

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP741-CR

Cir. Ct. No. 1996CF964119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKY ELLIOT SCOTT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 KESSLER, J. Ricky Elliot Scott appeals from an order denying his motion for reconsideration relating to his 2004 motion for sentence modification based upon a new factor, i.e., his assistance to law enforcement pre- and post-sentencing. Because we conclude that Scott's assistance does not satisfy the new

factor test we set forth in *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, we affirm.

BACKGROUND

¶2 In February 1997, Scott was convicted by a jury of two counts of attempted first-degree intentional homicide, armed robbery, and false imprisonment. Scott's conviction arose out of an August 1996 incident in which Scott held his mother and her two foster children at gunpoint inside his mother's house, took items from his mother by force, and before leaving, shot his mother twice, and shot one of the foster children. After his conviction, but before sentencing, Scott learned from a fellow inmate, Tomas Rodriguez, that Rodriguez had committed the triple homicide for which he had been charged and was awaiting trial. Rodriguez told this to Scott through another inmate who was translating for Scott as Scott did not speak Spanish and Rodriguez did not speak English. Scott informed a sheriff's deputy at the Milwaukee County Criminal Justice Facility that he had information regarding a homicide and, thereafter, Milwaukee County Sheriff's Deputy Earl Anderson interviewed Scott. During his interview, Scott was asked what he wanted for this information. Scott replied that he only wanted to get Rodriguez convicted because Rodriguez "was a[n] 'evil person and shouldn't go free.'"

¶3 The sheriff's department then contacted police and Scott was interviewed on or about April 15, 1997, by two City of Milwaukee police detectives, Michael Wesolowski and Gary Temp. Scott was promised nothing from the detectives and indicated to them that "he did not expect anything in return, but down the road he state[d] he would appreciate someone saying that he

co-operated with this investigation, either at his upcoming sentencing, or at a future parole hearing.”

¶4 Scott was sentenced on April 24, 1997. The trial court was not informed before or during the sentencing hearing of Scott’s meetings with law enforcement regarding the Rodriguez homicide investigation. After sentencing, Scott was subpoenaed by the State, and produced from his incarceration at the Dodge Correctional Institution, to testify at the Rodriguez trial. Scott was never called to testify, and Rodriguez was convicted of the three homicides and sentenced to three consecutive life sentences.

¶5 On November 4, 2004, Scott filed a motion for sentence modification on the grounds that his cooperation with law enforcement by providing information regarding Rodriguez and the triple homicide was a new factor that frustrated the purpose of the original sentence. It is undisputed that this motion was the first time this information was provided to the trial court. In a written decision dated January 5, 2005, the trial court (the same trial court that had presided over Scott’s entire case, including his sentencing) denied Scott’s motion to modify his sentence.

¶6 On March 22, 2005, the court of appeals released *Doe* which addressed how courts should evaluate motions for sentence modification based on a new factor where the potential new factor is an inmate’s cooperation with law enforcement. *Id.*, 280 Wis. 2d 731, ¶1. On January 8, 2007, Scott filed a motion for reconsideration. In his reconsideration motion, Scott argued that his circumstances paralleled the *Doe* court’s analysis of facts in light of the factors it was adopting in that decision. Specifically, Scott argued that because: (1) he provided “substantial assistance in a triple homicide” by making statements to law

enforcement and being available to testify at trial; (2) his information was useful at the time presented; (3) his cooperation was timely; and (4) he has done well since being incarcerated, he is entitled to sentence modification.

¶7 The trial court held a hearing on the motion for reconsideration, where only Scott testified. Scott testified that he had informed his trial counsel, Attorney Scott Phillips, of his cooperation with law enforcement prior to the sentencing hearing, but conceded that Phillips had not brought the matter up to the court at that time. Phillips was not present at the 2007 hearing and did not testify or provide any written submission in support of Scott's motion for reconsideration. The trial court, in reviewing its notes from the sentencing hearing, as well as the transcript prepared from that hearing, found that it had never been informed of Scott's cooperation with law enforcement. Additionally, there was no mention of Scott's cooperation in the Rodriguez homicide case in Scott's postconviction motion for a new trial which was heard on June 25, 1998.

