COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0820 **Cir. Ct. No. 03CF000193**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER JOHNSON,

DEFENDANT-APPELLANT.

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

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

¶1 FINE, J. A jury found Roger Johnson guilty of substantial battery, with the use of a dangerous weapon, as an habitual criminal. *See* WIS. STAT. §§ 940.19(3), 939.62, 939.63 (2001–02). Roger Johnson appeals from the judgment of conviction, and from an order denying his motion for postconviction

relief. He alleges that: (1) the circuit court erroneously exercised its sentencing discretion, and (2) new factors warrant sentence modification. We affirm.

I.

¶2 Roger Johnson was charged with substantial battery for hitting his wife, Annie Johnson, with a cordless telephone and a metal box. He pled not guilty and went to trial. At the trial, Milwaukee police officers Randy Piontkowski and Brock Cameron testified that they went to the Johnsons' apartment on January 1, 2003, to investigate a domestic-violence complaint. When they got there, Annie Johnson was very upset and had a bloody towel wrapped around her head. Piontkowski testified that, when Annie Johnson moved the towel, he saw a three-inch laceration that was bleeding "profusely." According to the officers, Annie Johnson told them that she was arguing with her husband, Roger Johnson, because he wanted to go to some bars with his ex-wife. She said that while they were arguing, Roger Johnson threw a cordless telephone at her, hitting her in the head, and hit her several times in the head with a metal box. The officers told the jury that they did not see blood on the telephone that Roger Johnson allegedly threw at Annie Johnson, but that they saw blood on the metal box.

¶3 Roger Johnson and Annie Johnson also testified. Annie Johnson told the jury that she and Roger Johnson were drinking at a New Year's Eve party. After the party, they went home where, according to Annie Johnson, they were "swapping words back and forth." Annie Johnson testified that, while she was sitting on a chair in the bedroom, Roger Johnson threw a telephone at her, which bounced off the wall and hit her in the head. She said that he then threw a canister of pennies. Annie Johnson claimed that the canister landed on the bed. She told

the jury that she felt partly responsible for the argument because she had been drinking and "bringing up things that [she] shouldn't have been bringing up."

¶4 Roger Johnson testified that after the New Year's Eve party, he and his wife went home, where he went into his office to use a computer. According to Roger Johnson, when a woman called to ask him how to set up a computer "cam," Annie Johnson, who was in the bedroom, twice picked up the telephone and told him to "get off the phone." Roger Johnson testified that he then threw the telephone into the bedroom. He claimed that Annie Johnson was still "fussing" after he threw the telephone, so he threw a can of pennies "to get her to … quiet down." Roger Johnson testified that he tried to help his wife when he realized that she was bleeding, but left the apartment after a few minutes because he was afraid that he would be arrested. He told the jury that Annie Johnson was gone when he got back, and that he then went to bed.

¶5 As noted, a jury found Roger Johnson guilty of substantial battery, with the use of a dangerous weapon, as an habitual criminal. This is a Class D felony with a maximum penalty of twenty-five years of imprisonment. *See* WIS. STAT. §§ 940.19(3) (2001–02), 939.50(3)(d) (maximum penalty for Class D felony is ten years in prison) (2001–02); 939.62(1)(c) (habitual-criminality enhancer may increase term of imprisonment by not more than ten years) (2001–02); 939.63(1)(a)2 (use-of-a-dangerous weapon enhancer may increase term of imprisonment by not more than five years) (2001–02).

¶6 Before sentencing, the probation department prepared a presentence-investigation report. In the report, the writer noted that she had previously interviewed Roger Johnson over the telephone when a drunk driver killed Johnson's daughter. Johnson told the report writer that he drank because he was

depressed by his daughter's death. He also told the report writer that his father was an alcoholic who had abused him as a child. Regarding Johnson's health, the report noted that he suffered from diabetes, arthritis, high blood pressure, and alcohol and cocaine dependency. The report writer recommended three to five years of initial confinement, and four to six years of extended supervision.

¶7 Several witnesses, including the Johnsons, spoke at the sentencing hearing. Annie Johnson asked the court to "have mercy on [her] husband" and to provide "counseling help [for him] on probation." The State recommended that Roger Johnson be sentenced to "upwards of 10 years of initial confinement, [and] a long period of extended supervision to ensure that he is not going back to his old ways." Roger Johnson's lawyer asked the circuit court for "a lengthy probation," and, if prison was necessary, for five years of imprisonment, with an initial confinement of two years, and three years of extended supervision. The circuit court sentenced Roger Johnson to thirteen years of imprisonment, with an initial confinement of eight years, and five years of extended supervision.

II.

¶8 Roger Johnson challenges his sentence on several grounds. First, he alleges that the circuit court erroneously exercised its sentencing discretion and points to ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, which requires that circuit courts "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives."[1] ***Id.***,

[1] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, was decided after Roger Johnson was sentenced. The ***Gallion*** sentencing standards *in haec verba* apply only to "future cases." *See* ***id.***, 2004 WI 42, ¶8, 270 Wis. 2d at 546, 678 N.W.2d at 202 ("we reaffirm the sentencing standards established in ***McCleary*** [***v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971),] and determine that the application of those standards, demonstrating the exercise of discretion, (continued)

2004 WI 42, ¶46, 270 Wis. 2d at 560, 678 N.W.2d at 208. Specifically, Johnson argues that the circuit court did not explain why the initial-confinement part of the sentence was the minimum necessary to promote the objectives of sentencing, particularly in light of the sentencing recommendations, the abuse he suffered as a child, and his daughter's death. We disagree.

