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DISTRICT III

May 25, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP343-CR State of Wisconsin v. John Raymond Lundberg
(L. C. No. 2017CF39)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John Raymond Lundberg appeals the judgment convicting him of four counts, all of which included a dangerous weapon enhancer: aggravated battery (Count 1); battery causing bodily harm (Count 2); first-degree recklessly endangering safety (Count 3); and first-degree reckless injury (Count 4). He also appeals the order denying his postconviction motion. Lundberg argues that the circuit court erred in denying both his motion to vacate one of the

convictions against him on grounds that it was multiplicitous, and his motion for sentence modification. The State concedes that the Count 1 aggravated battery charge is multiplicitous of Count 2 and cannot stand. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We remand with directions that the circuit court vacate the judgment of conviction entered against Lundberg for the Count 1 aggravated battery charge and dismiss that charge. In all other respects, we reject Lundberg's arguments and affirm.

According to the criminal complaint, the Douglas County Sheriff's Office received a call on the morning of January 24, 2017, during which someone said, "I'm bleeding to death," then mumbled "Lundberg" and hung up. Ten minutes later, dispatch received another call. The caller again said he was bleeding to death, identified himself, and said that Lundberg had cut the caller's throat.

When police officers arrived at Lundberg's home, they found the victim, covered in blood, on his knees on the side of the road. The victim said that he believed Lundberg was inside the home alone. After securing a warrant, the officers entered Lundberg's home, but no one was there.

The victim later told a police officer that Lundberg picked him up around 10:00 p.m., the night before the incident, and gave him a ride back to Lundberg's house, where the two hung out, listened to music, and drank. Around 6:00 a.m. the next day, the victim was listening to music

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

on a computer when Lundberg came up behind him. It was at that point that the victim thought Lundberg slit the victim's throat with a knife. The victim ran to the garage to call the police.

When police officers searched Lundberg's house, they found a broken liquor bottle near the computer. While the officers were in the home, Lundberg returned. He had blood on both of his hands and on the back of his head. The officers arrested him.

As detailed in the complaint, a laceration on the victim's face required nineteen sutures. The treating neurosurgeon indicated that the victim suffered a closed-head injury with a probable concussion and a probable brief loss of consciousness secondary to an assault. Additionally, the victim suffered a subarachnoid hemorrhage, which was defined in the complaint as bleeding in the subarachnoid space between the brain and the tissues surrounding the brain.

At trial Lundberg argued that he acted in self-defense. A jury found Lundberg guilty of all four counts, and the circuit court ordered him to serve the following concurrent sentences: Count 1, aggravated battery, three years of initial confinement followed by three years of extended supervision; Count 2, battery causing bodily harm, three years of initial confinement followed by three years of extended supervision; Count 3, first-degree recklessly endangering safety, five years of initial confinement followed by five years of extended supervision; and Count 4, first-degree reckless injury, five years of initial confinement followed by five years of extended supervision.

Lundberg sought postconviction relief.[2] He argued that Counts 1 and 2 were multiplicitous and that his trial counsel was ineffective for failing to raise the multiplicity issue. Lundberg additionally argued that he was entitled to sentence modification.

In its response, the State conceded that Counts 1 and 2 were multiplicitous. However, the State disagreed that that the multiplicitous charges constituted a new factor warranting sentence modification.

At the ensuing hearing, the circuit court, relying on the State's concession, orally ordered that the conviction entered against Lundberg for Count 1 be vacated and the charge dismissed. The court did not, however, enter a written order or an amended judgment to this effect. The court went on to conclude that even though Count 1 was multiplicitous, sentence modification was not warranted. The court explained:

> Quite frankly, I didn't look to punish anything more than what was on the most dangerous—or the serious charge, that being Count 4. The other charges, quite frankly, had they all been vacated, I don't think I would have done anything differently. In fact, I'm fairly certain the sentence would be the same. So that being said, I don't think it's a new factor that the [c]ourt can consider in modifying sentence.

On appeal, Lundberg argues the circuit court erred when it denied his motion for sentence modification based on multiplicity. He additionally contends that his trial counsel was ineffective for failing to raise the multiplicity issue.

[2] We focus our discussion on only those postconviction claims that are relevant for purposes of this appeal. To the extent Lundberg raised other claims in the circuit court that he does not pursue on appeal, we deem them abandoned and discuss them no further. *See* ***Cosio v. Medical Coll. of Wis., Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987) (arguments not briefed on appeal are deemed abandoned).

As it did below, the State again concedes that Counts 1 and 2 are multiplicitous and that remand is warranted so that the judgment of conviction can be amended to reflect the circuit court's decision to vacate the conviction for Count 1 and dismiss that charge. In light of this concession, we need not address Lundberg's claim that his trial counsel was ineffective for failing to raise the multiplicity issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

What remains then is Lundberg's claim that the circuit court erred when it concluded that multiplicity was not a new factor warranting sentence modification. Lundberg contends that instead of modifying his sentence, the court "merely speculated that it only punished Mr. Lundberg for [C]ount 4 stating that it was 'fairly certain the sentence would be the same.'"

To obtain sentence modification based on the showing of a new factor, a defendant must demonstrate by clear and convincing evidence that a new factor exists, and that the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-38, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is "a fact or set of facts highly relevant to the imposition of sentence" that was not known to the sentencing court, either because it was not in existence at the time of sentencing or because it was unknowingly overlooked by both parties. ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts presented by the defendant constitutes a new factor is a question of law we review de novo, but whether that new factor justifies sentence modification is a decision left to the discretion of the circuit court, which we review for an erroneous exercise of discretion. ***Id.***, ¶33. "[I]f a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion." ***Id.***, ¶38 (citation omitted).

Lundberg has not met his burden of establishing that his convictions for multiplicitous charges constitute a set of facts highly relevant to the imposition of his sentences. Lundberg contends that if he had not been convicted of multiplicitous counts, "the sentencing recommendation would not have been as severe, and as such, the circuit court's decision would have been different." The crux of Lundberg's argument is that if "the court had been aware that he should not have been convicted of both [C]ounts 1 and 2, his sentence would not consist of 4 felonies." We infer from this argument that Lundberg contends that if the court had known that he was properly convicted of only three felonies, it would have imposed a different sentence. Lundberg does not otherwise explain how the sentencing decisions on the multiplicitous charges influenced the sentences on the other counts, all of which were ordered to be served concurrently. We conclude that his argument misses its mark.

While it is true that vacating one of the multiplicitous charges results in Lundberg being convicted of three felonies instead of the original four, this fact does not establish a new factor. The circuit court imposed concurrent sentences, and it stated at the postconviction hearing that it was "fairly certain" its sentence of five years of initial confinement and five years of extended supervision would have remained the same on Count 4—Lundberg's most serious felony conviction—even if Counts 1, 2, and 3 had all been vacated. This remark makes clear that stripping away one count on the legal grounds of multiplicity was not highly relevant to the court's sentencing decision on the other counts. The court properly denied Lundberg's motion for sentence modification.

In light of the foregoing, we reverse and remand with directions that the circuit court vacate the judgment of conviction entered against Lundberg for the Count 1 aggravated battery

charge and dismiss that charge, in accordance with its oral ruling. In all other respects, we affirm.

Therefore,

IT IS ORDERED that the judgment and order are affirmed in part; reversed in part and cause remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals