COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP55-CR **Cir. Ct. No. 2009CF3221**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMEON DIMARIO HIGHSHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dameon Dimario Highshaw appeals the judgment of conviction for first-degree recklessly endangering safety, use of a dangerous weapon, as a party to a crime, conspiring to commit bribery of a witness, and conspiring to commit obstruction of justice. *See* WIS. STAT. §§ 941.30(1),

939.63(1)(b), 939.05, 939.31, 946.61(1)(a), & 946.65(1) (2011-12).[1] Highshaw also appeals the orders denying his postconviction motion for a ***Machner*** hearing and for sentence modification. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (1979). Because Highshaw's trial counsel was not ineffective and because sentence modification is not warranted, we affirm.

BACKGROUND

¶2 Highshaw was charged with the following counts: (1) first-degree recklessly endangering safety, use of a dangerous weapon; (2) possession of a firearm by a felon; (3) conspiring to commit bribery of a witness; (4) conspiring to commit bribery of a witness; and (5) conspiring to commit obstruction of justice. He ultimately pled guilty to count one as a party to a crime, and counts three, and five as charged in the complaint. Count two was dismissed but read in.

¶3 At the end of the plea hearing, neither the State nor Highshaw requested a presentence investigation (PSI) report.

¶4 Prior to the sentencing hearing in this case, Highshaw was convicted in federal court of conspiracy to possess within intent to deliver fifty grams or more of cocaine and was serving a 78-month sentence.

¶5 The circuit court sentenced Highshaw to eight years in prison on count one (four years of initial confinement and four years of extended supervision) consecutive to his federal sentence, four years on count three (two

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. Although the charges in this case date back to 2008, the versions of the statutes in effect at that time are the same as the current versions.

years of initial confinement and two years of extended supervision), and three years on count five (one year of initial confinement and two years of extended supervision). The sentences on counts three and five were concurrent to Highshaw's sentence on count one.

¶6 Highshaw filed a postconviction motion arguing that his trial counsel was ineffective for failing to request a PSI report. In the postconviction motion, Highshaw further asserted that his sentence should be modified so that his sentence on count one would run concurrently with his federal sentence, rather than consecutively. He claimed the circuit court was not fully aware of his federal sentence at the time of his sentencing in this case and submitted that the court should consider the changes he made to his character and lifestyle as a new factor. Additionally, Highshaw argued that his sentence was unduly harsh because the circuit court did not consider his cooperation with state and federal authorities.

¶7 The circuit court issued a decision and order partially denying Highshaw's postconviction motion. The court ruled that during the sentencing hearing, it was fully aware of the information raised by Highshaw.

¶8 Highshaw's postconviction motion originally included an argument for ineffective assistance of counsel based on trial counsel's failure to suppress all of Highshaw's electronically recorded phone calls. This part of the motion was not decided in the circuit court's initial decision and order. Highshaw subsequently withdrew this argument and the court issued an order denying the remainder of his postconviction motion.

DISCUSSION

A. Ineffective Assistance of Counsel

¶9 Highshaw argues that this court should order a ***Machner*** hearing to determine whether his trial counsel was ineffective for not requesting that the circuit court order a PSI report. According to Highshaw, a PSI report would have provided greater detail for the circuit court regarding his cooperation with law enforcement and would have revealed that he "had made improvements to his lifestyle and began acting as a mentor [to] at[-]risk youth in jail about the negative consequences of a life of drugs and crime." Highshaw submits that this information was necessary for the circuit court to have "the full picture" at his sentencing.

¶10 A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a right to a ***Machner*** hearing. ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. A two-part test is applied upon review of a circuit court's denial of an evidentiary hearing. ***Id.*** This test requires a mixed standard of review. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). First, we must determine whether the motion on its face alleges sufficient facts which would entitle the defendant to relief. ***Id.*** This is a question of law that we review *de novo*. ***Id.*** Second, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny the motion without a hearing. ***Phillips***, 322 Wis. 2d 576, ¶17. This decision will only be reversed if the court erroneously exercised its discretion. ***Id.***

¶11 To allege sufficient facts, the defendant must show that counsel's performance was deficient, and that he or she was actually prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The

court need not examine both components if the defendant makes an insufficient showing in one. ***Id.*** at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed." ***Id.*** To prove actual prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. A reasonable probability is sufficient to undermine confidence in the outcome. ***Id.***

¶12 Highshaw argues that his trial counsel's decision not to request a PSI report "made it impossible for the trial judge to fashion an appropriate sentence by considering all relevant and available information." He claims he was prejudiced by the omission of key information that would have been beneficial during the sentencing hearing. We disagree with Highshaw's conclusion as to prejudice.