¶9 Sentencing is committed to the discretion of the circuit court and our review is limited to determining whether the circuit court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971). There is a strong public policy against interfering with the circuit court's discretion in determining sentences, and the circuit court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To get relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶10 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability;

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must be set forth on the record for *future cases*.") (emphasis added; footnote omitted). Nevertheless, Roger Johnson's sentencing passes muster under ***Gallion***'s gloss on ***McCleary*** and its progeny as well. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, ___, 688 N.W.2d 20, 24 ("While ***Gallion*** revitalizes sentencing jurisprudence, it does not make any momentous changes.").

> (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted); *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is within the trial court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975); *see also* ***Gallion***, 2004 WI 42, ¶62, 270 Wis. 2d at 566, 678 N.W.2d at 211.

¶11 The circuit court here considered the appropriate factors. It considered the seriousness of the crime, describing the battery as a "serious offense," which "caused extreme injury to the victim." It also considered Roger Johnson's character, finding that his trial testimony was "dispassionate and cold," and that he showed "a great lack of understanding of the serious injury that was caused." The circuit court noted that Roger Johnson had "extensive contact" with the criminal-justice system, and was "particular[ly] concern[ed]" with his "admitted battery to other persons" and "significant violent contact." It further observed that Roger Johnson's probation was revoked four out of seven times, showing his inability to comply with the law:

> There is concern with the escape and the other offenses that show a lack of compliance with orders of the courts as much as disdain for the orders of the court, just not caring about orders of the court.
>
> ….
>
> One of the reasons a person is placed on probation or one of the factors the Court looks at is willingness to

> comply with orders of the Court, and there is no history here of that with respect to this offense and with respect to your prior history.

It opined that Roger Johnson had not "taken advantage" of treatment opportunities, and that the only way to ensure that "appropriate treatment is provided is in a secure setting."

¶12 Finally, the circuit court considered the need to protect the community. Recognizing that domestic violence has a significant negative impact on the community, it agreed with the presentence-investigation-report writer's "concern that given the continued alcohol use, there is jeopardy to the safety of Ms. Johnson as well as to others." It noted that "[t]here has been a strong argument about probation," but found that there was a "significant risk" that Roger Johnson would "reoffend," and concluded that prison was the only option. The circuit court fully explained Johnson's sentence and the reasons for it.[2]

¶13 Roger Johnson also contends that his sentence is "harsh under the circumstances" because the maximum penalty for substantial battery was reduced

[2] The circuit court wrote in its decision and order denying Roger Johnson's motion for postconviction relief that it "has no obligation to explain why it imposed this sentence over another." Roger Johnson claims that this statement "is wrong as a matter of law" under ***Gallion***, 2004 WI 42, ¶49, 270 Wis. 2d at 562, 678 N.W.2d at 209 (circuit courts should explain the general range of sentence imposed). That may be, and was also true prior to ***Gallion***, but we are assessing the circuit court's sentencing, not the rationale underlying its denial of Johnson's motion for postconviction relief. Whatever the circuit court may have thought about what it was or was not required to do at sentencing, its sentencing rationale fully supported its sentence. Based on the circuit court's remarks during sentencing, we cannot say that it erroneously exercised its sentencing discretion.

after he committed the crime.[3] He "acknowledges that a change in the law is not considered a 'new factor' for the purposes of a sentence modification," but argues that the circuit court should have considered a sentence reduction under its inherent authority to modify a sentence. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990) (circuit court has authority to modify sentence, even though a new factor is not presented, if sentence is unduly harsh). Again, we disagree.

¶14 A legislative reclassification of the maximum penalty for an offense is not a basis for sentence modification. *See generally* ***State v. Torres***, 2003 WI App 199, 267 Wis. 2d 213, 670 N.W.2d 400, *review denied*, 2004 WI 1, 268 Wis. 2d 135, 673 N.W.2d 693 (No. 03-0233-CR) (new truth-in-sentencing penalties do not present a valid basis for sentence modification). Moreover, a sentence is beyond the pale of reasonableness "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. Given Johnson's history of repeated unlawful and harmful activity, and the need to protect the community from his easily triggered potential for violence, the sentence imposed was not "shocking."

¶15 Finally, Roger Johnson claims that his daughter's death and his medical problems are new factors that warrant sentence modification. The circuit

[3] Effective February 1, 2003, the legislature repealed WIS. STAT. § 940.19(3), the statute under which Roger Johnson was charged and tried. Roger Johnson argues that the closest crime under the new statute is substantial battery under § 940.19(2). This is a Class I felony with a maximum possible penalty of three years and six months in prison. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(i) (2003–04).

court has the discretion to modify a sentence if the defendant presents a new factor. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191, 195 (Ct. App. 1997). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). Whether a set of facts constitutes a new factor is a question of law that we review *de novo*. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989).

¶16 Roger Johnson's daughter's death is not a new factor. First, it predated the sentencing and, indeed, the circuit court in its written decision and order denying Roger Johnson's motion for sentence modification, indicated that it relied on the presentence-investigation report, which detailed Roger Johnson's traumatic life experiences, including his daughter's death: "in sentencing the defendant, [this court] relied in part upon the Presentence Report which the defendant acknowledges details the traumatic life experiences suffered by the defendant. The court specifically referred to that report when discussing the character of the defendant." As sad as it was, it was not a "new factor." Second, Roger Johnson's medical problems are also not a new factor. The circuit court specifically referred to Roger Johnson's medical problems in its sentencing

remarks, and, in its written postconviction order, determined that Roger Johnson's "current health status … is not an event or development which frustrates the purpose of the original sentencing, i.e., community protection, punishment, deterrence." We agree. *See, e.g.*, ***Michels***, 150 Wis. 2d at 99–100, 441 N.W.2d at 280–281 (post-sentencing worsening of health does not frustrate purpose of original sentence).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.