COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2018

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2017AP174-CR
2017AP175-CR

Cir. Ct. Nos. 2015CF0990
2015CF2052

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE AUSTIN SEWELL,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: MICHELLE ACKERMAN HAVAS and CYNTHIA MAE DAVIS, Judges. *Affirmed*.

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

¶1 PER CURIAM. In these consolidated appeals, Kyle Austin Sewell appeals from judgments of conviction for one count of strangulation and suffocation and one count of felony intimidation of a witness, both as acts of domestic abuse and as a repeater. *See* WIS. STAT. §§ 940.235(1), 940.43(7), 973.055(1), and 939.62(1)(b) (2015-16).[1] Sewell also appeals from the denial of his postconviction motion.[2] At issue on appeal is whether Sewell is entitled to resentencing or sentence modification based on an inaccurate representation made by his trial counsel at sentencing concerning the date Sewell would finish serving his preexisting criminal sentences in three prior cases. We affirm.

BACKGROUND

¶2 In March 2016, Sewell entered a plea agreement with the State pursuant to which he agreed to enter guilty pleas in two pending criminal cases. As part of the plea agreement, one count of battery and one count of disorderly conduct were dismissed outright, and the State also agreed not to issue charges for a prior incident involving the same victim. In addition, the State agreed to recommend a prison sentence without specifying the length of the sentence.

¶3 The trial court accepted Sewell's pleas and found him guilty. At the request of the parties, the trial court proceeded to sentencing on the same day. The parties provided the trial court with a written list of Sewell's prior convictions.

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

[2] The trial court entered identical orders denying the motion in each criminal case.

That list included three cases in which Sewell's probation had been revoked as a result of his new charges.

¶4 During trial counsel's sentencing argument, he noted that Sewell had been ordered to serve time in prison after his probation was revoked in his prior cases. Trial counsel said that Sewell would be released from his prior sentences in December 2016. Trial counsel repeated the December 2016 date twice when he asked the trial court to impose two consecutive sentences of one year of initial confinement, which trial counsel said "would add two years of additional time to [Sewell's] release date in December [2016]." Trial counsel also said:

> I think that, you know, adding the two years to the time he's already been serving on his revocation sentences, acknowledging the seriousness of these offenses, the fact that he does need to be punished, the fact that he does have rehabilitative needs that can likely only be addressed in a prison setting, and that will give him almost a full four years to do between … March of [2015] and December of [2016], almost two years there, and then another two years total, so almost four years of confinement time not only to work on his rehabilitative needs but to think about what it is he has chosen to do that has put him in this position.

¶5 The trial court imposed two consecutive sentences of two-and-one-half years of initial confinement and two-and-one-half years of extended supervision, and it ordered that those sentences be served consecutive to Sewell's prior sentences. The trial court explained:

> The reason I am running those consecutively is that they were consecutive acts….
>
> This was separate days and separate actions, and you did that while knowing you were on probation for your current case[s]. That was another decision. So that's why I'm running them that way. So both of those cases will be consecutive to the time you're serving now.

The trial court did not reference the December 2016 date or suggest that date was a factor in the sentences it was imposing. It also did not offer any calculations as to the total amount of time it expected Sewell would serve before being released.

¶6 Represented by postconviction counsel, Sewell filed a postconviction motion seeking resentencing or sentence modification. Sewell asserted that trial counsel mistakenly told the trial court that Sewell would be released from his current sentences in December 2016 even though the actual anticipated date of release was October 2017. Sewell said that his new sentences "were based upon inaccurate information." He argued that he was therefore entitled to either resentencing based on the trial court's reliance on inaccurate information or sentence modification based on a new factor: the correct date Sewell would be released from his prior sentences.

