COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP2552-CR **Cir. Ct. No. 1999CF5988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE D. PRUDE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Terrance D. Prude, *pro se*, appeals the circuit court's order denying his motion seeking sentence modification. He argues there is a new factor justifying sentence modification. Alternatively, Prude argues he is

entitled to sentence modification in the interest of justice. We reject Prude's arguments on appeal and affirm the circuit court's order.

I. BACKGROUND

¶2 Because facts specific to Prude's underlying convictions have been set forth in prior decisions, we set forth only those facts relevant to the issues on appeal following remand.[1]

¶3 On September 16, 2008, more than six years after he was sentenced, Prude filed a motion for sentence modification based on a new factor. In his motion, he argued that the prosecutor had falsely informed the circuit court that Prude was responsible for making threatening calls to a victim of one of the armed robberies he was convicted of and that the circuit court had relied on this fact in sentencing him. The circuit court denied his motion without an evidentiary hearing, and Prude appealed. This court concluded that he was entitled to a hearing and remanded the matter, while maintaining jurisdiction over Prude's appeal.

¶4 In our remand order, we relayed the following:

> Prude pled guilty to five counts of armed robbery as party to a crime. *See* WIS. STAT. § 943.32(2) and 939.05 (1999-2000). Three additional felonies were dismissed and read in at sentencing. The trial court imposed five consecutive twenty-year sentences, staying the fifth sentence, in favor of a twenty-year probationary term.

[1] Prude's conviction was affirmed on appeal and he also unsuccessfully litigated a WIS. STAT. § 974.06 (2003-04) postconviction motion. *See* ***State v. Prude***, No. 04-554, unpublished slip op. (WI App. May 9, 2006); ***State v. Prude***, No. 07-1077, unpublished slip op. (WI App. July 3, 2007). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

At sentencing, Darlene M., the victim of one of the armed robberies, told the court that a person who identified himself as "Quan Rogers" had called her from the jail and told her that she should not testify. Darlene M. attributed the call to Prude, and she told the court she felt threatened by the call. She received several more calls, and police traced the calls back to Prude's "pod" in the jail. Darlene M. said that the last call "wasn't actually [Prude], but … somebody [else]" who told her "if [she] testif[ied] … he would kill [her]."

During her sentencing recommendation, the assistant district attorney described the telephone calls as "the ultimate in contempt," "appalling" and "clearly an aggravating factor." During its sentencing remarks, the trial court stated that its sentence included a "retribution aspect" and the victims' statements "weigh[ed] heavily" in its sentence. The court said: "The fact that one of the victims was contacted while this case was pending, whether it was by you or on your behalf, and told essentially not to testify was truly outrageous. It indicates, Mr. Prude, just how dangerous of an individual you are."

As noted, Prude moved for sentence modification based upon the presence of a new factor. Prude filed three affidavits in support of his motion. Dayon McIntosh averred that he made the threatening telephone calls to Darlene M. at the request of Darniel Johnson[2] and that Prude did not make any of the calls nor did he know that the calls were being made. Jamaica Wilson averred that McIntosh told him that McIntosh made the calls to Darlene M. at Johnson's request and that Prude was not aware of the calls. Prude averred that he did not make the calls to Darlene M., and that he did not know that she was being threatened. Prude averred that he was housed on the same jail "pod" as Johnson and McIntosh when the calls were placed. Prude further averred that, "[w]hile in Waupun prison," Johnson told him that he had asked McIntosh to make the phone calls.

[2] According to the criminal complaint, Darniel Johnson was a co-actor, with Prude and another man, in the carjacking of Darlene M.'s car.

¶5 On remand, the parties stipulated that Prude, Johnson, and McIntosh were all located in the same pod at the county jail when the calls were made, and the circuit court held evidentiary hearings at which the three testified.

¶6 Consistent with the averments in his affidavit, McIntosh took full responsibility for the threatening calls to Darlene M. and testified that he made the calls at Johnson's request. McIntosh testified that Johnson asked him to tell Darlene M. that he would kill her if she came to court and also, that she should not come to court because Johnson had "two kids on the way or something like that." McIntosh thought he was doing "a favor" for Johnson. He made "about two" calls to Darlene M. using the name Quan Rogers, which he made up. McIntosh further testified that he did not know Prude at the time and that Prude did not ask him to make the calls.

