COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP477-CR **Cir. Ct. No. 2015CF519**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EQUAN TAYLOR,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Equan Taylor appeals a judgment of conviction entered after he pled guilty to one count of burglary to a dwelling as a party to the

crime. *See* WIS. STAT. §§ 943.10(1m)(a), 939.05 (2013-14).[1] He also appeals the order denying his postconviction motion. We affirm.

I. BACKGROUND

¶2 As set forth in the complaint, which served as the factual basis for Taylor's plea, on September 1, 2014, then-sixteen-year-old Taylor along with his co-actor, Antoine Pettis, broke into an elderly woman's home. It was later determined that Pettis battered and sexually assaulted the woman.

¶3 Police recovered Taylor's fingerprints at the home, and in a ***Mirandized*** statement, he admitted that he and Pettis entered the home through a kitchen window.[2] Taylor told police that the two looked around but did not see anything to take. They then saw a woman they thought was dead and left but returned later to look again for something to take.

¶4 The complaint charging Taylor with one count of burglary to a dwelling as a party to a crime was filed on January 31, 2015, approximately five months after the crime and four months after Taylor turned seventeen.

¶5 Taylor ultimately pled guilty and the circuit court sentenced him to six years of initial confinement and three years of extended supervision. A postconviction motion followed, which the circuit court denied.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

II. ANALYSIS

A. *The State's Delay*

¶6 Taylor argues that the circuit court lacked personal jurisdiction over him because he was sixteen when the crime was committed; yet, the complaint against him was not filed until he turned seventeen. Taylor suggests that the State intentionally delayed charging him so as to change the jurisdiction from juvenile to adult court. He submits that the circuit court should have held a due process evidentiary hearing to determine whether it had jurisdiction. *See* ***State v. Becker***, 74 Wis. 2d 675, 677-78, 247 N.W.2d 495 (1976). Taylor's argument fails for at least three reasons.

¶7 For purposes of criminal law, a person who is seventeen years old is an adult. *See* WIS. STAT. § 938.02(1), (10m). There may be a due process—not a jurisdictional—violation if the State intentionally delays bringing charges until the defendant is an adult subject to adult criminal court jurisdiction for the purpose of avoiding juvenile court jurisdiction. *See* ***State v. Schroeder***, 224 Wis. 2d 706, 715-17, 593 N.W.2d 76 (Ct. App. 1999). However, by pleading guilty, Taylor forfeited his claim that the State waited until he was an adult before charging him with a crime he committed as a juvenile. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 ("The general rule is that a guilty… plea 'waives all nonjurisdictional defects, including constitutional claims.'") (citation omitted); *see also* ***State v. Higgs***, 230 Wis. 2d 1, 9, 601 N.W.2d 653 (Ct. App. 1999) (A challenge to personal jurisdiction is forfeited by a guilty plea.).

¶8 Second, even if Taylor had not forfeited his claim, his postconviction motion would fail because it is insufficient on its face. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 ("[I]f the

[postconviction] motion does not raise [sufficient] facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of the motion is a matter of discretion entrusted to the circuit court.") (citation omitted). He has not presented any support for his claim that the State deliberately delayed charging him.[3]

¶9 Third, in his reply brief, Taylor does not refute the State's position that by pleading guilty he forfeited this claim or the State's assertions regarding the shortcomings of his postconviction motion. We therefore deem the issue conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

B. *Sentence Modification*

¶10 Taylor also argues that the circuit court erred when it denied his sentence modification motion. He contends that modification is warranted: (1) to account for the actions he has taken since incarceration, which he describes as "dramatic changes to his lifestyle"; (2) to consider the waitlist when setting Taylor's eligibility for prison programs; and (3) to reconsider the circuit court's comparison between his conduct and that of his co-actor.

[3] As the State highlights and the record confirms:

> [T]he complaint indicates that the reason Taylor was not charged before his birthday on October 9, 2014, i.e., within one month and one week of the commission of the crime, is that the State did not match the fingerprints found at the victim's house to Taylor until much later, and that he did not admit entering the house until January 28, 2015. The circuit court stated that the police were not able to identify Taylor's [co-actor] by DNA testing until November 13, 2014, well after Taylor turned 17.

(Record citations omitted.)

¶11 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.*** 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); *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, then it determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

¶12 As his first basis for sentence modification, Taylor asks 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* ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988) ("Changes in attitude and prison rehabilitation are not new factors justifying sentence modification."). Accordingly, this argument fails.

¶13 As his second basis for sentence modification, Taylor asks that his sentence be modified to account for the waitlist when setting his eligibility for prison programs. The circuit court made Taylor eligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP) after he completed five of his six years of initial confinement.

¶14 Taylor submits that the expected wait time for CIP coupled with the eighteen months required to complete the program effectively prohibits him from participating. He requests that his sentence be modified to provide for earlier CIP eligibility.

¶15 As the circuit court explained in its decision denying Taylor's motion for postconviction relief, it "intended for [Taylor] to serve at least five years of confinement before becoming eligible for the early release programs":

> The court did not base the five-year eligibility waiting period upon a belief that the defendant would be placed in the early release programs at the five-year mark nor did it base its confinement decision in this case upon a belief that the defendant necessarily would be placed in the programs at some point during his confinement term. Consequently, whether the defendant has enough confinement time left to serve to participate in the early release programs at the end of five years is not relevant to the court's sentencing decision in this case.

Cf. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has an additional opportunity to explain its sentencing rationale in postconviction proceedings). The eligibility determination was not "highly relevant" to the sentence imposed in this case. *See* ***Rosado***, 70 Wis. 2d at 288. Taylor has not shown the existence of a new factor. As such, this argument also fails.

¶16 Taylor recognizes that his third basis for sentence modification does not amount to a new factor. Instead, he submits that review of his sentence is warranted to determine whether it is unduly harsh and unconscionable when compared to that of his co-actor, Pettis.

¶17 Taylor's sentence on the burglary charge in this case was one year shorter than Pettis's burglary sentence. The circuit court sentenced Pettis to ten

years of imprisonment on the burglary charge comprised of seven years of initial confinement and three years of extended supervision.[4] Taylor was sentenced to nine years of imprisonment comprised of six years of initial confinement and three years of extended supervision.

¶18 Wisconsin recognizes the importance of "[i]ndividualized 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 erroneous 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.

¶19 Here, the circuit court explained why Taylor and Pettis received different sentences: namely, the difference in their ages (Taylor was

[4] The record indicates that the State charged Pettis with burglary, aggravated battery of an elderly person, and second-degree sexual assault by use of force. He was sentenced to a total of forty-five years of imprisonment comprised of thirty years of initial confinement and fifteen years of extended supervision.

approximately one month away from turning seventeen and Pettis was twenty). The circuit court also heard about each man's juvenile/criminal record. Taylor has not shown that the sentencing disparity was based on improper or irrelevant factors. Instead, his argument, in essence, is that the circuit court gave short shrift to mitigating factors during sentencing. That the circuit court exercised its discretion differently than Taylor had hoped or than how another court might have does not demonstrate an erroneous exercise of discretion. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).