COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3116-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD E. BURGESS,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Bernard Burgess appeals from the judgment of conviction entered after he pled no contest to one count of delivery of a controlled substance – cocaine, contrary to WIS. STAT. §§ 961.16(2)(b)1 and

961.41(1)(cm)1,[1] and the trial court sentenced him to eight years' imprisonment and ordered him to pay a $5000 fine.[2] Burgess also appeals from the trial court's order denying his motion for postconviction relief. Burgess argues that the trial court erred in denying his motion seeking either sentence modification or a new sentencing hearing because the court: (1) failed to consider and/or correct errors in the information it received at the original sentencing; (2) denied him the right of allocution at the second sentencing hearing; (3) failed to consider his ability to pay before ordering a $5000 fine; (4) demonstrated bias against him by criticizing his invocation of his speedy trial rights; and (5) improperly rejected his request for sentence modification and erroneously exercised its discretion by reinstating his eight-year prison sentence. We are not persuaded by Burgess's arguments and affirm.

I. BACKGROUND.

¶2 In May of 1999, Burgess was arrested when he sold $10 worth of cocaine at his residence to an undercover police officer. Burgess was charged with one count of delivery of a controlled substance. He pled no contest and the trial court entered a judgment of conviction. The trial court then ordered a presentence investigation report (PSI). After reviewing the report, the trial court sentenced Burgess to serve eight years in prison and ordered him to pay a $5000 fine.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Burgess was charged as a habitual criminal based on a prior felony conviction, but the habitual criminality penalty enhancer was dropped when he pled no contest.

¶3 Following sentencing, several errors in the PSI were discovered. Based on these errors, Burgess filed a motion for postconviction relief, seeking a reduction in sentence or a new sentencing hearing. The trial court vacated the sentence and conducted a hearing. Following the hearing, however, the trial court concluded that the sentence had been vacated in error, the hearing was unnecessary and, thereafter, reimposed the same sentence. Burgess then filed a second motion for postconviction relief, again requesting a reduction in his sentence or a new sentencing hearing, which the trial court denied.

II. ANALYSIS.

¶4 Burgess argues that the trial court erred in denying his postconviction motion for sentence modification or a new sentencing hearing because the trial court: (1) refused to consider and/or correct the errors in the PSI; (2) denied his right to allocution at the second sentencing hearing; (3) ordered him to pay the $5000 fine without considering his ability to pay the fine; (4) demonstrated bias against him for invoking his constitutional right to a speedy trial; and (5) erroneously exercised its sentencing discretion and erroneously refused to grant his request for sentence modification. We reject Burgess's arguments.

¶5 Burgess first argues that at the second sentencing hearing, the trial court erroneously failed to "consider, address or correct" the errors in the PSI. Specifically, in setting out Burgess's criminal record, the PSI inaccurately indicated that Burgess had been previously convicted of carrying a concealed weapon. Although the trial court acknowledged the error, it concluded the error was inconsequential based on new aggravating factors that came to light following the original sentencing. Burgess now argues that the trial court considered three

erroneous pieces of information in the PSI: (1) a 1992 conviction for carrying a concealed weapon, which Burgess asserts was actually a conviction for obstructing an officer; (2) a 1995 conviction for battery/endangering safety, which he asserts was dismissed; and (3) a 1996 disorderly conduct offense, which Burgess admitted he pled guilty to, but he denied an underlying allegation in that case, leading the trial court to believe Burgess denied committing the crime. Burgess contends that the trial court failed to correct or even address these errors during the second sentencing hearing and, therefore, he concludes he is entitled to a new sentencing hearing. We disagree.

¶6 "It is well-settled that 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 circuit 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.'" ***Id.*** (citation omitted). A defendant has the burden of proving, by clear and convincing evidence, both the inaccuracy and prejudice prongs of the due process test. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Burgess failed to make the requisite showing.

