COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0713-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE D. JARDINE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: MICHAEL LUCCI, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Peterson and Dykman, JJ.

¶1 PER CURIAM. Jamie Jardine appeals an order denying his motion to modify or vacate a 1994 sentence for attempted first-degree intentional

homicide and four counts of first-degree sexual assault.[1] We construe the request to vacate the sentence in part as an effort to revive an October 25, 1996, motion for a new trial based on newly discovered evidence. That motion has never been heard or decided. We conclude that the trial court properly denied the motion to modify the sentence. However, we conclude that the true controversy regarding the alleged newly discovered evidence has not been heard. Therefore, in the interest of justice, we reverse the order denying the motion to vacate the sentence and remand for further proceedings.

¶2 In May 1996, this court affirmed Jardine's convictions and an order denying a 1995 motion for a new trial based on newly discovered evidence. While a petition for review was pending in the supreme court, the trial court received a letter allegedly from a police detective stating that he had altered the crime scene before photos were taken, removed several items that might indicate that acts of prostitution occurred at the crime scene, and coached a witness to withhold information. The letter confirms information presented to the trial court in the 1995 motion. Jardine's attorney filed a motion for a new trial based on the letter, but that motion was never heard. It was arguably renewed by Jardine's November 6, 2000, *pro se* motion and was implicitly denied when the trial court refused to vacate the sentence in its February 12, 2001, decision.

[1] After this matter was submitted to this court on briefs, Jardine filed a motion for voluntary dismissal without prejudice. Because this is not an appeal under WIS. STAT. RULE 809.30, the time for appealing cannot be extended. Therefore, any dismissal would be with prejudice. Because the motion requests relief that this court cannot provide, the motion is denied.

¶3 Because the 1996 motion was not timely under WIS. STAT. RULE 809.30[2] or under WIS. STAT. § 805.16(4) to qualify as a motion alleging newly discovered evidence, we construe it as a motion under WIS. STAT. § 974.06. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 251, 409 N.W.2d 432 (Ct. App. 1987). We also liberally construe Jardine's November 6, 2000 *pro se* motion as an attempt to renew the 1996 motion. *See* ***State ex rel. Terry v. Traeger***, 60 Wis. 2d 490, 496, 211 N.W.2d 4 (1973). While the issue was inartfully presented in the *pro se* motion, Jardine's brief did allude to the detective's falsified evidence. There is no deadline for deciding a motion under WIS. STAT. § 974.06, and the motion is not deemed denied as would be a motion under WIS. STAT. §§ 805.16(4) or 809.30(2). The 1996 motion remained open for more than four years for reasons that cannot be determined from the record before this court.

¶4 In the interest of justice, we reverse the order that implicitly denies the 1996 motion because the real controversy regarding the letter allegedly from the detective has not been heard. *See* WIS. STAT. § 752.35. The police misconduct alleged in the 1996 motion, combined with the allegations presented in the 1995 motion, go to the crux of the State's case. The new allegations appear to be particularly relevant to the sexual assault charges and are too important to be left unresolved. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 142, 327 N.W.2d 662 (1983).

¶5 The State argues that Jardine abandoned his motion by failing to ensure that it was heard and decided for more than four years. The trial court did

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

not deny the motion on that basis. Rather, it ignored the four-year-old pending motion. The record before this court does not establish any reason for the delay, and we cannot conclude that Jardine deliberately waived or abandoned the 1996 motion. Jardine's efforts to get a hearing on the motion, the reasons for not having a motion scheduled, the effectiveness of Jardine's attorney and issues relating to deliberate waiver or abandonment are fact-sensitive matters that cannot be resolved by this court. Therefore, we remand the matter to the trial court.

¶6 We affirm the denial of Jardine's motion to modify the sentence. Jardine did not establish any "new factors" that would justify a sentence reduction. To justify sentence modification, there must be some connection between the new factor and the sentencing that strikes at the very purpose of the sentence imposed. *See* ***State v Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). The detective's letter, the prosecutor's failure to turn over a medical report that was not in the State's sole knowledge or control, and the failure of the Department of Corrections to promulgate rules for release eligibility do not constitute new sentencing factors. The record does not show that the trial court relied on any of these factors when imposing the sentences. Therefore, changes in these factors do not frustrate the purpose of the sentences imposed. Jardine's sentences totaling sixty years are not so disproportionate to the offenses as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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