COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP83-CR **Cir. Ct. No. 1993CF934454**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN JOSE CASTELLANO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Jose Castellano appeals *pro se* from an order that denied his motion for sentence modification. The circuit court concluded that his assistance to law enforcement, although arguably a new factor, did not warrant any relief from his sentences. We affirm.

BACKGROUND

¶2 In 1993, Castellano sexually assaulted his fourteen-year-old sister-in-law, and he made videotapes and took photographs of the victim during the assaults. In 1994, he pled guilty to two counts of second-degree sexual assault, three counts of sexual exploitation of a child, and one count of possessing child pornography. The circuit court imposed an aggregate fifty-two-year sentence. In 2000, he successfully moved to withdraw his guilty pleas. The parties then reached a plea bargain, and Castellano pled guilty to one count of second-degree sexual assault and three counts of sexual exploitation of a child. The circuit court imposed four consecutive ten-year sentences.

¶3 In 2004, the State began investigating an allegation that someone identified only as "Brother David" sexually assaulted Castellano's son, S.C., in the mid-1980's, when the boy was nine or ten years old. S.C. described a series of sexual assaults by "Brother David" in Milwaukee, and S.C. also described a visit to "Brother David" in Delaware.

¶4 In October 2004, Castellano submitted written statements to the State and to police regarding S.C.'s allegations about "Brother David." Castellano wrote that S.C. disclosed sexual assault at the hands of "Brother David" in approximately 1986, after Castellano allowed S.C. to visit "Brother David" at his home "in Delaware, or maybe it was Boston." According to Castellano, he elected not to contact the police after S.C.'s disclosure because "it was taboo … to accuse a member of the cloth of such a crime," and because "we wanted to put it behind us." These statements to law enforcement did not affect the course of the investigation of "Brother David."

¶5 In November 2004, S.C. viewed a photo array and identified David Sanders as "Brother David." The State charged Sanders with sexual assault.

¶6 While the case against Sanders was pending, Castellano wrote another letter and sent it to the State and to the F.B.I. He opined that Sanders was "the wrong man." Castellano wrote that the "Brother David" who assaulted S.C. was "assigned to St. Mathews or St. Lawrence Catholic Church" and that "in or about the [s]ummer of 1986," "Brother David" "offered to fly [S.C.] to New England." This letter did not lead investigators or prosecutors to another "Brother David." A jury found Sanders guilty of sexual assault in December 2006. The circuit court imposed a prison sentence in early 2007.

¶7 In April 2007, after Sanders was imprisoned, Castellano contacted an F.B.I. agent and enclosed a letter he had received from David Nickerson. Castellano included a copy of an envelope with a return address in Delaware and a postmark of January 24, 1989. In the letter, Nickerson discussed "getting to know [S.C.]" at "St. Casimir's," and Nickerson thanked Castellano for permitting S.C. to accept an invitation to come to Delaware for a visit. The record reflects that Castellano kept the letter in his box of "legal and important papers," where his mother discovered it in February 2007 after he asked her to search for documents substantiating S.C.'s airplane trip to visit "Brother David."

¶8 Police investigation after Castellano's disclosure of the 1989 letter led the police to Nickerson, who confessed in 2007 to sexually assaulting S.C. Sanders was released from prison in June 2007 on the State's motion. Nickerson pled guilty to sexual assault of a child.

¶9 Castellano asked the State to recommend that he receive a sentence modification as consideration for the information that he provided about the clergyman who molested S.C. The State declined.

¶10 Castellano nonetheless pursued a claim for sentence modification on the ground that he provided substantial assistance to law enforcement. The State opposed the claim, contending that the history of the proceedings against Sanders and Nickerson reflected that Castellano's information was belatedly offered and that his communications with law enforcement included misleading and incomplete facts. The State also reviewed the sentencing rationale identified by the circuit court in 2000 and argued that Castellano's actions in withholding and then disclosing the sexual assault of his son should not be deemed mitigating in light of Castellano's criminal history and the sentencing court's concerns. The State asked the circuit court to conclude that, under the totality of the circumstances, Castellano was not an appropriate candidate for a sentence modification. The circuit court denied Castellano any relief, and this appeal followed.

