COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1988-CR **Cir. Ct. No. 2005CF6626**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WESLEY WALTER MAXCEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Wesley Walter Maxcey appeals an order denying his postconviction motion to modify his sentence.[1] He argues that new factors warrant modification. We disagree and affirm.

BACKGROUND

¶2 Maxcey pled guilty to one count of armed robbery with threat of force as a habitual offender. Three additional counts—two for robbery and one for armed robbery—were dismissed pursuant to a plea agreement, with the understanding that they would be read in for purposes of sentencing. The sentencing court concluded that Maxcey should serve twelve years of initial confinement and ten years of extended supervision.

¶3 Maxcey subsequently filed a postconviction motion to modify his sentence based on new factors. Specifically, he argued that the sentencing court's impermissible reliance on the read-in offenses constituted a new factor because it was an error that was known at the time of sentencing but overlooked by all of the parties. In addition, Maxcey asserted that his alleged transformation during his time in prison—which confirmed presentence promises he had made to the sentencing court—was a new factor.

¶4 The trial court denied Maxcey's postconviction motion. Regarding Maxcey's first proposed new factor, the trial court stated that the record indicated the sentencing court "did not impose a[n] actual sentence on the read-ins; [it] merely considered the read-ins as additional crimes in [its] overall sentencing

[1] The Honorable Karen E. Christenson presided at sentencing and entered the corrected judgment of conviction in this matter. The Honorable Jean A. DiMotto entered the order denying postconviction relief, which is the order appealed from.

structure." In addition, the trial court rejected Maxcey's second proposed new factor concluding that evidence of progress or continuing rehabilitation while incarcerated does not constitute a new factor warranting modification.

DISCUSSION

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

¶6 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 ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

¶7 Maxcey first contends that the sentencing court impermissibly relied on the read-in offenses at sentencing and that this "mistake" is a new factor because it was known at the time of sentencing, but overlooked by all of the parties. While a court may consider read-in charges in determining the sentence for a crime for which the defendant is convicted, it may not sentence a defendant on read-in charges. ***State v. Martel***, 2003 WI 70, ¶21, 262 Wis. 2d 483, 664 N.W.2d 69.

¶8 According to Maxcey, the sentencing court imposed four sentences, one on the charge Maxcey was convicted of and one on each of the three read-in charges. He bases his assertion upon the sentencing court's statements that "[it did] have to sentence [Maxcey] for four separate crimes," and "[it was] going to sentence [Maxcey] to three years of confinement time on each of the armed robberies, so it should be a total of twelve years confinement."

¶9 In its response, however, the State directs our attention to the sentencing court's clarifying language. The sentencing court's remarks, as they relate to this issue, were as follows:

> THE COURT: … I think, Mr. Maxcey, that I do have to sentence you for four separate crimes and I am going to do that. I am, however, going to make your confinement concurrent to the confinement that you are now serving and you don't get any credit for it. Because you committed these armed robberies without a gun, I am going to sentence you to three years of confinement time on each of the armed robberies, so it should be a total of twelve years of confinement. That would be consecutive to the five years you are serving but that is a length of time that makes sense to me, given the nature of the crime—
>
> [DEFENSE COUNSEL]: I thought you said it was going to be concurrent.
>
> THE COURT: Did I say consecutive? Three years consecutive to—this is what I meant to say, *I am sentencing [you] on one count with three read-ins; the bottom line number is twelve years because there are four crimes that I am considering here*, but it will be concurrent to the sentence he is serving. Does that explain it?
>
> [DEFENSE COUNSEL]: Yes.

(Emphasis added.)

¶10 The italicized language makes clear that the court sentenced Maxcey solely on the charge he was convicted of and only considered the read-in charges

in determining the length of that sentence. Thus, there was no mistake that was overlooked by the sentencing court and the parties. As such, Maxcey's first proposed new factor is not a new factor at all.

¶11 Maxcey next contends that his actions while incarcerated constitute a new factor because they nullify the sentencing court's uncertainty about the sincerity of his commitment to beating his addiction, which he claims led the court to impose a longer period of confinement. At sentencing, Maxcey presented the sentencing court with a commitment to sobriety and a promise to change. Yet, the sentencing court expressed uncertainty about whether Maxcey could beat his addiction and thus, not be a danger to the community. Maxcey asserts that he has since "made good" on his promises, noting that he has completed various programs designed to foster a commitment to sobriety and highlighting his achievements and other positive uses of his time while incarcerated. He argues that if the sentencing court had known the sincerity of his commitment to sobriety, it would have sentenced him to a lesser term.

¶12 Maxcey acknowledges that we rejected an argument similar to this one in ***State v. McDermott***, 2012 WI App 14, 339 Wis. 2d 316, 810 N.W.2d 237. There, we explained:

> McDermott contends that his "actions over the past 19 years remove" the basis for the trial court's assertion that it would "never feel comfortable around you." He says that he "has made good" on his promise to rehabilitate himself, and that this is, therefore, a "new factor" that justifies modifying his parole-eligibility date: "Had the [trial] court known that McDermott's transformation in fact was sincere, the scales would have weighed differently, with his sincerity mitigating against the perceived need for such a lengthy period before parole consideration to protect the community or to address his character." McDermott says "that the attainment of his goals and proving that he in fact could be rehabilitated, something the sentencing court was

> uncertain he could accomplish, is the new factor. McDermott's conduct puts to rest any doubt the [trial] court had about his ability to change." This, however, is but an "I am now rehabilitated" argument in slightly different clothes, and could apply to almost any defendant who on sentencing day apologizes and promises to put his disordered life together. If accepted as a "new factor," it would wholly gut established law in Wisconsin that "an inmate's progress or rehabilitation while incarcerated" is not a "new factor."

Id., ¶15 (citations omitted; brackets in ***McDermott***). Maxcey, however, "respectfully submits that ***McDermott*** was wrongly decided … and makes this argument in order to preserve it for further review."

¶13 As Maxcey concedes, we are bound by ***McDermott***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). And we agree with the State that Maxcey's alleged transformation is simply another word for rehabilitation. Because rehabilitation while incarcerated may not be the basis for a new factor, *see* ***McDermott***, 339 Wis. 2d 316, ¶15, Maxcey's argument fails.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).