COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP86-CR **Cir. Ct. No. 2002CF5598**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLIN A. DIXON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and WILLIAM W. BRASH, III, Judges.[1] *Affirmed.*

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

[1] The Honorable John A. Franke entered the judgment of conviction. The Honorable William W. Brash, III, decided Dixon's postconviction motion.

¶1 PER CURIAM. After a trial to the court, Marlin A. Dixon was convicted of first-degree reckless homicide for his involvement in the beating death of Charlie Young, Jr. The circuit court imposed a forty-year prison sentence on Dixon. Dixon was a fourteen-year-old juvenile at the time of the crime, and he was initially incarcerated at the Ethan Allen School, a juvenile facility. When he turned sixteen, the Department of Corrections (DOC) transferred him to an adult institution where he was sexually assaulted by his cellmate. Dixon sought sentence modification, arguing that his premature transfer to an adult institution and subsequent rape constituted a new factor warranting sentence modification. The circuit court rejected Dixon's motion, and Dixon appeals. We reject Dixon's arguments and affirm the judgment of conviction and postconviction order.

¶2 At the age of fourteen years, Dixon was involved along with about twenty others in the beating death of Charlie Young, Jr. Dixon was originally charged as an adult, but sought a "reverse waiver" to juvenile status. The request was denied,[2] Dixon waived his right to a jury trial, and the circuit court found him guilty and sentenced him for his role in Young's death.

¶3 Although Dixon was originally housed at Ethan Allen School, the DOC transferred him to Green Bay Correctional Institution, an adult prison, when

[2] Throughout his brief, Dixon makes much of the fact that the judge at the "reverse waiver" proceeding relied on DOC testimony that it was "unreal[istic]" to believe that Dixon would be ready for a transfer to adult incarceration at the age of sixteen. He then notes that a different judge sentenced him and was unaware of that DOC testimony.

he turned sixteen, in apparent violation of WIS. STAT. § 938.183(3) (2005-06),[3] which prohibits transferring a juvenile younger than seventeen-years-old to an adult institution. Dixon was repeatedly sexually assaulted and abused by his cellmate at Green Bay.

¶4 Dixon filed a postconviction motion seeking sentence modification. As a basis for the motion, Dixon argued that his transfer to an adult prison in violation of statute and his subsequent rape constituted new factors warranting sentence modification. He maintained that the improper transfer and assault were highly relevant to sentencing because they resulted in the imposed sentence being "vastly more punitive" than the sentencing court intended.

¶5 The circuit court denied the postconviction motion, reasoning that Dixon's presumably improper transfer was not a new factor because it was without "jurisdiction to designate that a defendant be placed in a particular facility," and therefore sentencing courts do not consider the place of a defendant's incarceration "when deciding the appropriate amount of punishment." It concluded that "even if the sentencing court had known that the defendant in this case *could* be transferred from Ethan Allen School to an adult prison upon reaching the age of sixteen, the sentence would likely have been no different based upon the various factors that the court considered."

¶6 Similarly, the circuit court concluded that the prison assaults were not a new factor warranting sentence modification because the risk of violence in

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

prison is one "many offenders face." The circuit court noted that when sentence is imposed, the circuit court does so "based upon the nature of the offense, the character and rehabilitative needs of the defendant and the need for community protection." The court noted that it is not obliged to consider the possibility of a prison assault at sentencing, and that possibility is not highly relevant to imposition of sentence.

¶7 On appeal, Dixon argues that his allegedly improper transfer to adult prison and the subsequent abuse by his cellmate together constitute a new factor warranting sentence modification. In addition, Dixon argues for the first time that it was a violation of the constitutional prohibition against cruel and unusual punishment to sentence a fourteen-year-old offender to eighteen years of initial confinement in an adult prison. We reject Dixon's arguments.

¶8 In order to obtain sentence modification based on a new factor, a defendant must show that a new factor exists and that the new factor warrants sentence modification. ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524. A new factor is a fact or set of facts highly relevant to sentencing, but not known to the sentencing judge either because it was not then in existence or because it was in existence, but was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). To be a new factor, the information or development must also "'frustrate[] the purpose of the original sentence.'" ***Crochiere***, 273 Wis. 2d 57, ¶14 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law, decided by this court *de novo*. ***State v. Ralph***, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990).

¶9 We assume for purposes of this appeal that Dixon's transfer to adult prison was improper and that Dixon was sexually and physically abused by his cellmate. Neither fact meets the definition of a new factor warranting sentence modification, however. As the State points out, the question of inmate placement and program assignments are vested in the DOC by WIS. ADMIN. CODE ch. DOC 302 (2006); *see also* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (control over prisoner care is vested by statute in the DOC). At sentencing, the circuit court indicated that Dixon was being given a long sentence due to his role in the crime, the seriousness of the crime, and the need to protect the public. There is no indication that the place of Dixon's confinement was a factor in the length of the sentence, nor is there any indication that if the circuit court had known that Dixon would be moved to an adult prison at age sixteen that fact would have affected the length of the sentence. More significantly, the circuit court was undoubtedly aware that the place of incarceration was within the DOC's purview, and it therefore received little or no consideration at sentencing.[4] Similarly, Dixon's sexual assault, although regrettable, is not a fact highly relevant to the length of Dixon's sentence. *See* ***State v. Klubertanz***, 2006 WI App 71, ¶41, 291 Wis. 2d 751, 713 N.W.2d 116.

¶10 Dixon's claim that sentencing a juvenile to a minimum of eighteen years of imprisonment violates the constitutional prohibition against cruel and

[4] As the circuit court correctly noted when it denied Dixon's postconviction motion:

> [T]he court is not obliged to consider the possibility that a particular defendant might be assaulted in prison in deciding an appropriate sentence for the crime or crimes being considered. An offender who is sexually assaulted by a cellmate in prison may have administrative remedies available to him with the Department of Corrections. In addition, inmates can be prosecuted for crimes committed during their incarceration.

unusual punishment is meritless. The Supreme Court cases on which Dixon relies, ***Thompson v. Oklahoma***, 487 U.S. 815 (1988), and ***Roper v. Simmons***, 543 U.S. 551 (2005), involve imposition of the death penalty on a person under the age of eighteen, and they are therefore inapposite. Dixon's general principle is that the sentence imposed upon him is "incompatible with the evolving standards of decency that mark the progress of a maturing society," ***Estelle v. Gamble***, 429 U.S. 97 102-03 (1976) (citation omitted), because the transfer to adult prison resulted in "corporal punishment" by his cellmate.

¶11 We note, however, that the circuit court did not impose and the DOC did not mandate "corporal punishment" for Dixon in the form of abuse by his cellmate. As we noted above, Dixon's remedies for his brutalization are through the DOC or criminal prosecution. Dixon's sentence, although severe, is not "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 v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). This is so because the circuit court considered Dixon to be more culpable for Young's death than the others who participated. Witnesses had seen Dixon inflict a savage beating on Young. At sentencing, the circuit court had noted that it was "extremely likely that [Dixon's] conduct alone … would have caused [the victim's] death or something close to it." Dixon's sentence in light of his conduct is neither harsh nor unconscionable.

By the Court.—Judgment and order affirmed.

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