DISCUSSION

¶11 Castellano rests his claim for sentence modification on an alleged new factor. For purposes of sentence modification, 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 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.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quotation marks omitted).

¶12 A defendant alleging a new factor has the burden to show by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. The existence of a new factor alone does not, however, entitle a defendant to sentence modification. ***Id.***, ¶37. Rather, the decision to modify a sentence upon proof of a new factor lies in the circuit court's discretion. ***Id.*** "Thus, to prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***Id.***, ¶38. If a defendant fails to make an adequate showing as to one component of the analysis, the circuit court need not address the other. ***Id.***

¶13 "Whether a set of facts constitutes a new factor is a question of law that we review *de novo*." ***State v. Doe***, 2005 WI App 68, ¶5, 280 Wis. 2d 731, 697 N.W.2d 101. By contrast, we review with deference the circuit court's discretionary determination of whether a new factor warrants sentence modification. *See* ***State v. Verstoppen***, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994). We will sustain a discretionary decision if it is reasonably based on the facts of record and an appropriate application of the law. ***Id.*** Our role as an appellate court is to search the record for reasons to sustain a circuit court's discretionary decision. *See* ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

¶14 Castellano asked the circuit court to conclude that his assistance to law enforcement constitutes a new factor for which he should receive a "just reward." Assistance to law enforcement that is both substantial and important may constitute a new factor. *See* ***Doe***, 280 Wis. 2d 731, ¶1. The analysis of whether the claimed assistance constitutes a new factor includes consideration of five criteria: (1) the significance and usefulness of the assistance and the State's evaluation of the assistance rendered; (2) the truthfulness, completeness, and

reliability of the defendant's information or testimony; (3) the nature and extent of the assistance; (4) any injury or risk of injury incurred by the defendant or his family as a consequence of the assistance; and (5) the timeliness of the assistance. ***Id.***, ¶9.

¶15 Here, the circuit court concluded that Castellano's actions in producing the 1989 letter from Nickerson "arguably meets the criteria set forth in ***Doe*** for the 'new factor' test." The circuit court did not agree, however, that the new factor warranted sentence modification. In the circuit court's view, Castellano's actions were not sufficiently commendable to warrant "a reduction of his sentence given what he originally knew about the incident and his stated intention to keep quiet about it."

¶16 We question the circuit court's legal conclusion that Castellano "arguably" took actions that constitute a new factor. Indeed, his disclosures fully satisfied none of the criteria discussed in ***Doe***. His information was indisputably untimely. He knew in 1989 that Nickerson sexually assaulted S.C. but chose to say nothing to law enforcement about S.C.'s victimization until 2004. Moreover, Castellano's disclosures at that time were incomplete and not entirely accurate and did not add to the fund of information already available to prosecutors. When Castellano finally disclosed the name of the perpetrator in 2007, an innocent man had already been tried, convicted, and imprisoned for the offense. Further, nothing in the record suggests that Castellano or any of his family members were exposed to any risk of injury when he identified the elderly clergyman who sexually assaulted a small boy two decades earlier.

¶17 We need not, however, labor over the question of whether Castellano demonstrated the existence of a new factor as a matter of law because

the record supports the circuit court's exercise of discretion in refusing to modify Castellano's sentences. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on the narrowest possible ground). The circuit court could reasonably conclude that Castellano's 2007 identification of a child abuser first brought to his attention in 1989 was not "highly relevant to the imposition of sentence." *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

¶18 The sentencing court in 2000 discussed its purposes and goals in sentencing Castellano for sexually assaulting and exploiting a child and indicated that its primary concern was protecting children. The sentencing court explained that the laws against child abuse are intended "to send a message to John Castellano and all the children in our community and all the adults in our community. You cannot compromise the innocence and the childhood that those kids are entitled to." Further, the sentencing court took into account that Castellano took advantage of a child who was a member of Castellano's family. In the sentencing court's view, "that aggravates the seriousness of this offense because it puts you in a position of responsibility to [the victim]."