¶7 The postconviction court denied Sewell's motion in a written order, without a hearing.[3] It identified the three criminal cases for which Sewell was serving prison time after his probation revocation, and it confirmed Sewell's assertion that he would not complete his confinement time in those sentences until October 2, 2017. However, the trial court concluded that Sewell had not shown he was entitled to resentencing or sentence modification "because there is no indication in the record that the [sentencing] court relied on counsel's statements that the defendant would complete his revocation sentences in December 2016 or

[3] The Honorable Michelle Ackerman Havas accepted Sewell's guilty pleas and sentenced him. The Honorable Cynthia Mae Davis denied Sewell's postconviction motion after being assigned the case due to judicial rotation. For clarity, we will refer to the sentencing court and the postconviction court from this point forward.

that this information was highly relevant to the sentence the court imposed." The postconviction court explained:

> The [sentencing] court considered the gravity of the offenses, the defendant's character as demonstrated by his record of 19 prior convictions and six revocations, as well as his lack of respect for the systems put in place to help him, his extensive rehabilitative needs and the interest in community protection…. [N]othing in the record suggests that the court based its sentencing decision in these cases on incorrect information about the duration of the defendant's revocation sentences, and therefore, the court is not persuaded that the defendant has shown by clear and convincing evidence that the [sentencing] court relied upon inaccurate information or that a new factor has been presented in these cases.

(Bolding and underlining omitted.) This appeal follows.

DISCUSSION

¶8 Sewell argues that he is entitled to relief based on two different legal theories. He asserts that he is entitled to *resentencing* because the sentencing court relied on inaccurate information (i.e., an anticipated release date of December 2016 in Sewell's prior cases). In the alternative, Sewell contends that he is entitled to sentence modification because "no one knew [at sentencing] that Mr. Sewell's revocation sentences would last until October 2, 2017, 18 months after sentencing." We consider each argument in turn.

I. Resentencing.

¶9 "[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 requests resentencing due to the [sentencing] court's use of inaccurate information at the sentencing hearing must

show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (two sets of quotation marks and citations omitted). "Whether the [sentencing] court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citation omitted). The defendant "must establish by clear and convincing evidence that the [sentencing] court actually relied on the inaccurate information." ***State v. Travis***, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491. "Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless." ***Tiepelman***, 291 Wis. 2d 179, ¶26.

¶10 On appeal, the State—like the postconviction court—agrees with Sewell that trial counsel misidentified the date Sewell would complete his prior sentences. At issue is whether the sentencing court relied on that inaccurate information at sentencing.

¶11 Sewell implies that the fact the sentencing court heard trial counsel incorrectly refer to a release date of December 2016 three times was sufficient proof that the sentencing court relied on that incorrect information. He states:

> [W]hen the court imposed sentences to run consecutive to the revocation sentences, the court necessarily relied on an inaccurate understanding of the duration of the revocation sentences. One whose knowledge was limited to the sentencing transcript would conclude that Mr. Sewell was serving revocation sentences until December of 2016, to be followed by two consecutive 2½-year terms of initial confinement, resulting in a release to extended supervision in December of 2021. Because the [sentencing] court relied on inaccurate information, no one at the sentencing hearing was aware of the actual effect of the sentence

> imposed: Mr. Sewell will not be release[d] to extended supervision until October 2, 2022.

¶12 Like the postconviction court, we are not persuaded that Sewell has shown by clear and convincing evidence that the sentencing court relied on the misinformation. Although the sentencing court heard trial counsel's argument, it never mentioned the December 2016 date when it imposed the sentences. It also never discussed when it believed Sewell would be released on extended supervision after completing all of his sentences. We reject Sewell's argument that the sentencing court "necessarily relied on an inaccurate understanding of the duration of the revocation sentences" when it chose the length of the new sentences and imposed them consecutive to each other and Sewell's prior sentences. Accordingly, Sewell is not entitled to resentencing.

II. Sentence modification.

¶13 Defendants may seek sentence modification upon the showing of a "'new factor.'" *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 57, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is:

> "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."

