

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2002

Cornelia G. Clark
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. 01-1844
STATE OF WISCONSIN**

Cir. Ct. No. 97-CF-300

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON M. SICARD,

DEFENDANT-APPELLANT.**

APPEAL from orders of the circuit court for Winnebago County:
BRUCE K. SCHMIDT, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Jason M. Sicard has appealed from an order denying a postconviction motion filed by him pursuant to WIS. STAT. § 974.06

(1999-2000),¹ and from an order denying his motion for reconsideration. We affirm the orders.

¶2 Sicard was convicted of burglary and criminal damage to property on November 18, 1997. He was sentenced to ten years in prison for the burglary. A five-year prison sentence was imposed and stayed on the criminal damage to property charge, and Sicard was placed on five years' probation, consecutive to the ten-year prison term.

¶3 In his postconviction motion, Sicard requested resentencing based upon ineffective assistance of trial counsel and new sentencing factors. The trial court denied the motion on the ground that it was untimely.

¶4 As conceded by the State, the trial court erred in determining that Sicard's motion was untimely. If a defendant is seeking relief from his or her sentence based upon "new factors," he or she may do so by filing a motion in the trial court even though the time limits set forth in WIS. STAT. § 973.19(1)(a) and WIS. STAT. RULE 809.30 have expired. *State v. Marks*, 194 Wis. 2d 79, 95, 533 N.W.2d 730 (1995); *State v. Krueger*, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984). The time limits of § 973.19(1)(a) and RULE 809.30 are similarly inapplicable to a motion under WIS. STAT. § 974.06, alleging a constitutional claim of ineffective assistance of trial counsel.

¶5 Although the trial court erred in determining that Sicard's motion was untimely, we affirm its orders because the record conclusively establishes that Sicard is entitled to no relief. Sicard contends that his trial counsel rendered

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

ineffective assistance at his sentencing hearing when he erroneously informed the trial court that Jason Tank, one of Sicard's co-defendants, had been sentenced to thirty years in prison for these crimes. He also complains that counsel failed to provide the trial court with information regarding the adult criminal records and prior incarceration of his co-defendants.

¶6 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Even if deficient performance is found, a judgment of conviction will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

¶7 A trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Sicard's motion was properly denied without an evidentiary hearing because the record conclusively demonstrates that he is not entitled to relief.

¶8 Contrary to Sicard's contention, his trial counsel did not tell the trial court that Tank had been sentenced to thirty years in prison for the offenses that he committed with Sicard. Instead, after pointing out that Tank had a prior criminal record and had been charged as a repeater, trial counsel stated: "And in talking with Jason Sicard, it sounds as though he'd receive at least 25 to 30 years in prison due to the charges in this county and other counties."

¶9 Counsel simply relayed Sicard's representation that he believed Tank was going to be sentenced to twenty-five to thirty years in prison. Counsel did not indicate that Tank or Sicard's other co-defendant had already been sentenced, or that Tank had received a sentence of twenty-five to thirty years for the offenses committed with Sicard. He thus provided no erroneous information to the trial court.

¶10 Contrary to Sicard's contention, his trial counsel also informed the sentencing court that Tank had a prior adult record and was being charged as a repeater for these offenses, in contrast to Sicard, who had only a juvenile record. Although trial counsel did not go into detail as to Tank's prior record, he pointed out that Tank was familiar to the Winnebago county courts. In addition, the criminal complaint filed against Sicard contained information about the prior records of Tank and the other co-defendant. No basis therefore exists to conclude that counsel rendered deficient performance by failing to provide more specific information.

¶11 Most importantly, no basis exists to conclude that Sicard was prejudiced by counsel's statement regarding Tank's sentence, or by his failure to provide additional information regarding the prior records of Sicard's co-defendants. The record reveals that in sentencing Sicard, the trial court focused on

his individual culpability, his character, the seriousness of the offenses, and the need to protect the public. The trial court never compared Sicard to the other defendants, or expressed any desire for parity between Sicard's sentence and the sentences of his co-defendants. Instead, the trial court individualized the sentence based upon the factors it deemed relevant to Sicard's sentencing. While acknowledging that no one had been physically injured in the commission of these offenses, it concluded that the offenses were extremely serious because such crimes have a negative effect on the community, causing economic hardship and increased feelings of insecurity. The trial court also emphasized its belief that Sicard had essentially thrown his life away until this point in time, and concluded that imprisonment was necessary to compel him to take stock of his life. The trial court expressed a hope that Sicard would take advantage of educational, training and counseling opportunities available in prison, but emphasized that he would first have to learn how to show respect for other people and their property. The trial court concluded that in light of these offenses and the numerous charges that were pending against Sicard in other counties, a lengthy prison term was necessary to protect the public from him.

¶12 It is clear from the trial court's sentencing discussion that its focus was on factors personal to Sicard, and how those factors related to the primary sentencing factors concerning the gravity of the offense, the character of the defendant, and the need for protection of the public. *See State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The trial court did not discuss the prior records of Sicard's co-defendants, or anything related to them or their sentencings. Because the trial court's concern was clearly with Sicard's individual circumstances, and the appropriate sentence to be imposed based upon those circumstances, no basis exists to conclude that Sicard was prejudiced by trial

counsel's discussion of Tank's sentence, or by his failure to provide additional information regarding the prior records of the co-defendants.

¶13 Based upon the record, it is also clear that information regarding the sentences received by Sicard's co-defendants and their prior criminal records does not constitute a new factor for purposes of sentence modification. A trial court may, in the exercise of its discretion, modify a criminal sentence upon a showing of a new factor. *State v. Michels*, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989). A defendant must establish the existence of a new factor by clear and convincing evidence. *Id.* at 97. However, the issue of whether a set of facts constitutes a "new factor" for sentencing purposes presents a question of law which we review without deference to the trial court. *Id.*

¶14 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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Id.* at 96. In addition, it must be an event or development which frustrates the purpose of the original sentence. *See id.* at 99. There must be some connection between the factor and the sentencing which strikes at the very purpose for the sentence selected by the trial court. *See id.*

¶15 A disparity between the sentences of co-defendants is proper when the individual sentences are based upon individual culpability and the need for rehabilitation. *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). When a trial court does not express any desire for parity between co-defendants' sentences, a disparity does not frustrate the sentencing court's original intent, and does not constitute a new factor for purposes of sentence modification. *Id.* at 362-63.

¶16 As already discussed, the trial court expressed no desire for parity between the sentences of Sicard and his co-defendants. Moreover, the sentences imposed by the trial court were based upon information and factors personal to Sicard, not upon the sentences received by Sicard's co-defendants or other information personal to them. Because information regarding the sentences and criminal records of Sicard's co-defendants does not frustrate the trial court's intent in sentencing Sicard, the information does not constitute a new factor for purposes of sentence modification. *See id.* Sicard's motion therefore was properly denied in its entirety.

By the Court.—Orders affirmed.

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