¶19 The sentencing court also fashioned the sentence in light of the risk that Castellano would reoffend. The sentencing court considered that Castellano's course of conduct in the case involved repeated victimization of a fourteen-year-old girl over nine months and that he previously had been convicted of two felonies. The sentencing court stated that, by Castellano's own admission, he was "a sex addict" who "can't get enough of sex and pornography, and that makes [him] a high risk [to] reoffend[]." Adding to the court's concern were Castellano's statements minimizing the severity of his conduct.

¶20 In light of the sentencing court's remarks, the State urged the circuit court to deny Castellano's motion for sentence modification because the aggregate forty-year sentence "was intended to reflect what the [sentencing] court considered necessary to protect the community." The circuit court agreed with the State and concluded that modification was not appropriate. The conclusion was reasonable, and we must sustain it. *See* ***Verstoppen***, 185 Wis. 2d at 741.

¶21 Sentence modification would reward Castellano for failing to report heinous offenses against S.C. when Castellano learned of them in 1989. Despite the special responsibility that he had to protect and defend his young son, Castellano covered up Nickerson's abuse and delayed disclosure for nearly two decades, providing useful information only when doing so might aid Castellano. As the circuit court explained, Castellano could have "done something about [the sexual assault] at th[e] time [it occurred], but declined to do so." Knowledge that a child has been sexually assaulted is not a rare coin to be secreted away and later exchanged for some personal benefit. The circuit court reasonably exercised its discretion by declining to encourage such behavior with the reward that Castellano seeks. Accordingly, we uphold the circuit court's decision. *See* ***id.***

¶22 Castellano complains, however, that the circuit court erroneously exercised its discretion by failing to address one of his arguments. Castellano contended that the State vindictively refused to support his motion for sentence modification as punishment for his success in withdrawing his original guilty pleas in this case. On appeal, he asserts that the circuit court did not respond to the contention. We disagree. The circuit court implicitly rejected the argument when it denied Castellano's motion. The circuit court clearly found that the State's opposition to the motion was legitimate and appropriate. We will not disturb that

finding. *See* ***State v. Mark***, 2008 WI App 44, ¶24, 308 Wis. 2d 191, 747 N.W.2d 727 (we accept implicit findings that are supported by the record).

¶23 Castellano raises three additional issues: (1) he complains that the State's circuit court brief in opposition to his motion included improper argument and constituted prosecutorial misconduct; (2) he contends that the circuit court that presided over the sentence modification proceedings should have recused itself because it earlier presided over Sanders's preliminary examination; and (3) Castellano asserts that he has completed sex offender treatment while in prison, and he characterizes this treatment as an additional new factor warranting sentence modification.[1] We reject these claims because Castellano did not present them to the circuit court.[2] We do not consider issues raised for the first time on appeal. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We affirm.

[1] Castellano's court filings are lengthy and often disjointed. We note the observations of one circuit court addressing another of Castellano's motions: "Castellano writes like an impressionist, lifting quotations out of transcripts and documents and published opinions, highlighting certain passages and stringing them together without explaining in a straightforward declarative sentence what I should conclude from them." Our review of Castellano's appellate brief in this case satisfies us that we have identified his contentions. To the extent that he may be able to suggest that he raised additional issues, we reject any such claims as amorphous and undeveloped. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

[2] To the extent that Castellano might be capable of locating in one of his circuit court submissions some suggestion that the State's circuit court brief contained improper argument, that the circuit court should have recused itself, or that his sex offender treatment is a new factor warranting sentence modification, we are satisfied that he failed to raise such issues with sufficient prominence that the circuit court understood that it was asked to decide them. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656.

By the Court.—Order affirmed.

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