

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP31-CR

Cir. Ct. No. 2008CF3218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE T. HUNTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Antoine T. Hunter appeals from a judgment of conviction and an order denying postconviction relief. The only question presented is whether the circuit court erroneously rejected Hunter's claim that a new factor warrants sentence modification. We affirm.

BACKGROUND

¶2 Hunter had a fight with his girlfriend, Tanszar Veal. As a result, Veal required thirty-two stitches to her face and ear. At trial, Veal claimed that Hunter attacked her in her apartment with a knife and a beer bottle and prevented her daughter from calling for help. Veal also testified that after she and her children ran from the apartment, she observed Hunter leave the scene in her truck. Hunter claimed that he acted in self-defense during the fight, but admitted that he took Veal's truck without permission.

¶3 A jury acquitted Hunter of substantial battery and false imprisonment but convicted him of operating a motor vehicle without the owner's consent. At sentencing, Hunter conceded his status as a habitual offender based on a prior felony conviction. He faced maximum statutory penalties of ten years of imprisonment and a \$10,000 fine. *See* WIS. STAT. §§ 943.23(2), 939.50(3)(h), and 939.62(1)(b) (2007-08).¹ The circuit court imposed a five-year sentence, bifurcated as three years of initial confinement and two years of extended supervision.

¶4 Hunter moved for postconviction relief on the ground that a new factor warranted sentence modification. Hunter asserted that the circuit court's sentencing remarks reflect an erroneous belief that he took Veal's truck while Veal remained in the apartment. In fact, he argued, the trial testimony established that Veal and her children left the apartment before he did. The circuit court

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

determined that Hunter misconstrued its statements and denied the motion. Hunter appeals.

DISCUSSION

¶5 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 ... it was unknowingly overlooked by all of the parties.” *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Additionally, the 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). The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *State v. Koeppen*, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. We apply a two-part standard of review.

Whether a new factor exists is a question of law, which we review *de novo*. “The existence of a new factor does not, however, automatically entitle the defendant to relief.” The question of whether the sentence warrants modification is left to the discretion of the circuit court. We will not overrule that decision unless the court’s discretion was erroneously exercised.

State v. Trujillo, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933 (italics added, citation omitted).

¶6 Hunter focuses on sentencing remarks that, in his view, reflect the circuit court’s belief that he left the apartment while Veal and her children remained inside:

[y]ou and Miss Veal have a disagreement And you storm out, get [in] the car, and walk away, or drive away. And that’s car theft And you’re punished for that. And that punishment is of a whole different order of magnitude

than if you walk out and get in that car and drive away when you leave somebody bleeding as badly as she's bleeding with kids in hysterics. These kids that you say that you have raised as your family, running from those circumstances is a whole different kind of crime [F]or you to go off and drive away and turn your back on the whole thing just speaks volumes about the fact that you have a stone for a heart

....

[T]he way you responded was, basically, to turn your back on this suffering. So that's aggravated.

Because the evidence at trial showed that Hunter left the residence after it was vacated by the other occupants, he asserts that sentence modification is warranted.

¶7 The circuit court clarified its sentencing remarks in its postconviction order. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has additional opportunity to explain its sentence when challenged by postconviction motion). The circuit court first indicated that it knew at the time of sentencing that “Veal was not in [Hunter’s] presence bleeding ... when [Hunter] turned to flee.” The court then said:

[w]hen I referred to Mr. Hunter ‘running from those circumstances’ and ‘turning [his] back on the whole thing,’ I was referring not simply to leaving the apartment itself, but instead to leaving the entire premises and leaving behind people he claimed as his *family* without making any attempt to help them. He presents no evidence to suggest that he looked for them to help them after they fled the apartment, that he called for medical assistance for them, that he tried to care for any of the children, that he asked others to care for them, or that he took any step to assure himself that all of them, or any of them, were safe. He presents no persuasive evidence that he returned to the scene or otherwise followed up to make certain that they were safe. (Emphasis in original.)

¶8 The circuit court thus explained that it spoke figuratively when it referred to Hunter “turning his back,” “running from the circumstances,” and

leaving others behind. The circuit court's explanation is supported by the record. The circuit court used idiomatic and metaphorical language throughout the sentencing hearing; as noted, the circuit court described Hunter's actions as "speaking volumes" and Hunter himself as having "a stone for a heart." The circuit court's figures of speech are not clear and convincing evidence that the circuit court overlooked or was unaware of Veal's location when Hunter took her truck. See *Kluck*, 210 Wis. 2d at 7.

¶9 Hunter also has not satisfied his burden to demonstrate that Veal's precise location when he took the truck was material to the purposes of the original sentence. See *Michels*, 150 Wis. 2d at 99. The circuit court selected punishment and protection of the community as the primary sentencing goals and identified Hunter's character as the most significant factor in reaching the sentencing decision. See *State v. Gallion*, 2004 WI 42, ¶¶41-42, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring the circuit court to explain the sentencing objectives and to describe the facts relevant to those objectives). The circuit court emphasized Hunter's failure to show any empathy for Veal and reminded him that he "kick[ed] somebody [who was] down" by taking Veal's vehicle when she needed medical treatment and had children in her care. The circuit court described Hunter as having a "heartlessness problem" that "is a real concern." In the circuit court's view, Hunter's decision to take the truck "says something about [his] willingness to do the wrong thing ... without regard to the effect it has on other people."

¶10 The circuit court also noted Hunter's substantial criminal history spanning nearly fifteen years, and the court pointed out that Hunter committed the offense in this case while serving a term of community supervision for another crime. The circuit court determined that Hunter presented a substantial risk of

reoffending and concluded that a five-year sentence was “the minimum amount of time that [Hunter] need[ed] to serve in order to be adequately punished and in order to protect the community.” These considerations are not affected by whether Veal was in the apartment bleeding or whether, as she testified, she and her children were in the street asking for help from passersby at the exact moment when Hunter drove away with her transportation. Accordingly, the circuit court did not err by refusing to modify Hunter’s sentence.²

By the Court.—Judgment and order affirmed.

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

² 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. *State v. Tiepelman*, 2006 WI 66, ¶¶9, 26, 291 Wis.2d 179, 717 N.W.2d 1. Resentencing, however, may pose a risk to defendants that sentence modification does not entail, because, in resentencing, the circuit court approaches the sentencing process anew and “is not required to defer to the original sentencing objectives.” *State v. Wood*, 2007 WI App 190, ¶6, 305 Wis. 2d 133, 738 N.W.2d 81. We do not lightly construe a motion for sentence modification as a request for resentencing. See *id.*, ¶¶15-17. In this case, Hunter did not base his claim for relief on a stated due process violation nor did he ask to be resentenced. Rather, he limited his claim to one for sentence modification on the ground that the allegedly inaccurate information he identified constitutes a new factor. Accordingly, we do not consider whether due process concerns are implicated. See *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (we will not develop a party’s arguments).

