COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1266 **Cir. Ct. No. 00-CM-312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE C. FONDREN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Willie C. Fondren appeals from an order denying his motion for sentence modification. Fondren makes three almost incomprehensible arguments in support of sentence modification; as best we can tell, Fondren argues

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that his trial counsel was ineffective, that the trial court erred in not citing any precedent in support of its actions, and that the trial court improperly failed to hold a ***Machner***[2] hearing. We reject all of Fondren's arguments and affirm the order denying sentence modification.

FACTS

¶2 On April 26, 2000, Fondren pled no contest to charges of obstructing an officer, as a repeat offender, and bail jumping. Pursuant to a plea agreement with the State, the repeat offender penalty enhancer on the bail jumping was dismissed and a second count of bail jumping was dismissed outright. Fondren reviewed and signed a plea questionnaire/waiver of rights form in which he attested that he understood that the trial court was not bound by the plea agreement. Fondren attested that he was aware that the maximum penalty for his crimes was three years and nine months' incarceration. Judge David Bastianelli accepted Fondren's plea and conducted an extensive plea colloquy.

¶3 On May 18, 2000, a sentencing hearing was held before Judge Mary Kay Wagner-Malloy. After hearing arguments, the trial court imposed a twenty-four month prison sentence on the obstructing charge, consecutive to a five-year sentence Fondren was currently serving from prior charges. The trial court imposed a nine-month sentence for the bail jumping offense, to be served concurrent with the twenty-four month sentence.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 On February 21, 2001, Fondren filed a "Motion for Modification of Sentence." After a hearing, the trial court denied the motion in a written order on May 3, 2001, and Fondren appeals from the order.

DISCUSSION

¶5 To obtain sentence modification, a defendant must establish that (1) a new factor exists, and (2) the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide de novo. ***Id***. Whether a new factor justifies sentence modification, however, presents an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard. ***Id***.

¶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 the 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 (1975). Further, a new factor is "an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶7 Nowhere in this record has Fondren alleged or proved a new factor warranting sentence modification. In fact, neither the State nor Fondren addresses the standard of review for sentence modification. While none of Fondren's arguments constitute a new factor warranting sentence modification, for the sake of judicial economy we will address Fondren's assertions.

¶8 Fondren's first argument, as best we are able to tell, concerns ineffective assistance of counsel. A defendant claiming ineffective assistance of counsel so substandard as to require reversal of the conviction must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Fondren neither alleged nor proved deficiency or prejudice; in addition, there is no record of a ***Machner*** hearing, which is necessary for the appellate court to review trial counsel's performance. *See* ***State v. Machner***, 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979).

¶9 Our inability to address Fondren's ineffective assistance of counsel claim for lack of a ***Machner*** hearing leads to another of Fondren's arguments: that the trial court erred when it failed to provide him a ***Machner*** hearing. We disagree.

¶10 A motion claiming ineffective assistance of counsel does not automatically trigger a right to a ***Machner*** testimonial hearing; no hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In reviewing the circuit court's denial of an evidentiary hearing, we apply a two-part test. ***Id***. at 310. We must determine whether the motion, on its face, alleges facts entitling Fondren to relief. ***Id***. at 310-11. If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without any evidentiary hearing. ***Id***. at 311. This discretionary decision will only be reversed if the trial court erroneously exercised that discretion. ***Id***.

¶11 In his brief, while Fondren makes a general statement that the trial court erred when it "brushed under the rug" his allegations of ineffective assistance of counsel, he does not provide any reasons why he believes trial counsel was ineffective. In his motion to the trial court, Fondren argued that trial counsel was ineffective because he had "entered a plea based upon Counsel's advice, stating that, 'Whatever time the Defendant received as a Sentence, would be imposed Concurrent with his 8 year Sentence,' and because of this fact ... would be ineffective Counsel." This quotation is not attributed to anyone in particular and is not supported by an affidavit from either Fondren or trial counsel. Fondren provides insufficient objective facts to support this conclusory, vague statement. Fondren's allegations are self-serving conclusions insufficient to trigger an evidentiary hearing. The trial court was not required to hold an evidentiary hearing on his claims of ineffective assistance of counsel.

¶12 We decline to address Fondren's final argument that the trial court erred "in not addressing precedent case law as to what the court must do." Fondren cites to no case law or authority supporting this argument and provides nothing more than bare allegations. This court may decline to review issues which are inadequately briefed. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶13 Sentencing, including whether to make a sentence concurrent or consecutive, is within the trial court's discretion, ***State v. LaTender***, 86 Wis. 2d 410, 432, 273 N.W.2d 260 (1979), and our review is limited to whether the trial court erroneously exercised its discretion in sentencing Fondren. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). The primary factors the court is to consider in sentencing are: (1) the gravity and nature of the offense; (2) the

offender's character and rehabilitative needs; and (3) the public's need for protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984).

¶14 A review of the record indicates that the trial court considered the proper factors and was aware of the facts of the crime and Fondren's criminal history. The trial court properly considered Fondren's character, noting that he had been on probation for sexual assault at the time of the offenses at issue here, and had several drunk driving incidents while on probation. The trial court noted that while on probation, Fondren had failed to prove that he could conform his behavior so as to not pose a risk to the community. In addition, the court noted that the current convictions were serious in light of Fondren's past criminal history.

¶15 Fondren was sentenced to a total of two years in prison. Two years in prison for two separate charges—obstructing an officer as a repeat offender and bail jumping—when the maximum penalty was three years and nine months in prison is not so excessive, unusual and disproportionate to the offense committed so as to shock public sentiment. ***Hanson v. State***, 48 Wis. 2d 203, 206, 179 N.W.2d 909 (1970).

CONCLUSION

¶16 Fondren neither alleges nor presents proof of any new factor warranting sentence modification. In addition, we reject his arguments that his trial counsel was ineffective, that the trial court erred in not citing any precedent in support of its actions, and that the trial court improperly failed to hold a ***Machner*** hearing. We therefore affirm the trial court's order denying sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.