¶7 The State called Johnson to testify.[3] Johnson admitted meeting McIntosh while he was in custody at the county jail; however, he denied ever attempting to contact, or asking McIntosh or anyone else to contact, any witnesses or victims in the armed robbery cases with which he was charged. Johnson testified that he did not have any children or any children on the way, during the time when the calls were made. Johnson initially denied ever talking to Prude about the phone calls after being moved from the county jail to a different prison;

[3] After being asked three questions by the State, Johnson sought to invoke his Fifth Amendment right against self-incrimination. The State asked the circuit court to give Johnson immunity. Johnson, however, persisted in his refusal to testify. The court subsequently appointed counsel to represent Johnson during the hearing and to explain the Fifth Amendment implications of testifying under a grant of immunity. After conferring with his appointed counsel, Johnson decided he would answer questions during the hearing so long as he was afforded the opportunity to invoke his Fifth Amendment right if he was asked a question he was uncomfortable answering. Johnson did not subsequently seek to invoke his Fifth Amendment right; instead, he went on to answer all of the questions asked of him.

yet, on cross-examination, Johnson acknowledged telling Prude that in court, he would not admit to causing the calls to be made.

¶8 Prude testified that during a conversation he had with Johnson, Johnson admitted he was responsible for asking McIntosh to make the calls. According to Prude, Johnson refused to admit this either by coming to court or by submitting an affidavit. Prude went on to testify that he had one child and that this child was "on the way" during the time the threatening calls were made. In addition, he testified that his middle name is "Deshawn" and that he has never used the middle name of "Quan."

¶9 The circuit court denied Prude's sentence modification motion. In announcing its decision, the circuit court noted the conflicting testimony provided by the various witnesses and discrepancies in the testimony relating to the timing of the phone calls and statements purportedly made during the calls. Among other things, the circuit court accounted for McIntosh's ten convictions when assessing his credibility, the purported timing of the calls, which it deemed at odds with Prude's version of events, and Johnson's express denial of any involvement in the calls. The circuit court stated:

> [W]hile I do find it is certainly in the realm of possibility that someone other than Mr. Prude made those calls, the burden on the moving party here is to present this Court clear and convincing evidence, and I do not find it at all clear and convincing that someone else other than Mr. Prude had made calls to this victim in Mr. Prude's case or had coerced anyone else to do so. I think there are facts in the record that undermine that position.

¶10 We subsequently ordered the parties to submit briefs addressing the merits of this ruling, and this appeal follows.

II. ANALYSIS

¶11 The basis for Prude's motion for sentence modification is that he did not make threatening calls to Darlene M.

¶12 Sentence modification is warranted where a defendant establishes (1) that a new factor exists and (2) that the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). This court reviews without deference the question of law of whether the facts constitute a new factor. ***Id.*** If a new factor is established, the question of sentence modification is addressed to the circuit court's discretion. ***Id.***

¶13 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). In addition, a new factor "must be an event or development [that] frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). "A defendant bears the burden of proving the existence of a new factor by clear and convincing evidence. Erroneous or inaccurate information used at sentencing may constitute a new factor if it was highly relevant to the imposed sentence and was relied upon by the trial court." ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656 (citations and internal quotation marks omitted).

¶14 While maintaining that he satisfied the clear and convincing standard, on appeal, Prude nevertheless asserts that this is not the proper standard

under the circumstances presented. Citing ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, he contends that the proper standard is "actual reliance" because he is making a due process claim. *See* ***id.***, ¶¶9, 26 (A defendant has a due process right to be sentenced on the basis of accurate information and may seek resentencing upon a showing that the sentencing court actually relied on inaccurate information.). On remand, however, Prude did not argue that the correct standard was actual reliance. Rather, the record reveals that the parties and circuit court agreed on the clear and convincing standard. Because this court will not consider matters raised for the first time on appeal, we do not consider this argument further. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶15 After listening to the testimony of McIntosh, Johnson, and Prude, the circuit court made credibility determinations and found that Prude did not meet his burden of proving by clear and convincing evidence that someone else either made or instigated the calls. Where there is conflicting testimony, the circuit court is the ultimate arbiter of the credibility of witnesses. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Id.*** Accordingly, we defer to the circuit court's assessment of the witnesses' credibility.

¶16 Although Prude argues that he is entitled to sentence modification in the interest of justice, we are not convinced. *See generally* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (We will exercise our discretionary reversal power only sparingly.). There is support in the record for the court's findings and

subsequent refusal to modify Prude's sentence; as such, we will not overturn its decision on appeal.[4]

By the Court.—Order affirmed.

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

[4] In closing, we note that the record belies Prude's argument that the circuit court forced Johnson to speak after Johnson invoked his Fifth Amendment right against self-incrimination. *See* note 3, supra.

We further note that Prude's reference to a conversation he had with Johnson after Johnson testified during the evidentiary hearing is improper as that conversation is not part of the appellate record. *See* WIS. STAT. RULE 809.19(1)(e) ("The argument on each issue is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and *parts of the record relied on*.") (emphasis added); *see also* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) ("Assertions of fact that are not part of the record will not be considered.").