COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2835-CR
2008AP2836-CR

Cir. Ct. Nos. 2004CF130
2004CF656

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT J. SPENCER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: ROBERT G. MAWDSLEY and RALPH M. RAMIREZ, Judges.[1] *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

[1] The Honorable Ralph M. Ramirez presided at the reconfinement hearing and entered the order for reconfinement. The Honorable Robert G. Mawdsley heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Vincent J. Spencer appeals from the order for reconfinement and the order denying his motion for sentence modification. He argues that he established the existence of new factors that warranted sentence modification, or alternatively, that the circuit court relied on inaccurate information when it sentenced him and imposed a sentence that was unduly harsh. We reject Spencer's arguments and affirm the orders of the circuit court.

¶2 In November 2004, Spencer pled guilty to three counts of burglary in two separate cases. The court sentenced him to concurrent sentences of three years of initial confinement and two years of extended supervision on all three counts. In March 2007, Spencer was released on extended supervision. A little less than one year later, his extended supervision was revoked because he left Wisconsin to go to Illinois without getting permission from his agent, and he stole things from a Kohl's Department Store. In addition, his "negative adjustments" to extended supervision included using crack cocaine twice, testing positive for THC, and refusing to take a breathalyzer test.

¶3 A reconfinement hearing was held before the Honorable Ralph Ramirez, the same judge who sentenced Spencer initially. The court concluded that Spencer had a "history of failure on supervision in the community," and noted that the Department of Corrections had done everything it could not to revoke him. The court then sentenced him to the maximum amount of time he had left on each case.

¶4 In August 2008, Spencer moved for sentence modification alleging the existence of two new factors. He argued that the State had dismissed the theft charge against him, and that his lab results while he was on extended supervision were ultimately found to be negative for illegal substances. In the alternative, he

argued that the court considered inaccurate information when it sentenced him, and his sentence was unduly harsh.

¶5 The circuit court, by the Honorable Robert Mawdsley, held a hearing on the motion and rejected it. The court determined that the dismissal of the theft charge was not an acquittal and, hence, was not a new factor; expressed doubt about whether the lab results would have made a difference because the sentencing court focused on Spencer's very poor record while on supervision; and found that the sentence was not unduly harsh.

¶6 On appeal, Spencer again argues that he alleged new factors that entitled him to sentence modification. Sentence modification is a two step process. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A defendant seeking sentence modification must first demonstrate that there is a new factor justifying the motion. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A new factor, as defined in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." Whether facts constitute a new factor is a question of law that may be decided without deference to the lower court's determination. ***Hegwood***, 113 Wis. 2d at 547. Once the defendant establishes the existence of a new factor, then the circuit court must determine whether the new factor justifies modification of the sentence. ***Id.*** at 546. The new factor must be "an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the

sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶7 Spencer argues that his case is similar to ***State v. Verstoppen***, 185 Wis. 2d 728, 519 N.W.2d 653 (Ct. App. 1994). In ***Verstoppen***, the circuit court determined that the fact that the appellant had been acquitted of the charge underlying his revocation of probation was a new factor. ***Id.*** at 735. The circuit court, nonetheless, determined that Verstoppen was not entitled to sentence modification because of other considerations, including its finding that Verstoppen continued to be a danger to the community. ***Id.*** We concluded that the circuit court properly considered the acquittal to be a new factor, and that it did not erroneously exercise its discretion when it refused to modify his sentence. ***Id.*** at 740-42.

¶8 Relying on ***Verstoppen***, Spencer argues that because the theft charge against him was dismissed, he has established the existence of a new factor that requires the court to modify his sentence. Spencer, however, overstates his case when he argues that the dismissal nullifies the underlying charge. The record demonstrates that the State decided to dismiss the theft charge in the interest of judicial economy. Unlike ***Verstoppen***, this was not a determination that Spencer was innocent of the crime. The State decided not to pursue the issue for reasons unrelated to Spencer's guilt. We conclude that this was not a ***Verstoppen*** case and that Spencer did not establish the existence of a new factor on this basis.

¶9 Spencer also argues that there is a second new factor because he went for an extended period of time on supervision without drug or alcohol violations. Spencer argues that the circuit court relied on incomplete information when it noted that he continued to have trouble on supervision. He specifically

argues that the information on which the court relied did not explain the circumstances under which he refused to take a breathalyzer test, nor did it note that he ultimately took the test, and the result did not show any alcohol. He also argues that the court considered a drug test that came back positive for THC, but the court did not know that he had not reported all the prescription drugs he was taking when he had a positive test for THC. A subsequent drug testing showed that he did not have any illegal drugs in his system.

¶10 We again conclude that Spencer did not establish the existence of a new factor. First, this information was not new because Spencer knew of it at the time of the reconfinement hearing. More importantly, however, even assuming it was a new factor, it did not frustrate the purpose of the reconfinement sentence. The court focused on Spencer's prior violations of supervision, his repeated criminal conduct and behavior, and his decisions not to follow the rules of supervision. Spencer does not contest that he had been revoked in the past, and in this case violated rules of supervision, including using crack cocaine and leaving the State without permission.

¶11 Spencer's second argument is that the court relied on inaccurate information when it considered the dismissed theft charge and the false positive drug test. "[I]n a motion for resentencing based on a circuit court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

¶12 First, there is nothing to support Spencer's argument that the theft charge was inaccurate. He was charged with the crime, and the State decided not

to prosecute the charge in the interest of judicial economy. As we have discussed, there was no determination that he had not committed the crime.

¶13 Second, Spencer has not established that the other information was inaccurate or that the reconfinement court relied on the information he claims was inaccurate. When hearing the motion for sentence modification, Judge Mawdsley questioned whether Spencer had established that there was, in fact, a false positive for THC. Spencer admits that he did not offer any expert opinion on this issue. Further, at the reconfinement hearing, the court did not mention Spencer's violation for using THC. The main basis for the reconfinement sentence was Spencer's history of failing to follow the rules of supervision, and repeated criminal activity. The court stated that "what I have seen is that every time you have supervision you fail." The court considered Spencer's entire record, and not just one incident. Consequently, we conclude that Spencer has not established that the reconfinement court relied on inaccurate information.

¶14 Finally, Spencer argues that the sentence imposed was unduly harsh, and the court did not consider mitigating factors, including that Spencer was adjusting well to supervision, and that he went to Illinois to get married. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised in a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d

535, 678 N.W.2d 197. We may find that the circuit court erroneously exercised its discretion in setting the length of a sentence when "the sentence is 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).

¶15 The court was entitled to sentence Spencer to all the time remaining on his sentence at the time his extended supervision was revoked. The court carefully explained its reasons, and the sentence the court imposed was within the maximum allowed. We conclude that the sentence was not harsh or excessive. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).