COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2822-CR **Cir. Ct. No. 2004CF4134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMANUEL ROVON HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Emmanuel Rovon Hamilton, *pro se*, appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06

(2009-10).[1] He argues: (1) that he is entitled to sentence modification based on a new factor; and (2) that his right to equal protection under the law was violated. We affirm.

¶2 Hamilton first argues that the disparity between his sentence and the sentences of his co-defendants is a "new factor" entitling him to sentence modification. Hamilton received an aggregate term of twenty-five years of initial confinement on four counts of armed robbery, one count of first-degree reckless injury, and one count of first-degree recklessly endangering safety. His three co-defendants received aggregate initial confinement terms of twenty-three years, twenty years, and eighteen years, respectively.

¶3 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***Id.***, ¶36. First, the defendant must "demonstrate by clear and convincing evidence the existence of a new factor," which is a question of law. ***Id.*** Second, if a new factor is present, the circuit court must determine "whether that new factor justifies modification of the sentence." ***Id.***, ¶37.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The State argues that prior cases have established that a disparity in sentences between co-defendants does not constitute a new factor, citing ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524 (overruled in part), which relies on ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994). ***Toliver*** explains that a disparity in co-defendants' sentences is not a new factor, in the absence of an expressed desire for parity, because "the disparity [does] not frustrate the sentencing court's original intent when it imposed … sentence." ***Id.*** at 362.

¶5 After the State filed its brief in this appeal, the supreme court issued ***Harbor***, cited above, which held that the new factor test had been incorrectly modified over time by cases that improperly added the additional requirement that the new factor must "'frustrate[] the purpose of the original sentencing.'" ***Id.***, 333 Wis. 2d 53, ¶41 (citation omitted). The supreme court clarified "that frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." ***Id.***, ¶48. The supreme court withdrew any language from cases that suggested "an additional requirement that an alleged new factor must also frustrate the purpose of the original sentence." ***Id.***, ¶52. Based on ***Harbor***, the reasoning of ***Toliver*** and ***Crochiere*** on this point is no longer valid.

¶6 Even though ***Toliver*** and ***Crochiere*** are no longer good law for the proposition cited by the State—that a disparity in sentences between co-defendants is not a new factor because it does not frustrate the purpose of the original sentence—we nevertheless conclude that Hamilton has not shown the existence of a new factor. A "new factor" is "'a fact or set of facts highly relevant to the imposition of sentence.'" ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). The disparity between Hamilton's sentence and that of his co-defendants was not

highly relevant to the imposition of Hamilton's sentence. The circuit court mentioned Hamilton's co-defendants only briefly when sentencing Hamilton, explaining his co-defendants told the police that Hamilton had said "I had to pop the bitch" after he shot one of the victims. The circuit court pointed to this as evidence of Hamilton's callous disregard for the victims. Beyond this reference to Hamilton's co-defendants, the circuit court did not mention them at all in imposing Hamilton's sentence, much less suggest that their relative culpability was important to the sentence it was imposing on Hamilton.[2] The circuit court based its lengthy sentence on the need to protect the community from Hamilton's violent conduct and on Hamilton's substantial need for rehabilitation. The circuit court's sentencing remarks show that the disparity in the sentences received by Hamilton and his co-defendants was not "highly relevant to the imposition of the sentence," and thus was not a "new factor" entitling Hamilton to resentencing.

¶7 Hamilton next argues that his right to equal protection was violated because he received a longer sentence than his co-defendants. "[A]ny claim that could have been raised on direct appeal or in a previous Wis. Stat. § 974.06 … postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason." ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756 (footnote omitted); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

[2] One of Hamilton's co-defendants was sentenced prior to Hamilton, and two were sentenced after Hamilton. All were sentenced before Hamilton filed his first postconviction motion.

¶8 Hamilton failed to raise his equal protection claim during prior proceedings. Hamilton was convicted in 2005. His appointed appellate counsel filed a no-merit appeal, but Hamilton chose to proceed *pro se* and voluntarily dismissed the appeal. Hamilton filed a motion for postconviction relief, which was denied. He filed a supplemental motion for postconviction relief, which was also denied. He then filed a direct appeal, in which we affirmed the judgment of conviction and orders denying postconviction relief. After his direct appeal, Hamilton filed a postconviction motion to vacate the DNA surcharge imposed on him, which was also denied. Hamilton did not raise the claim that his right to equal protection was violated during any of these prior proceedings. Hamilton contends that his appointed appellate counsel's failure to raise this issue instead of filing the initial no-merit appeal was a sufficient reason for his failure to raise his equal protection argument sooner, but Hamilton has not explained why he did not raise the issue *himself* in the subsequent proceedings during which he was proceeding without an attorney's assistance. Therefore, we conclude that Hamilton's claim that his equal protection rights were violated is subject to the procedural bar of ***Escalona-Naranjo***.

By the Court.—Order affirmed.

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