Id., ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "[A] motion for sentence modification based on a new factor [requires] a two-step inquiry." ***Id.***, ¶36. First, it is the defendant's "burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.*** "Whether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." ***Id.*** Second, if the defendant establishes the existence of a new factor, the trial

court exercises discretion to determine whether sentence modification is justified. *See* ***id.***, ¶37.

¶14 We begin with the first step: whether Sewell has demonstrated the existence of a new factor. He argues that the postconviction court's decision "accepts that the new factor exists," pointing to the postconviction court's recognition that trial counsel cited the wrong date of Sewell's expected release from his prior cases. Sewell offers no other argument in this section of his brief in support of his assertion that a new factor exists.

¶15 At the outset, we reject Sewell's assertion that the postconviction court concluded that he had demonstrated the existence of a new factor by clear and convincing evidence. *See* ***id.***, ¶36. Although the postconviction court agreed that trial counsel had misspoken, it did not conclude that the mistake was a "new factor" as defined in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Instead, the postconviction court explicitly concluded that "there [was] no indication in the record that … this information was highly relevant to the sentence the court imposed."

¶16 In any event, whether Sewell has established a new factor presents a question of law that we review *de novo*. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. For the same reasons we have concluded that the sentencing court did not rely on inaccurate information, we conclude that the December 2016 date was not highly relevant to the sentence imposed. Specifically, the sentencing court did not discuss the date when Sewell would be released from his other sentences or suggest that it was calculating the sentences based on the specific date it wanted Sewell to complete his initial confinement in his new sentences.

¶17 The facts in this case differ from those in ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, a case that Sewell discusses in his brief. In ***Norton***, the defendant committed felony theft at the time he was on probation for a misdemeanor theft and, if revoked, would have to serve a nine-month imposed-and-stayed sentence of incarceration. *See* ***id.***, ¶¶2-3. Based on representations from Norton's probation agent, "everyone understood that Norton's probation would not be revoked at the time of sentencing, or subsequent to sentencing, as a result of the felony theft." *See* ***id.***, ¶¶4, 10. Further, it was "also clear from the sentencing transcript that both sides, [the probation agent], and the trial court were all focused on sending Norton to prison for a sufficient period of time so that he could receive drug treatment." ***Id.***, ¶11. The trial court imposed a forty-two month sentence "'consecutive to any other sentence.'" ***Id.***, ¶5 (quoting the trial court).

¶18 Subsequently, the same probation agent "contacted Norton and suggested that he voluntarily agree to submit to the revocation of probation on the misdemeanor theft offense[,] … [telling] him that the nine-month stayed sentence[] could be served concurrently with the forty-two month sentence." ***Id.*** Norton agreed and later learned he would have to serve a total of fifty-one months because the new sentence was imposed consecutive to all other sentences. *See* ***id.*** He filed a postconviction motion seeking sentence modification on grounds that "the revocation and extension of his sentence constituted a new factor because the trial court relied on inaccurate information when it imposed the sentence; that is, that his probation would not be revoked." ***Id.***, ¶6. The trial court denied the motion and we reversed, concluding "that the circumstances do constitute a new factor" because "[t]he probation and whether it was going to be revoked was highly relevant to sentencing." *See* ***id.***, ¶13.

¶19 While the facts in ***Norton*** led this court to conclude that a new factor existed, we are not persuaded that the facts in this case lead to the same conclusion. As we have already explained, there is no indication that the trial court considered the date of Sewell's release in his prior cases to be a relevant factor at sentencing—much less a "highly relevant" factor. *See* ***Rosado***, 70 Wis. 2d at 288. We conclude that Sewell has failed "to demonstrate by clear and convincing evidence the existence of a new factor." *See* ***Harbor***, 333 Wis. 2d 53, ¶36. Accordingly, we need not discuss his argument that sentence modification is warranted. *See* ***id.***, ¶38 ("[I]f a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion.") (citation omitted).

By the Court.—Judgments and orders affirmed.

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