¶8 After taking testimony and hearing argument by the parties, the trial court denied Scott's motion for reconsideration. In concluding that Scott's cooperation with law enforcement did not warrant a modification to his sentence, the trial court applied the facts to the five *Doe* factors. As to factor one, the trial court found that Scott had provided it with no information as to the usefulness of Scott's cooperation and the information Scott provided to law enforcement. The court noted the fact that Rodriguez had already been charged with the subject triple homicide at the time Scott obtained the information and that, although willing, the State did not have Scott testify at Rodriguez's trial nor were Scott's statements sufficient to cause Rodriguez to plead guilty without a trial. The trial court found that the "significance and usefulness of [Scott]'s assistance is not substantial," or unique, i.e., that law enforcement either did not already have the

information or that Scott's information led to the discovery of any additional information.

¶9 In discussing factor two, the trial court noted that “[t]here’s no indication regarding the truthfulness, completeness or reliability of the information that [Scott] provided. It’s merely a recitation of what ... Rodriguez apparently told him through an interpreter [which] may well have been the State’s reasoning for not calling him as a witness.... We don’t know.” The court also noted that it had not found Scott credible during his trial or during his testimony relating to his postconviction motions, and that it did not find him credible in his testimony at this hearing regarding having told his counsel before sentencing of his cooperation. As to factor three, the nature and extent of Scott’s involvement, the trial court found that the involvement was not significant, based on its findings relating to factors one and two.

¶10 Regarding factor four, relating to any injuries suffered, the court found that there were none, only one incident of a threat which was not carried through. Finally, regarding timeliness, factor five, the trial court found that the timeliness of both bringing the information to the attention of law enforcement and bringing the information to this court’s attention was a concern. The court noted that Scott brought the information to law enforcement while he was awaiting sentence for convictions that had the potential maximum of 122 years of incarceration. The trial court also found significant that Scott never brought up his cooperation either at his sentencing or in a postconviction motion that he filed shortly thereafter, despite the fact that in his statements to law enforcement, he stated that “he would appreciate someone saying that he co-operated with this investigation, either at his upcoming sentencing, or at a future parole hearing.” The trial court then considered the fact that Phillips did not appear or otherwise

testify on Scott's behalf as to his strategic decisions for not providing this information to the court, if he, as Scott testified, knew about the cooperation prior to the sentencing hearing, or why Phillips did not request an adjournment of sentencing until after it was determined whether Scott would testify against Rodriguez, and concluded that it believed Phillips would have brought up the fact of the cooperation to the court at sentencing if he had been aware of it. Finally, while agreeing with the *Doe* court that it was good public policy to "encourage courts to consider defendants who have been sentenced to continue their cooperation" and not provide a disincentive to contact law enforcement when they learn valuable information, the trial court concluded that the assistance provided by Scott did not warrant a modification of his sentence. Scott appeals.

DISCUSSION

¶11 Scott seeks sentence modification based upon the assistance he gave to law enforcement relating to Rodriguez and the triple homicide charge against him. We examined a substantially similar request in *Doe*. *Id.*, ¶1. A new factor is defined as 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.

A new factor must be an event or development that frustrates the purpose of the original sentence.

Id., ¶5 (citations omitted). The burden rests with the defendant to establish the existence of a new factor by clear and convincing evidence. *Id.*

¶12 We employ a two-step analysis when determining whether sentence modification is appropriate based on the existence of a new factor. *Id.*, ¶6. “First, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying a motion for sentence modification. If the defendant demonstrates the existence of a new factor, the trial court is then obliged to determine whether the new factor justifies modification.” *Id.* (citation omitted). This is a conjunctive test requiring the defendant to prevail on “both steps of the new factor analysis by proving the existence of a new factor and that it is one which should cause the trial court to modify the original sentence.” *Id.* “Whether a set of facts constitutes a new factor is a question of law that we review *de novo.*” *Id.*, ¶5. It is, however, within the trial court’s discretion whether sentence modification is warranted due to a new factor, *id.*, and we review the trial court’s determination under an erroneous exercise of discretion standard, *State v. Verstoppen*, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994).