¶7 There is no evidence that the trial court relied on inaccurate information when sentencing Burgess. Although the PSI erroneously indicated that in 1992 Burgess had been convicted of carrying a concealed weapon and obstructing, there is no indication that the trial court relied on the inaccurate information. In fact, at the second hearing, the trial court expressly acknowledged that Burgess had been charged with both carrying a concealed weapon and obstructing, but only convicted of obstructing. The trial court asserted that this

correction to Burgess's criminal record did not merit a change in the sentence. With regard to the 1995 incident, the record also reveals that the trial court noted that Burgess had been *arrested* for battery/endangering safety, not *convicted* of the charge, as Burgess contends the trial court stated. Finally, the trial court did not err in noting that although Burgess pled guilty to the 1996 disorderly conduct charge, he had not accepted responsibility for the offense because he continued to deny engaging in the criminal conduct. Burgess's assertion that he accepted responsibility for the 1996 disorderly conduct charge by pleading guilty, and that he simply denied engaging in the conduct which led to the charge, defies logic. For these reasons, we conclude that the trial court sentenced Burgess based on accurate information.

¶8 Next, Burgess argues that the trial court denied his right to allocution at the second sentencing hearing.[3] WISCONSIN STAT. § 972.14(2) requires, in pertinent part: "Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence." In ***State v. Lindsey***, 203 Wis. 2d 423, 447, 554 N.W.2d 215 (Ct. App. 1996), this court expressly determined that § 972.14(2) "clearly establishes a statutory right of allocution." Here, Burgess argues that the trial court's failure to afford him the right to speak at the

[3] Burgess argues that in denying him his right to allocution, the trial court violated his federal and state constitutional rights. In ***Hill v. United States***, 368 U.S. 424, 428 (1962), the Supreme Court held that there is no federal constitutional right to allocution. Instead, the federal right to allocution is granted through Rule 32 (a) of the Federal Rules of Criminal Procedure. Moreover, in ***State v. Lindsey***, 203 Wis. 2d 423, 447, 554 N.W.2d 215 (Ct. App. 1996), this court acknowledged "conflicting case law in Wisconsin" regarding "whether there is a due process right to allocution under the Wisconsin Constitution." However, this court did not decide the issue because we conclude any error, constitutional or otherwise, was harmless. ***Id.*** at 447-48.

"resentencing" violated this right. We disagree. Burgess has made a simple, yet fatal, error in his recollection of the events.

¶9 Quite simply, the second sentencing hearing was not a "resentencing." Rather, the trial court determined that because Burgess failed to prove that he was sentenced based on inaccurate information, it erred in vacating the original sentence. Therefore, the original sentence was reinstated. Because Burgess had been given the opportunity to speak before the original sentence was imposed, it was not necessary to afford him a second opportunity to speak before the original sentence was reinstated.

¶10 Burgess's third argument is that the trial court improperly imposed a $5000 fine as part of his sentence without considering his ability to pay. However, we decline to address this issue because Burgess raised this claim for the first time on appeal and, therefore, it is waived. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (appellate court will generally not review an issued raised for the first time on appeal).

¶11 Next, Burgess argues that the trial court demonstrated inappropriate bias towards him by criticizing his invocation of his right to a speedy trial. Burgess maintains that, although it is permissible for a trial court to consider a defendant's waiver of a constitutional right as a mitigating factor, the trial court may not use the defendant's invocation of a constitutional right as an aggravating factor as, he asserts, the trial court did in the instant case. While Burgess correctly states the law, here the record does not support his claim that the trial court considered his invocation of the right to a speedy trial as an aggravating factor. Rather, the trial court criticized Burgess for repeatedly invoking his right to a speedy trial and then failing to appear in court, resulting in the issuance of bench

warrants. The trial court was criticizing Burgess's failure to appear, not his invocation of the right to a speedy trial.

¶12 Burgess also argues that the trial court erroneously exercised its discretion by improperly addressing him as a habitual offender, threatening to double his sentence, asserting that he was facing a maximum sentence at the second hearing, failing to properly weigh the aggravating and mitigating factors, and finally re-imposing "a near-maximum" sentence. Burgess claims that the trial court failed to consider the appropriate sentencing factors, failed to properly consider mitigating factors and imposed a sentence which "shock[s] public sentiment and violate[s] the judgment of reasonable people." We disagree.

