COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2588-CR **Cir. Ct. No. 1997CF975395**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICKEY JEROME CRITTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mickey Jerome Critton, *pro se*, appeals from an order denying his motion for sentence modification. We affirm.

BACKGROUND

¶2 This is the fourth time that this court will decide an issue related to Critton's 1999 conviction for cocaine and firearm offenses. We affirmed his conviction and sentence in 2000. *See* ***State v. Critton***, No. 1999AP2033-CR, unpublished slip op. (WI App Aug. 3, 2000). We affirmed the denial of his postconviction and reconsideration motions in 2003. *See* ***State v. Critton***, No. 2001AP3254, unpublished slip op. (WI App Aug. 12, 2003). Finally, in 2007, we again affirmed the denial of postconviction motions. *See* ***State v. Critton***, No. 2006AP1913, unpublished slip op. (WI App May 8, 2007).

¶3 Critton's first two appeals both included issues related to sentencing, as does this appeal.[1] At sentencing, the State asked the sentencing court to impose an indeterminate sentence of thirty-five years for Critton's conviction for possession with intent to deliver cocaine and a consecutive two-year sentence for being a felon in possession of a firearm. The sentencing court indicated that the recommendation seemed high "even with the two priors," and it asked how Critton would have been sentenced in the federal system. Trial counsel suggested that they could get that information with a telephone call to the United States Attorney's Office. The sentencing hearing was adjourned.

¶4 At the continued sentencing hearing, the sentencing court explained that given the State's recommendation, it "thought it would be appropriate to at least make a rough determination about how this case might come out under the federal sentencing guidelines for proportionality purposes because the state and

[1] The Honorable Diane S. Sykes sentenced Critton and will be referred to as the "sentencing court" in this decision.

federal governments have essentially concurrent jurisdiction over drug prosecutions." The sentencing court and the parties learned from a federal prosecutor that the sentencing range for the two crimes would have been seventeen to twenty years in the federal system. The sentencing court said that the comparison of the federal sentencing guidelines was "instructive" and that it thought the comparison "will have some influence on the sentence in this case." The sentencing court imposed a sentence of thirty years on the cocaine count and a consecutive sentence of two years on the firearm count.

¶5 In Critton's first appeal, he argued that the sentencing court erroneously exercised its discretion, in part because it considered the federal sentencing guidelines. In Critton's second appeal, he argued that his trial counsel was ineffective for not properly advising Critton about the federal sentencing guidelines and for not objecting when the trial court considered the federal sentencing guidelines. We rejected these arguments.

¶6 After Critton's third appeal, he filed several *pro se* motions in the trial court seeking to modify his sentence because the federal sentencing guidelines were retroactively amended in 2007 to shorten the sentencing disparity between those convicted of dealing crack or cocaine base and those dealing powder cocaine. Critton asserted that when the sentencing court determined what he would have received as a sentence in the federal system, it was considering the amount of cocaine base he had in his possession.

¶7 After initially finding the motions insufficient, the trial court later ordered briefing.[2] The State asserted that the change in the federal sentencing guidelines was not a "new factor" that warranted sentence modification. At a hearing on Critton's motion, the trial court discussed whether Critton was seeking sentence modification or a new sentencing and whether he might be entitled to either, noting that Critton had made a compelling case that the retroactive amendment of the federal sentencing guidelines was a new factor that justified relief because the sentencing court had relied on the federal sentencing guidelines.

¶8 At a subsequent hearing, with Critton represented by retained counsel, the parties discussed the fact that the federal sentencing guidelines were likely to be amended again in the near future. The hearing was postponed.

¶9 At the third hearing, which was held in September 2009, the parties informed the trial court that they had agreed to stipulate to a sentence modification pursuant to which Critton would be sentenced to a total of twenty years for both crimes, rather than the thirty-two years originally imposed. Critton's counsel noted that the stipulation was made with "the understanding that the Federal Sentencing Guidelines are changing and subsequent litigation could come out of this case allowing it to go to the Court of Appeals, to come back, and that there would be years more of litigation with this case." Critton's counsel continued:

> The parties have come to an agreement—other than litigating it one way or another—that a fair and reasonable sentence at the end of the day would be a twenty-year sentence by way of stipulation. Obviously … [the trial court] doesn't have to follow that, and I have talked to the defendant with regard to that, but that is what we are

[2] The Honorable Kevin E. Mertens considered Critton's motions that were based on the 2007 amendments to the federal sentencing guidelines.

> proposing with the understanding that the litigation of this lawsuit would then end.

¶10 The State added that the stipulation was taking into account the additional changes to the federal sentencing guidelines that would take effect in November 2009. The State explained: "We anticipated that, and Mr. Critton knows that he will not be able to bring this again as an issue in November, as it was considered in advance in our stipulation here." The State also said that it was joining the stipulation—even though it did not agree that Critton had established a new factor justifying sentence modification—because it believed the stipulation would accomplish the State's sentencing goals and was a fair sentence.

¶11 The trial court engaged in a colloquy with Critton about the stipulation. It discussed whether Critton would prefer to seek resentencing, which could increase or decrease his sentence, or the stipulated modification. Critton answered several questions indicating that he understood the stipulation and wanted the trial court to accept it.

