COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP834-CR **Cir. Ct. No. 2014CF1335**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Bruce Johnson appeals a judgment of conviction and an order denying his postconviction motion. Johnson argues he is entitled either to sentence modification due to a new factor or to resentencing because the circuit

[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.

court relied on inaccurate information at sentencing. The main premise of both arguments is that the circuit court mistakenly believed Johnson would serve his sentence in jail instead of prison. We conclude that, assuming this constituted a new factor, the circuit court did not erroneously exercise its discretion in deciding this factor failed to justify modifying Johnson's sentence. We also conclude the court did not rely on this fact at sentencing such that resentencing is required. Accordingly, we affirm.

BACKGROUND

¶2 Johnson was charged with one count of possession of cocaine as party to a crime, as a second or subsequent offense. He entered a no-contest plea to the charge after the State agreed to dismiss the second or subsequent-offense modifier. The circuit court withheld sentence and placed Johnson on probation for twelve months.

¶3 Johnson's probation was later revoked, and he returned to the circuit court for sentencing. At the hearing, both the State and defense counsel informed the court that Johnson was serving criminal sentences in connection with the revocation of his extended supervision in other cases. The State recommended that Johnson be sentenced to one year in jail, consecutive to any other sentence he was then serving. Johnson requested that any sentence run concurrent to his other sentences so that he would be allowed to receive "any programming that he can get into in the prison system."

¶4 In its sentencing decision, the circuit court explained that Johnson showed a "desire on his part to get out and work and earn a living … and make sure that no one else has to support him or his family." However, the court also stated that the conduct resulting in Johnson's revocation did not reflect favorably

upon him and was "concerning" because it was "similar in nature" to the original charge. The court then addressed the impact of Johnson's crime:

> The public takes these types of offenses seriously because it indicates that there are [il]licit drugs like, in this case, cocaine in our community, and that brings with it a whole host of other problems for the community …. And the public is concerned about that, and they look to the courts for protection from those types of things, and I take that task very seriously.

While the court noted that Johnson had some rehabilitative needs, it also noted that it "consider[ed] punishment" in its sentence.

¶5 The circuit court adopted the State's recommendation and sentenced Johnson to one year in jail, consecutive to his other sentences.[2] After the court pronounced the sentence, Johnson, through his counsel, inquired if the court had taken a position on good time and Huber privileges. The court summarily responded that Johnson would "get Huber and good time."

¶6 Johnson later learned from the Department of Corrections that he would serve his one-year sentence in state prison instead of local jail. This change occurred because Johnson was already serving separate sentences in prison when the sentence was imposed in this case. *See* WIS. STAT. § 973.03(2) ("A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons."). It also meant Johnson became ineligible for good time and Huber privileges because he was not serving his sentence in jail. *See* WIS. STAT.

[2] The circuit court imposed the maximum term of imprisonment for possession of cocaine upon a first conviction, which is "not more than one year in the county jail." WIS. STAT. § 961.41(3g)(c).

§§ 302.43, 303.08. Johnson moved for postconviction relief, alleging that the parties and the circuit court mistakenly believed that he would serve his sentence in jail and that he would be granted these privileges. He sought either modification of his sentence or resentencing.[3]

¶7 At a hearing on Johnson's postconviction motion, the circuit court rejected Johnson's arguments. The court explained that whether Johnson received Huber or good time privileges was not part of its sentencing analysis and that modification or resentencing was not warranted. The court later entered an order denying the motion. This appeal follows.

DISCUSSION

I. Sentence Modification

¶8 A circuit court may modify a sentence if a defendant demonstrates by clear and convincing evidence both that a new factor exists and that this new factor justifies modification. ***State v. Harbor***, 2011 WI 28, ¶¶35, 38, 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 that was unknown to the court at the time of the original sentencing. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The factor may be unknown either because it did not yet exist or because its existence was unknowingly overlooked by the parties. ***Id.*** However, if a court decides that "the alleged new factor would not justify sentence modification, the court need not

[3] At the postconviction motion hearing, Johnson clarified that he sought to have the circuit court either modify the sentence in this case to run concurrent with his prison sentences in his other cases or, in the alternative, resentence him to probation and order one year of conditional jail time so that he would serve the sentence in jail after his release from prison.

determine whether the facts asserted by the defendant constitute a new factor." ***Harbor***, 333 Wis. 2d 53, ¶38. Whether a new factor exists is a question of law that we review independently, but we review a circuit court's decision regarding sentence modification due to a new factor for an erroneous exercise of discretion. ***State v. Ninham***, 2011 WI 33, ¶90, 333 Wis. 2d 335, 797 N.W.2d 451.