¶13 Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Harris***, 199 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). A strong policy exists against interfering with the trial court's discretion in determining sentences. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). Our review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Borrell***, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992). To obtain relief on appeal, Burgess bears the burden of demonstrating "some unreasonable or unjustified basis in the record for the sentence imposed." ***Id.*** at 782.

¶14 The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for protection of the public. ***Sarabia***, 118 Wis. 2d at 673. The court may also properly consider, *inter alia*, the defendant's past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and

social traits; the results of the presentence investigation; the degree of the defendant's culpability; the defendant's age, educational background and employment record; and the defendant's remorse, repentance and cooperativeness. ***Harris***, 119 Wis. 2d at 623-24. The weight attributed to any one sentencing factor is a determination particularly within the trial court's wide discretion. ***Harris v. State***, 75 Wis. 2d 513, 520, 250 N.W.2d 7 (1977).

¶15 Burgess has failed to demonstrate that the trial court relied on an unreasonable or unjustifiable basis in imposing sentence. The trial court properly considered the primary sentencing factors – the gravity of the offense, the defendant's character and the need to protect the public. ***Sarabia***, 118 Wis. 2d at 673. Specifically, the trial court noted the serious nature of the offense, which involved the sale of drugs, and the need to protect the public from drugs and drug dealing. The court also noted Burgess's recidivistic tendencies, as well as his frequent denial of culpability for his conduct despite his convictions. The record also reveals that in sentencing Burgess, the trial court paid considerable attention to his behavioral history, his negative personality traits, his lack of repentance and lackluster cooperation, as well as other information contained in the PSI, in particular, his extensive criminal record. These are all proper factors for the trial court to consider at sentencing, and Burgess has failed to demonstrate that the trial court erroneously exercised its sentencing discretion.

¶16 Finally, Burgess argues that the trial court erroneously refused to grant his request for sentence modification or grant a new "sentencing" hearing. Burgess asserts that once the errors in the PSI were discovered, a sentence modification hearing was required, at which "[t]he trial court should have inquired into the existence of all relevant information." Specifically, Burgess contends the trial court should have corrected the errors in the PSI and considered two "new

factors" presented at the hearing – the amount of time Burgess had served and his conduct while incarcerated. We reject this argument. As noted, the trial court conducted a hearing, and at its conclusion, elected to reinstate Burgess's sentence after determining it had been vacated in error. Burgess has failed to prove the existence of any new factors which would obligate the trial court to hold another "sentencing" hearing.

¶17 For the purposes of sentence modification, a new factor is a:

> [F]act 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.

State v. Kluck, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997) (footnote omitted). The "new factor" must frustrate the purpose of the original sentence. ***State v. Johnson***, 210 Wis. 2d 196, 204, 565 N.W.2d 191 (Ct. App. 1997). If the defendant presents a new factor, the trial court has the discretion to modify the sentence. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402 (1983). However, we review whether a set of facts constitutes a new factor *de novo*. ***State v. Franklin***, 148 Wis. 2d 1,8, 434 N.W.2d 609 (1989).

¶18 We are satisfied that Burgess failed to establish the existence of any new factors warranting sentence modification. Contrary to Burgess's assertions, the trial court did consider the errors in the PSI. The errors pertained to Burgess's criminal record, which the trial court thoroughly reviewed to determine the offenses with which Burgess had been charged and the offenses of which he had been convicted. However, the trial court explained that the minor mistakes in the PSI were overshadowed by additional negative information learned about Burgess

since the original sentencing hearing. Further, we conclude that the minor errors in the PSI did not meet the "new factor" test. Also, a defendant's prison record and progress are not new factors justifying sentence modification, but are matters more properly considered by the parole board. ***State v. Ambrose***, 181 Wis. 2d 234, 240, 510 N.W.2d 758 (Ct. App. 1993).[4] Therefore, we conclude the trial court properly exercised its discretion by denying Burgess's motion for sentence modification.

¶19 For all of the above stated reasons, we affirm.

By the Court.—Judgment and order affirmed.

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

[4] *But see* ***State v. Carter***, 208 Wis. 2d 142, 560 N.W.2d 256 (1997) (conduct in prison is relevant to resentencing).