¶12 The trial court adopted the parties' stipulation for sentence modification and modified Critton's sentence on the cocaine count so that he was ordered to serve eighteen years, rather than thirty years. The two-year consecutive sentence for the firearm count remained the same.

¶13 Nearly a year later, Critton filed a *pro se* motion and supplemental motion to set aside the stipulation. He asserted that his counsel "never discussed with him that the federal sentencing guidelines were going to change in November nor did they discuss the forfeiting of Critton's right to file any additional motions as to further changes in the guidelines." He continued: "The first time Critton heard of a November change in the federal guidelines and a forfeiture of his right

to file another motion to the change was during the colloquy [and when the State] … stated the information in open court." The trial court denied the original motion but, according to CCAP entries, it conducted an evidentiary hearing on Critton's supplemental motion on May 10, 2011, at which both Critton and his counsel testified. The trial court denied the motion on the record.[3] Critton did not appeal.

¶14 On August 24, 2011, Critton filed the motion that is the subject of this appeal. His motion was entitled: "Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) and the Inherent Power of the Trial Court." (Some capitalization omitted.) Critton stated that the 2009 stipulation was entered "with the understanding that he would not file an additional motion to modify his sentence as a result of another change in the guidelines by Congress on November 1, 2009" and that Critton therefore did not file an additional motion for sentence modification in 2009. Critton asserted, however, that the June 30, 2011 changes to the federal sentencing guidelines were not discussed at the 2009 hearing and that he should have his sentence "reduced" as a result of those 2011 changes.

¶15 The State opposed the motion. It asserted that although it had "never conceded that the change in the federal sentencing guidelines would be a 'new factor' entitling Mr. Critton to a sentence modification," it had "agreed to not pursue an appeal of the finding by the court as to the 'new factor' argued by Mr. Critton." The State said that in exchange, Critton had "agreed to waive future

[3] No transcript of this hearing has ever been produced. In a subsequent brief related to the motion at issue in this appeal, the State explained that the trial court found that Critton's counsel "was not ineffective in his representation of Mr. Critton in the negotiations, communications and stipulation and that [counsel] had advised Mr. Critton of the consequences of entering into the 20 year stipulation."

requests for reductions based upon sentence guideline changes in the federal system." The State also argued that Critton was "attempting to re-litigate the issues ruled upon" at the May 2011 evidentiary hearing. The State asserted that Critton should not be allowed to "keep renegotiating his sentence based upon facts or circumstances not relied upon" when the trial court "follow[ed] that stipulated, joint sentencing recommendation."

¶16 In a written order, the trial court explicitly agreed with the State and found "that the stipulation effectively precludes [Critton] from seeking further modification or reduction of his sentence."[4] The trial court explained:

> As the State indicates, the former reduction was not based on a determination of what similarly situated defendants in the federal system would receive, but on a recommendation by both parties—a stipulation—as to what a fair and equitable sentence would be in this case. [Critton] agreed not to seek further relief, and the State agreed not to appeal [the] … new factor determination. [Critton] is not entitled to a further reduction of his sentence pursuant to the stipulation entered by the parties.

This appeal follows.

DISCUSSION

¶17 At issue is the denial of Critton's latest motion, which Critton refers to in his brief as a motion for sentence modification. A trial court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. ***Id.***, ¶36. First, the defendant must demonstrate by clear and convincing

[4] The Honorable Michael D. Guolee issued the written decision that is before this court on appeal.

evidence that a new factor exists. ***Id.*** Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶37.

¶18 We affirm the order denying Critton's motion for sentence modification, for two reasons. First, even if we were to assume that the 2011 federal sentencing guidelines established a new factor, we conclude that the trial court did not erroneously exercise its discretion when it concluded that "the stipulation effectively precludes [Critton] from seeking further modification or reduction of his sentence." The transcript of the 2009 hearing indicates that the stipulation to modify the sentence was intended to end litigation based on the federal sentencing guidelines. Critton's counsel explicitly told the trial court that the parties' proposed resolution was made "with the understanding that the litigation of this lawsuit would then end."

¶19 Critton disagrees with this interpretation of the stipulation. He asks this court to review a letter he sent to the trial court after the 2009 hearing and "find that Critton is not barred from filing an additional motion for sentence modification due to the June 30, 2011 change in the federal sentencing guidelines." But Critton already had the opportunity to litigate his understanding of the stipulation in May 2011. After an evidentiary hearing, the trial court denied Critton's motion to be relieved of the stipulation. Critton did not appeal. He cannot now relitigate his understanding of the stipulation.

¶20 There is a second, independent reason why affirming the trial court order is appropriate in this case: Critton's appellate brief is inadequate. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). The six-page, handwritten brief does not adequately outline the history of this case or adequately address why

sentence modification is appropriate. It also does not discuss the legal standards for sentence modification. Further, Critton did not file a reply brief, so he has not even attempted to refute the State's analysis and arguments in favor of affirming the trial court's order. Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The burden was on Critton to show that a new factor exists and that it justifies sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶¶36-37. Critton has not met his burden. Therefore, we affirm.

By the Court.—Order affirmed.

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