Gallion*** court opined that "[a]llowing implied reasoning rather than requiring an on-the-record explanation for the particular sentence imposed lies at the heart of this erosion" of the proper application of the ***McCleary*** factors. ***Id.***, ¶50.

¶28 In our review of the record, we do not find that the trial court made the required linkage between the relevant facts and factors of the case and the sentencing objectives. Instead, the trial court hones in on one particular objective, the gravity of the offense, and proceeds with a recitation about using the criminal justice system to exact personal vengeance. However, this scolding by the trial court appears to virtually ignore the basic facts of the case: that St. Peter was an addict on probation from a previous drug charge who was trying to buy drugs when his car was stolen; that his car was stolen by his drug dealer; and that he lied to police about the manner in which his car was stolen because he did not want the police, or his probation agent, to discover that he had been trying to buy drugs when the theft of his car occurred. Furthermore, the trial court's perception of the gravity of the offense was skewed by its apparent inaccurate understanding of the facts of the case, as discussed above.

¶29 In following the ***McCleary*** guidelines, trial courts are "encourage[d] ... to refer to information provided by others." ***Gallion***, 270 Wis. 2d 535, ¶47. Although St. Peter, in his motion for sentence modification, asserted

that the trial court "was not presented with important factual information" relating to the relevant sentencing factors[3], our review of the record shows that defense counsel provided considerable facts and information regarding St. Peter that are relevant to many of the sentencing factors, such as: (1) that St. Peter's only prior criminal record was the drug charge, for which he was on probation at the time of this incident; (2) other than that prior drug charge, he had no history of previous undesirable behavior patterns; (3) with regard to personality, character, and social traits, that he had "a profound drug problem" and had "put himself in a bad spot" as a result of his addiction, losing his marriage and his job, but that he was trying to rehabilitate himself and had entered into an in-patient drug rehabilitation for sixty hours after his arrest for this incident; (4) that St. Peter had received the drug treatment as an alternative to the revocation of his probation; (5) that there was no apparent vicious or malicious intent on St. Peter's part relative this crime, but that he had admittedly embellished the truth to cover his real reason for meeting with Wright—buying drugs; (6) that St. Peter accepted full responsibility for his actions, resolving the case by plea; (7) that St. Peter had previously been employed for over twenty years before losing his job as a result of this incident; and (8) that St. Peter was extremely remorseful when confronted by police about his fabrication, and immediately admitted that there was no gun involved in the car theft. St. Peter also made a statement to the trial court at the sentencing hearing,

[3] In making this argument regarding "important factual information" in his motion for sentence modification, St. Peter may have been attempting to meet the "new factor" requirement for sentence modification. However, the type of background information he is referencing would not meet the definition of a "new factor" because it is not information that was not in existence at the time of sentencing, nor is it information that was unknowingly overlooked by all of the parties. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). At any rate, this is not an argument that St. Peter develops on appeal, and we decline to do it for him. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

apologizing to the police department, the community, the trial court, and his family for his actions.

¶30 In imposing the sentence, the trial court referenced none of this information. Instead, it made analogies to situations where a person might be "framed" for felony battery for hitting a judge or a police officer without knowing it, and that the criminal justice system will not stand for that. While these are noble sentiments, we are unclear as to their relevance to St. Peter's sentencing, particularly when there are so many relevant factors to sentencing that were never mentioned by the trial court. In fact, other than discussing its perception relative the gravity of the offense, the trial court did not touch on the other primary ***McCleary*** factors: the character of the defendant and the need to protect the public.

¶31 St. Peter also argues that the trial court erred in not explaining its rejection of the recommended sentence. This argument, however, is not compelling. On the contrary, it has been firmly established that a sentencing court "is not bound or controlled by any understanding between an accused and the State regarding the sentence." ***State v. Williams***, 2002 WI 1, ¶24, 249 Wis. 2d 492, 637 N.W.2d 733. Indeed, this type of information is not included in the list of factors to be considered for sentencing, nor is it relevant to a sentencing analysis. Therefore, this argument fails.

¶32 We recognize that the sentence imposed was longer than what was jointly recommended by the State and the defense, and that it was also significantly shorter than the maximum possible penalty for this charge as well. *See* WIS. STAT. § 939.51(3)(a). What remains constant, however, is that the trial

court must provide an explanation on the record as to its reasoning for any sentence it imposes. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶45-46.

¶33 The extent of the explanation "will vary from case to case." ***Gallion***, 270 Wis. 2d 535, ¶39. To be sure, "mathematical precision" in determining a sentence is neither expected nor r equired. ***Id.***, ¶49. Still, ***McCleary*** "mandate[s] that discretion of a sentencing judge be exercised on a 'rational and explainable basis.'" ***Id.*** (quoting ***McCleary***, 49 Wis. 2d at 276). As we explained in ***State v. Odom***, 2006 WI App 145, 294 Wis. 2d 844, 720 N.W.2d 695:

> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

Id., ¶9 (quoting ***McCleary***, 49 Wis. 2d at 277).

¶34 In this case, the record does not reflect that the trial court engaged in this discretionary process. As such, we are unable to ascertain the validity of the sentence due to the lack of a "'rational and explainable basis'" that refers to "the relevant facts and factors" and explains "how the sentence's component parts promote the sentencing objectives" in the record. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶46, 49 (quoting ***McCleary***, 49 Wis. 2d at 276). Because this "linkage on the record" is not present, *see* ***id.***, ¶46, we find that the trial court did not properly exercise its discretion in sentencing St. Peter.

¶35 Therefore, as a result of the due process violation and the erroneous exercise of discretion that occurred during sentencing, we reverse the trial court's denial of St. Peter's postconviction motion, and remand the case for resentencing.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.