

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 00-1459-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Mitchell appeals from a judgment of conviction and an order denying his motion for postconviction relief. Because we conclude that Mitchell's contentions lack merit, we affirm.

¶2 Mitchell was charged following an incident where he and codefendant Robert Ford were alleged to have severely beaten and robbed another man in the city of Kenosha.¹ Pursuant to the terms of a plea agreement, Mitchell entered no contest pleas to one count of substantial battery and one count of party to the crime of robbery contrary to WIS. STAT. §§ 940.19(3) and 943.32(1)(a) (1999-2000).² Under the plea agreement, the State agreed to dismiss two other charges, retained freedom regarding its sentencing recommendation with respect to the battery count, and agreed to recommend consecutive probation on the robbery count. The trial court, following the State's recommendation, sentenced Mitchell to five years' imprisonment on the battery count, imposed and stayed a consecutive five-year sentence on the robbery count, and placed Mitchell on probation for a period of ten years.

¶3 After Mitchell was sentenced, codefendant Ford was sentenced on one count of party to the crime of substantial battery. The trial court imposed and stayed the maximum sentence of five years. The court then placed Ford on probation for five years with the condition that he spend one year in the county jail, with Huber privileges, to enable him to receive alcohol, drug and psychiatric treatment as deemed necessary by his probation agent.

¶4 Mitchell filed a motion for postconviction relief seeking a modification of his sentence. He contends that the fact that Ford received a significantly lesser sentence on the charge of substantial battery was a new factor

¹ The victim stated that a third man was also involved in the beating, but was not apprehended.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that warranted a modification of Mitchell’s sentence. In the alternative, Mitchell argues that his sentence was unduly harsh and unconscionable. After hearing arguments from both sides, the trial court denied the motion for sentence modification. Mitchell appeals his judgment of conviction and the order denying his motion for postconviction relief.

¶5 A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). Thus, the first question we address is whether the fact that codefendant Ford received a significantly lesser sentence on the charge of substantial battery, despite Ford’s allegedly greater culpability and violent background, is, as Mitchell contends, a “new factor.” Mitchell points to the fact that Ford—not Mitchell—allegedly initiated the beating of the victim. He also notes that although Ford did not have an adult criminal record, his juvenile record was lengthy and violent.

¶6 Whether Mitchell has demonstrated the existence of a “new factor” is a question of law that we decide de novo. *See State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). 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.” *Id.* (citation omitted). A defendant must establish the existence of a new factor by clear and convincing evidence. *Id.* at 9-10. This standard promotes the policy of finality of judgments and satisfies the purpose of sentence modification, i.e., the correction of unjust sentences. *Id.* at 9.

¶7 Ford was sentenced after Mitchell, so the exact terms of Ford's sentence were obviously unknown to the trial court when it imposed sentence on Mitchell. However, at the hearing on Mitchell's postconviction motion, the trial court stated that it was "well aware at the time both these individuals were sentenced of the relative culpability of each one of them." A review of the sentencing transcript supports the trial court's finding on this point. Before imposing sentence on Mitchell, the trial court questioned counsel regarding the victim's and the witnesses' recollections of the defendants' relative participation in the beating. Because the trial court was aware of, and did not overlook, the information regarding codefendant Ford, it cannot be considered a new factor justifying a reduced sentence. See *State v. Kaster*, 148 Wis. 2d 789, 803, 436 N.W.2d 891 (Ct. App. 1989). We affirm the trial court's determination that there was no new factor in this case.

¶8 Mitchell also contends that his five-year prison sentence is unduly harsh and unconscionable, especially when compared to his codefendant's more lenient sentence on the same charge, such that the trial court misused its discretion in failing to modify Mitchell's sentence. Again, we disagree.

¶9 The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. *Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977); *Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977); *Rosado v. State*, 70 Wis. 2d 280, 291, 234 N.W.2d 69 (1975); *McCleary v. State*, 49 Wis. 2d 263, 274-76, 182 N.W.2d 512 (1971). Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an erroneous exercise of that discretion. This court has held that "such questions will be treated in light of a strong policy against interference with the discretion of

the trial court in passing sentence.” *Briggs v. State*, 76 Wis. 2d 313, 335, 251 N.W.2d 12 (1977) (citing *Ocanas v. State*, 70 Wis. 2d 179, 183, 233 N.W.2d 457 (1975)). In reviewing a sentence to determine whether or not discretion has been misused, the appellate court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. *Krueger v. State*, 86 Wis. 2d 435, 444, 272 N.W.2d 847 (1979); *Harris v. State*, 78 Wis. 2d 357, 371, 254 N.W.2d 291 (1977).

¶10 First, there is no contention that the trial court failed to consider the essential factors required before imposing sentence. Rather, Mitchell focuses on the fact that his codefendant received a more lenient sentence on the same charge. Mitchell assumes that he and his codefendant were similarly situated because they were charged in connection with the same incident. However, the trial court explicitly found that Mitchell and codefendant Ford were not similarly situated. The court noted the different ages and criminal histories of the defendants. Ford was seventeen years old and, despite an admittedly violent juvenile record, had no adult record at the time of sentencing. Mitchell, twenty-seven, had a prior adult record that included prison time. The court also noted that Mitchell was convicted and sentenced on two felonies, with a possible sentence of fifteen years, while Ford was convicted and sentenced on one felony with a maximum sentence of five years. The trial court concluded that Ford required extensive treatment for emotional, alcohol and possibly psychiatric problems and expressed concern about Ford receiving effective treatment in the prison system. In any event, while a sentence given to a similarly situated codefendant is relevant to the sentencing decision, *see State v. Ralph*, 156 Wis. 2d 433, 439, 456 N.W.2d 657 (Ct. App. 1990), it is not controlling.

¶11 Here, the record supports the trial court's finding that the codefendants were not similarly situated. The sentence imposed on Mitchell was consistent with the terms of his plea agreement and within the range established by statute. The trial court did not misuse its discretion in refusing to modify Mitchell's sentence.

By the Court.—Judgment and order affirmed.

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