¶9 Johnson contends that a new factor emerged here because both the parties and the circuit court "were laboring under a mistake" that his sentence would be served in jail as opposed to prison. In support, Johnson cites the references to "jail" at the sentencing hearing, his request for Huber privileges, and the lack of discussion of the operation of WIS. STAT. § 973.03(2) all as evidence that no one realized his confinement would be served in prison. Johnson also argues this supposed "mistake" was highly relevant to his sentence because the circuit court ultimately allowed Johnson Huber release and good time privileges, thus emphasizing rehabilitation.

¶10 We need not decide whether Johnson has shown the existence of a new factor because, even if we assume he has, we conclude the circuit court did not erroneously exercise its discretion when it declined to modify Johnson's sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶38. Contrary to Johnson's argument, the record is clear that his place of confinement and whether he received good time or Huber privileges was not, according to the circuit court, "in any respect" part of the court's analysis in imposing a sentence in this case. In fact, the court explained at the postconviction hearing that it would not have ordered Huber privileges or good time after it pronounced the sentence but for Johnson's request.

¶11 Instead, the record reflects that in imposing the sentence, the circuit court primarily considered Johnson's character, the gravity of his offense, and the

need to protect the public. *See* ***State v. Klubertanz***, 2006 WI App 71, ¶¶17-18, 291 Wis. 2d 751, 713 N.W.2d 116. The court emphasized the similarities between Johnson's revocation and the underlying offense, as well as the public safety concerns implicated by his crime. Johnson does not allege that any of the information underlying these considerations was affected by his purported "new factor." At the same time, nothing indicates that the court assigned importance to the place of Johnson's one-year confinement, despite both parties acknowledging that Johnson was then serving other sentences. In short, the court placed great emphasis on Johnson's punishment and the need to protect the community, both of which are valid sentencing objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197.

¶12 In addressing the circuit court's exercise of discretion in his reply brief, Johnson contends the court was "likely required to address" his eligibility for "Earned Release, Boot Camp, Huber release, good time and so on" before sentencing him. His argument lacks citation to any authority and is undeveloped. Johnson offers only speculation on whether the court was required to consider these factors, let alone whether he was actually eligible to participate in any of these programs. In all, the court considered proper factors when sentencing Johnson and did not rely upon the place where Johnson would be confined in imposing that sentence. Therefore, the court did not erroneously exercise its discretion in declining to modify Johnson's sentence, even if we assume the operation of WIS. STAT. § 973.03(2) and its resulting disqualification of Johnson from Huber privileges and good time constituted a new factor.

II. Resentencing

¶13 A criminal defendant has a due process right to be sentenced based upon accurate information. ***State v. Travis***, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491; *see also* ***United States v. Tucker***, 404 U.S. 443, 447 (1972). A defendant alleging he or she was sentenced upon inaccurate information must establish two things: (1) inaccurate information was before the sentencing court; and (2) the court actually relied on this inaccurate information at sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. If the defendant satisfies both prongs, the burden shifts to the State to establish that any error was harmless. ***Id.***, ¶3. Whether a defendant's due process right has been violated in this regard presents a question of law that we independently review. ***Travis***, 347 Wis. 2d 142, ¶20.

¶14 Johnson's argument for resentencing is similar to the one he presents for sentence modification. He first contends that the purported mistake on the place of his confinement—which placement was caused by operation of WIS. STAT. § 973.03(2)—constituted inaccurate information. The circuit court then relied on this information because, according to Johnson, the court intended to craft a sentence that allowed him to obtain early release and to work while confined.

¶15 The State concedes that the discussion regarding Johnson's place of confinement placed inaccurate information before the circuit court. However, it argues the court did not rely on that inaccurate information as a basis for its sentencing decision. We agree.

¶16 A circuit court actually relies on inaccurate information when the court gives "'explicit attention' or 'specific consideration' to it, so that the

misinformation 'formed part of the basis for the sentence.'" ***Tiepelman***, 291 Wis. 2d 179, ¶14 (citation omitted). This type of reliance is absent here. In imposing the sentence, the circuit court assigned no significance to whether Johnson would serve his sentence in jail or prison. The court may have summarily granted Huber privileges and good time eligibility upon request and after it pronounced the length of confinement, but Johnson cannot simply isolate this grant and work backward from it to prove reliance. *See* ***State v. Alexander***, 2015 WI 6, ¶25, 360 Wis. 2d 292, 858 N.W.2d 662 (circuit court's basis for sentencing must be reviewed in the context of the whole sentencing transcript). As already explained, the court ordered both privileges as an afterthought to its sentence, and it otherwise thoroughly discussed the relevant sentencing factors and placed emphasis on punishment over rehabilitation. *See supra* ¶¶10-11. Nothing entitles Johnson to resentencing in this case.

By the Court.—Judgment and order affirmed.

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