¶13 In *Doe*, we adopted the factors set forth in § 5K1.1 of the UNITED STATES SENTENCING GUIDELINES MANUAL (2004) to assess whether the assistance provided to law enforcement constitutes a new factor. *Doe*, 280 Wis. 2d 731, ¶9. These factors are:

- (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.

Id.

¶14 Scott argues that his cooperation with law enforcement constitutes a new factor. The State argues that Scott's cooperation is insufficient to meet *Doe*'s requirement that to be a new factor, the assistance to law enforcement must be "substantial and important," which Scott's information and cooperation were not in that they did not lead to: (1) Rodriguez's arrest for the crimes (he was already charged with them); (2) Rodriguez pleading guilty prior to trial; or (3) Scott's testifying at Rodriguez's trial (where he was convicted).

¶15 After independently reviewing the record, we concur with the trial court's assessment of Scott's cooperation under the *Doe* factors and conclude that the cooperation does not constitute a new factor. There is nothing in the record to explain why Scott did not raise the issue at his sentencing or in previous postconviction motions. There was no testimony by his trial counsel that Scott informed him of this information and that trial counsel withheld it for any strategic reasons. The statements taken by law enforcement show that Scott had requested law enforcement's assistance at sentencing or future parole hearings, yet Scott made no mention of his involvement to the trial court until years later. The information that he did provide to law enforcement did not lead to an earlier resolution of the Rodriguez case, nor was his testimony necessary to convict Rodriguez. While we agree with the *Doe* court that it is good public policy to not provide disincentives for convicted individuals to cooperate with law enforcement when they learn of information which may assist in solving crimes, we see nothing in the information Scott provided that "frustrates the purpose of the original sentence." *See id.*, ¶5. At the time Scott provided the information to law enforcement, he had already been convicted of two counts of attempted first-degree intentional homicide of his mother and one of her foster children, armed

robbery of his mother, and false imprisonment for holding his mother and two of her foster children at gunpoint for hours. Scott provided the Rodriguez information to law enforcement two weeks before his sentencing hearing, yet he made no mention of it to the trial court at his sentencing hearing or in his postconviction motions. If Scott had considered this information significant enough to warrant his getting a shorter sentence—in his motion, he is requesting that his sentence for the armed robbery run concurrent with, rather than consecutive to, his attempted homicides sentences—he would have raised the issue at the time of his sentencing or in earlier postconviction motions. We also defer to the trial court’s determinations that it found Scott’s testimony at the hearing to be incredible. *See State v. Missouri*, 2006 WI App 74, ¶17, 291 Wis. 2d 466, 714 N.W.2d 595 (resolution of credibility issues must be determined by the factfinder).

¶16 The trial court, notwithstanding its new factor analysis under the *Doe* factors, went on to determine whether this new information warranted a modification of Scott’s sentence and concluded that it did not. In assessing Scott’s cooperation with law enforcement and the usefulness of the information he provided, the trial court weighed the incentive for Scott to provide the information, particularly at the stage of his trial that he did so, against the seriousness of the conduct for which he had just been convicted. After reciting the circumstances of the crimes for which Scott had been convicted, the trial court concluded that all of the same sentencing factors which were present at Scott’s original sentencing were still applicable even in light of this new information and it found that “it would be inappropriate and would unduly depreciate the seriousness of the offense, the conduct that [Scott] engaged in, and the need to protect the community from [Scott] to in any way modify the sentence.” The trial court applied the relevant

facts and the appropriate legal principles, and reached a rational decision. *See Southeast Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.*, 2007 WI App 185, ¶39, ___ Wis. 2d ___, 738 N.W.2d 87 (“[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.”).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

