COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3137-CR **Cir. Ct. No. 2003CF1327**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER R. MCCLURE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Christopher R. McClure appeals from an order for reconfinement after his extended supervision was revoked and from an order denying his postconviction motion, in which he contended that the reconfinement

court failed to consider a new factor. We agree with the court that McClure's mental health history is not a new factor and was considered, but not given prime importance, at his initial sentencing and on reconfinement. We affirm.

¶2 In February 2004, McClure pled guilty to and was convicted of first-degree recklessly endangering safety for slashing a man with a butcher knife. The court imposed an eight-year sentence, bifurcated as two years of confinement and six years of extended supervision. He was released to extended supervision on December 13, 2005. Seventeen days later, he committed two armed robberies and, five days after that, a burglary. His extended supervision was revoked. The court reconfined him for the six years and two days remaining on his original sentence.

¶3 McClure filed a motion for postconviction relief. He claimed to have a significant mental health history that the court did not consider either at the original sentencing or at reconfinement. Since his history did not inform the original sentence, he argued, it was a new factor warranting sentence modification. The court rejected McClure's argument. McClure appeals, seeking modification of his reconfinement sentence.

¶4 On appeal, McClure again contends that his mental health history is a new factor. A "new factor" is a fact or set of facts highly relevant to the imposition of sentence, but that was not known to the trial judge at the time of original sentencing either because it did not then exist or the parties unknowingly overlooked it. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). It also must frustrate the purpose of the original sentence. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Defendants must establish the existence of a new factor by clear and convincing evidence. ***Id.*** at 97. Whether the information constitutes a new factor is a question of law. ***Id.***

¶5 McClure's mental health history is not a new factor. The same judge presided over the plea hearing, original sentencing, reconfinement and postconviction motion hearing. At the plea hearing, McClure told the court he had been treated with medications and a hospitalization, mainly for depression. The presentence investigation (PSI) report further detailed his mental health and drug-and-alcohol history. The prosecutor observed that McClure "had severe problems with depression [and] [t]here was also a mention of an oppositional disorder. I think that that is reflected in the prior reports, Judge."

¶6 The court itself noted McClure's "long history of threatening and belligerent behavior" and that his drug and alcohol use aggravated his violent and threatening predisposition. It acknowledged McClure's "difficult upbringing" marked by verbal and physical abuse, but found it "really very disturbing" and "very troubling that he's back … for something of the enormity of this crime … [where] life itself is in the balance." It concluded that a prison sentence was appropriate because "a message … needs to be sent loudly and clearly" for "this level of criminal activity." A sentencing court is required to consider the gravity of the offense, the character of the offender and the need to protect the public. *See* ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289.

¶7 We may treat the reconfinement proceeding as a continuum of the original sentencing hearing because the same judge presided over both. *See* ***State v. Brown***, 2006 WI 131, ¶21, 298 Wis. 2d 37, 725 N.W.2d 262. The court said it had revisited the PSI from the original sentencing, noting that in the butcher knife attack McClure had admitted yelling, "I'm crazy, I'll blanking kill you" and observing that "there's a reason for concern here." As an aside, we note that McClure himself did not raise his mental health history in his allocution.

Likewise, his counsel did not raise it as a mitigating factor, and McClure does not make a claim of ineffective assistance.

¶8 In its decision denying McClure's postconviction motion, the court stated that it had considered his mental health history at sentencing and reconfinement but gave it less weight than crime deterrence and protection of the public. It also rejected McClure's suggestion that giving that factor greater weight necessarily would have resulted in a more lenient sentence, due to the "extreme risk [McClure] poses to innocent persons." McClure has not established by clear and convincing evidence that the court sentenced or reconfined him while unaware of his mental health history, nor has he shown that the information frustrated the purpose of the original sentence. *See* ***Michels***, 150 Wis. 2d at 97, 99.

¶9 Next, McClure argues for the first time that the reconfinement court erroneously exercised its discretion by either not considering or giving insufficient weight to his mental health history. Not only is this issue waived, *see* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727, it has no merit. Suffice it to say that the reconfinement court did consider his mental health history. It also must consider a number of factors, including the nature and severity of the original offense, the amount of incarceration necessary to protect the public from the risk of further criminal activity, and the nature of the violation during extended supervision. *See* ***Brown***, 298 Wis. 2d 37, ¶34.

¶10 The court found McClure's criminal conduct "alarming," noting that he was on extended supervision only seventeen days when he took part "in these grotesque crimes." It again expressed concern about the kind of message leniency would send to others on extended supervision or probation, and observed that "the impact on others … is critical in the criminal court process. Sometimes it's the

most important factor to be considered by the judge." It is within the court's discretion to identify the general objectives of greatest importance, describe the circumstances and factors relevant to those objectives and to decide what weight to give the particular factors. *See* ***State v. Walker***, 2008 WI 34, ¶18, 308 Wis. 2d 666, 747 N.W.2d 673. We see no misuse of discretion.

¶11 Lastly, McClure argues, also for the first time, that the reconfinement sentence is unconstitutional because it is unduly harsh and constitutes cruel and unusual punishment. Again, issues not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. ***Huebner***, 235 Wis. 2d 486, ¶10. Furthermore, his constitutional argument was inadequately briefed, and is unsupported by applicable authority. We need consider it no further. *See* ***State v. Schaffer***, 96 Wis. 2d 531, 546, 292 N.W.2d 370 (Ct. App. 1980).

By the Court.—Orders affirmed.

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