COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

NOTICE

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3352-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY L. WILKINS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Corey L. Wilkins appeals from a judgment of conviction, upon a no-contest plea, for first-degree reckless homicide, party to a crime, and an order denying his postconviction motion for sentence modification.

Wilkins advances two arguments for review: (1) he contends that his co-defendants' lesser sentences, in conjunction with their affidavits minimizing Wilkins's role as an accomplice to the crime for which he was convicted, constitute new factors for sentence modification purposes; and (2) he maintains that the trial court erroneously exercised its discretion in denying his sentence modification plea. We reject both arguments and affirm.

While the facts underlying Wilkins's conviction are extensive, the following are dispositive to this appeal. On the evening of August 9, 1993, Wilkins and four friends—Henry Bland, Willie Wilson, Vernado Howard, and Deunagelo George—all co-defendants, waited in anticipation of retaliation against them for shootings occurring earlier that day. Meanwhile, Wilkins's friend, Demarco Groves, and approximately four other individuals arrived to complain that "Nate" Wilder had stolen one of their "chains." After three automobiles arrived at Wilkins's home, Bland, Nelson, Howard, and George proceeded to fire shots at the vehicles' occupants, fatally wounding Eric Lindsey and injuring Wilder. Wilkins attempted to fire, but his gun jammed. Thereafter, Wilkins, Bland, and Wilson traveled to Wilder's home, where Wilkins fired his gun three times. No injuries resulted.

Wilkins pleaded no contest to a charge of first-degree reckless homicide, party to a crime, for Lindsey's death. The trial court sentenced him to the maximum twenty-year prison term. Bland and Howard subsequently received eight-year, eleven-month and eight-year, five-month sentences, respectively. On November 18, 1994, Wilkins filed a motion for sentence modification pursuant to § 809.30, STATS. He asserted that because Bland and Howard had not been sentenced, his sentencing court could not be aware of Bland's and Howard's lesser sentences. Further, he supplied Bland's and George's affidavits which alleged that Wilkins played a limited role in the shooting. He argued that both of these facts were new factors which warranted a reduction of his sentence. Moreover, he claimed that the maximum twenty-year term was unduly harsh and excessive. The trial court denied the motion. Wilkins now appeals from both the judgment of conviction and order denying his postconviction motion.

Whether information constitutes new factors for sentencing is a question of law that we determine *de novo*. ***State v. Ralph***, 156 Wis.2d 433, 436, 456 N.W.2d 657, 659 (Ct. App. 1990). As such, we do not defer to the trial

court's conclusions. ***State v. Michels***, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989).

A new factor meriting sentence modification 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." ***Ralph***, 156 Wis.2d at 436, 456 N.W.2d at 659 (quoting ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975)). Wilkins contends that Bland's and Howard's lesser sentences satisfy the aforementioned new factor criteria. We disagree.

At sentencing, Wilkins's attorney stated: "Willie Wilson I understand received a fourteen year sentence ... And it's my understanding also that Henry Bland is going to receive a recommendation ... for ten years." In ***Ralph***, this court concluded that because a co-defendant's proposed sentence recommendation was enunciated at sentencing, this information was not "unknowingly overlooked by all the parties" and, thus, did not constitute a new factor in sentencing. ***Ralph***, 156 Wis.2d at 437-38, 456 N.W.2d at 659 (citation omitted). Similarly, in the present case, the trial court was well aware that Wilkins might receive a more severe sentence than either Bland or Howard. We deem the disparity between their respective recommended and actual sentences inconsequential for new factor purposes. *See* ***State v. Toliver***, 187 Wis.2d 346, 362-63, 523 N.W.2d 113, 119 (Ct. App. 1994) (disparity in sentences does not constitute new factor).

The post-sentencing affidavits of Bland and George, both purporting to minimize Wilkins's involvement in the crime, also cannot justifiably be deemed new factors. In ***State v. Vennemann***, 180 Wis.2d 81, 508 N.W.2d 404 (1993), the defendant's accomplices, after sentencing, proffered evidence alleging the defendant's limited culpability. ***Id***. at 98, 508 N.W.2d at 411. The Wisconsin Supreme Court held that "[w]hatever evidence [a] co-defendant may now present on the defendant's behalf, it is not newly discovered. Instead, it always existed and the defendant was always aware of its existence." ***Id***. (citation omitted). Likewise, the information in Bland's and George's affidavits should be construed to always have been known and, therefore, are not new factors. Indeed, a sentenced co-defendant "`who now seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose

by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial.'" *See* ***State v. Jackson***, 188 Wis.2d 187, 200, 525 N.W.2d 739, 744 (Ct. App. 1994) (discussing the dangers of using already sentenced codefendant's testimony as newly-available evidence) (citation omitted).

Wilkins next argues that the trial court erroneously exercised its discretion by failing to modify his sentence from the maximum twenty-year prison term. In reviewing the trial court's sentencing decision, we recognize that there exists a presumption of reasonableness on its behalf. ***Krueger v. State***, 86 Wis.2d 435, 444, 272 N.W.2d 847, 851 (1979). This presumption may be rebutted, and an erroneous exercise of discretion demonstrated, only if the trial court: (1) failed to declare, on the record, the material factors influencing its decision; (2) allocated too great of weight to one element in the face of contravening considerations; or (3) relied on irrelevant or immaterial factors. ***Harris v. State***, 75 Wis.2d 513, 518, 250 N.W.2d 7, 10 (1977).

A trial court may consider numerous factors when exercising its discretion in sentencing decisions, with the defendant's character, the gravity of the offense, and the need for public protection being chief among them. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). At Wilkins's sentencing, the court acknowledged and articulated these criteria: "When the Court sentences you ... [it] looks at the gravity of the offense, your character, and the risk you pose to the community." Hence, no erroneous exercise of discretion exists because the trial court discussed, on the record, the requisite factors.

Wilkins argues that, "given the large disparity in the [defendant's and his accomplices'] sentences and its mistaken belief as to Wilkins's role in this incident, the trial court's decision refusing to modify Wilkins'[s] sentence was not a thorough and reasoned exercise of discretion." We disagree. To reiterate, Bland's and George's affidavits, in which they minimized Wilkins's alleged role in the crime, are not new factors. Further, "[a] mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability." ***Toliver***, 187 Wis.2d at 362, 523 N.W.2d at 119.

Additionally, we conclude that Wilkins's sentence is not unduly harsh. A trial court possesses significant discretion to determine the length of a defendant's sentence within the permissible range set by statute. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). Although Wilkins's sentence was significantly greater than his co-defendants', the trial court fit the particular circumstances of the case to the individual characteristics of the defendant. *See* ***id***. In doing so, it cited Wilkins's extensive criminal record—much more significant than either Bland's or Wilson's—as being particularly dispositive. The sentence was wholly consistent with the aforementioned sentencing criteria's objectives and, as such, was not unduly harsh or excessive. *See* ***Toliver***, 187 Wis.2d at 363, 523 N.W.2d at 119.

In sum, we conclude that Wilkins's arguments are without merit and, accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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