¶13 Requesting a PSI report is not the only way that a defendant can present potentially mitigating information to the court. "[I]t behooves an attorney to investigate possible mitigating factors and to bring them to the attention of the court. Doing so may involve requesting the court to order a PSI, commissioning a sentencing memorandum, or defense attorneys conducting their own investigation." ***State v. Harbor***, 2011 WI 28, ¶68, 333 Wis. 2d 53, 797 N.W.2d 828. Here, Highshaw's trial counsel prepared a sentencing memorandum. The memorandum detailed Highshaw's cooperation with the law and described Highshaw's mentoring efforts. Supporting documentation from law enforcement was also submitted in advance of Highshaw's sentencing, which further highlighted Highshaw's cooperation. Consequently, we agree with the circuit court's conclusion, as set forth in its decision and order denying Highshaw's postconviction motion: "Counsel cannot be deemed to be ineffective for failing to request a presentence report that would include this information because *all of the*

information the defendant now claims was not considered was, in fact, presented and considered by the court." (Emphasis added.) *Cf.* ***id.***, ¶¶75-76 (concluding that defendant was not prejudiced by counsel's failure to present sentencing memorandum).

¶14 The circuit court properly denied Highshaw's motion without holding a ***Machner*** hearing.

B. Sentence Modification

¶15 Next, Highshaw argues that his sentence should be modified. According to him, the circuit court "was not fully aware" of his federal sentence, his previous cooperation with authorities, and the dramatic changes he made to his character and lifestyle. As such, he seems to contend that these details amount to new factors. The record refutes Highshaw's new-factor argument.

¶16 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."

Harbor, 333 Wis. 2d 53, ¶40 (citation omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. Whether a new factor exists is a question of law, but whether a sentence should be modified based on a new factor is a discretionary decision for the circuit court. ***Id.***, ¶¶36-37.

¶17 We first address Highshaw's assertion that the circuit court was not fully aware of his federal sentence. The unsealed portion of the sentencing

transcript reveals that the State advised the court as to Highshaw's federal sentence when it was detailing his criminal history.[2] Specifically, the prosecutor stated:

> And then his most recent conviction is in Federal court and that was in 2009 that the case arose, conspiracy to possess with intent to deliver 50 grams or more of cocaine; he was indicted; he pled guilty on April 19th, 2011, and was sentenced to 78 months in Federal prison, and he's serving that now.

It is unclear to this court what additional information Highshaw thinks was needed for the circuit court to be fully aware of the federal sentence.

¶18 As to Highshaw's previous cooperation and the changes to his character and lifestyle, the following is set forth in Highshaw's brief:

> At the time of sentencing, [Highshaw's trial counsel] informed the Court that Highshaw had been cooperating with the police for over three (3) years and met with law enforcement on several occasions for numerous debriefings. During the debriefings not only did Highshaw discuss his own role with regard to the crimes he was charged for, he also gave information about other Federal defendants, including one who was under indictment at the time.
>
> During the sentencing hearing, [Highshaw's trial counsel] called an FBI Agent to testify regarding Highshaw's cooperation and the quality of information given. The FBI Agent stated on the record that not only did Highshaw provide long and detailed debriefings, he also provided the Bureau with credible information.
>
> During the sentencing hearing, [Highshaw's trial counsel] also called a Milwaukee County Detective to testify. The detective indicated that Highshaw had been very cooperative and very willing to give information. This

[2] Portions of the sentencing hearing transcript were ordered sealed due to the sensitive nature of the testimony offered regarding Highshaw's cooperation with law enforcement.

> witness also believed that information given by Highshaw was found to be truthful, and even gave Highshaw a score of ten (10) on a scale from one (1) to (10), with ten (10) being the quality of assistance provided by Highshaw.

(Record citations omitted.) During the sentencing hearing, the circuit court also heard about Highshaw's mentoring efforts.

¶19 Again, in light of the forgoing, this court is at a loss as to what exactly Highshaw is arguing as a new factor. This argument fails.

¶20 Highshaw goes on to argue that even if we conclude no new factors were presented, the circuit court should have modified his sentence because it is unduly harsh or unconscionable. *See* ***id.***, ¶35 n.8 (A circuit court has the authority to modify a sentence when it determines that the sentence was "unduly harsh or unconscionable.").

¶21 A sentence is unduly harsh if it is "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). "'A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.*** (one set of brackets and citation omitted).

¶22 As the State points out, it is not clear what Highshaw finds to be unduly harsh or unconscionable about his sentence; instead, it appears he is dissatisfied with how the court weighed mitigating factors. We reject this argument. *See* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d

197 (weight given to sentencing factors is within trial court's discretion). Highshaw's sentence was neither unduly harsh nor was it unconscionable.

By the Court.—Judgment and orders affirmed.

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