COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3508-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAREESE ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

DYKMAN, P.J.[1] Mareese Anderson appeals from a judgment convicting him of battery while armed and from an order denying his postconviction motion for sentence modification. Anderson argues that the trial court erred in denying his motion because: (1) the court failed to recognize his

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

Chapter 51, STATS., commitment as a "new factor"; (2) the court failed to consider his postconviction schizophrenia diagnosis as a "new factor"; and (3) the court based its denial on facts not fairly inferable from the record. We conclude that Anderson's involuntary commitment and schizophrenia diagnosis were not "new factors" that warranted sentence modification and that the court properly denied sentence reduction based on findings inferable from the record. Therefore, we affirm the trial court's order.

BACKGROUND

In September 1995, Anderson pleaded guilty to battery while armed and was placed on two years' probation. On October 9, 1995, he was arrested for a second armed disturbance. On November 8, 1995, the court ordered that Anderson be confined to the Rock County Health Care Center for a psychiatric evaluation as a condition of probation. On November 22, 1995, Anderson was discharged from the health care center and returned to jail for inappropriate sexual behavior and engaging in altercations with health center staff. In February 1996, due to these offenses, the Department of Corrections revoked Anderson's probation and the court sentenced him to fifteen months in prison.

Anderson was again admitted to the Rock County Health Care Center on July 25, 1996. On August 2, 1996, Dr. Paul Frechette examined Anderson for the court pursuant to commitment proceedings and concluded that Anderson suffered from paranoid schizophrenia and cocaine abuse. On August 6, 1996, the court committed Anderson for six months to the custody of the Rock County § 51.42, STATS., Board with placement authorized at a psychiatric hospital. Anderson received inpatient treatment and medication to control his

schizophrenia while at Rock County Health Care Center. He was released under supervision on August 26, 1996.

Anderson filed a motion in the circuit court requesting sentence modification on the basis that his newly-diagnosed schizophrenia and his involuntary commitment were "new factors" that frustrated the court's purpose for imposing his prison sentence. After a hearing, the trial court concluded that no "new factors" existed and denied his motion. Anderson appeals.

DISCUSSION

First, Anderson argues that his involuntary commitment to the Rock County § 51.42 Board is a "new factor" that warrants sentence modification because the commitment frustrates the court's purpose for imposing sentence. That purpose, he notes, was declared when the court pronounced his sentence: "I think that based upon your conduct here, that if I don't do something to protect the public, I think somebody is going to get hurt here, and it's the judgment of the Court that you be sentenced to a term of 15 months in the Rock County Jail ...."[2] Anderson argues that his commitment, which involved diagnosis, treatment, medication and monitoring, is a more effective means to protect the public than confinement. Therefore, he claims, it is a "new factor" that frustrates the court's purpose for putting him in jail.

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

[2] The court later amended Anderson's sentence to confine him to Wisconsin State Prisons rather than the Rock County Jail.

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, 73 (1975). "[A] 'new factor' must be an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). A defendant must demonstrate the existence of a "new factor" by clear and convincing evidence. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611 (1989). Whether a "new factor" exists is a question of law that we review *de novo*. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399, 401 (1983).

Anderson has not demonstrated by clear and convincing evidence that his involuntary commitment frustrates the purpose of his original sentence. The court imposed Anderson's original sentence in February 1996 to protect the public from his dangerous behavior. Assuming, *arguendo*, that Anderson received treatment that made him less dangerous to the public, this does not mean that Anderson will not pose any threat to the public if left in an unconfined setting. Anderson did not comply with the terms of his probation. And after his release from the health care center, Anderson failed to meet with his psychiatrist once a month, as required by his Chapter 51 treatment plan. Based on these events, the court reasonably inferred that confinement was necessary to control Anderson and ascertain the effects of his medication.

Anderson argues next that his August 1996 schizophrenia diagnosis is a "new factor" that warrants sentence modification. At sentencing, the court stated that it imposed a jail term in part to deter Anderson from future criminal conduct. However, Anderson's treating psychiatrist, Dr. Paul Frechette, testified that Anderson cannot benefit from the experience of punishment because his criminal conduct is the result of schizophrenic delusions and hallucinations.

Therefore, Anderson contends, his schizophrenia frustrates the court's purpose for imposing sentence.

The trial court considered Dr. Frechette's diagnosis as a possible "new factor." It also considered a doctor's inherent nature to overprotect his or her patients. After weighing the expert testimony against its own observations and experience, the court rejected the underlying facts of Anderson's argument:

> I do believe that [Anderson] has the ability to understand. I know Dr. Frechette says that he doesn't think that's true, but I believe based on my observations of Mr. Anderson I think he does understand and I think he in fact has been fairly good at evading responsibility for his actions and I do think that—I do think that both in terms of specific and general deterrence, a period of incarceration is necessary ….

The trial court has the discretion to reject testimony of an expert witness. ***Schleiss v. State***, 71 Wis.2d 733, 745, 239 N.W.2d 68, 75 (1976). In addition, the fact finder can freely disbelieve the evidence presented by either side and can reject even an uncontradicted expert opinion regarding the defendant's mental state at the time the offense was committed. ***State v. Krieger***, 163 Wis.2d 241, 256-57, 471 N.W.2d 599, 605 (Ct. App. 1991).

In weighing Dr. Frechette's testimony, the trial court considered Anderson's overall courtroom demeanor, the context of the psychiatrist's testimony and its own observation that Anderson could understand the cause and effect of punishment. The court reasonably determined, based on relevant factual findings, that his schizophrenia was not a "new factor." Therefore, we conclude that the court properly exercised its discretion when it denied Anderson's motion.

Finally, Anderson argues that the trial court improperly denied his motion for sentence modification because it based its decision on facts not fairly

inferable from the record. Anderson argues that the trial judge relied on four factual findings not supported by the evidence: (1) that Anderson's crime was well-planned, (2) that Anderson has the ability to understand, (3) that Anderson has attempted to evade responsibility, and (4) that Anderson's psychiatric treatment needed to be tested in a confined setting. We conclude that the factual findings were fairly inferable from the record.

Sentencing is left to the discretion of the trial judge, and we review sentencing for an erroneous exercise of discretion. ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). If the facts which predicate the trial court's judgment are fairly inferable from the record and the reasons indicate the consideration of legally relevant factors, we will ordinarily affirm the sentence. ***McCleary v. State***, 49 Wis.2d 263, 281, 182 N.W.2d 512, 521 (1971).

Anderson first asserts that the evidence does not support the court's finding that his crime was well-planned because he suffers from paranoid delusions which make him incapable of devising a rational plan to commit a battery. But Anderson admitted that he hid a stick the night before the crime, waited until his victim fell asleep the next day, and then hit the victim so as to have the upper hand when he awoke. The trial court logically inferred from these facts that Anderson was capable of performing a well-planned crime.

Second, Anderson contends the evidence cannot support the court's finding that he understands or can benefit from punishment because this conclusion directly contradicts his psychiatrist's opinion that he lacks the ability to understand punishment or gain from the experience of it. As we stated previously, the trial judge is free to disbelieve the evidence presented and to reject expert testimony. ***Kreiger***, 163 Wis.2d at 256-57, 471 N.W.2d at 605. In this instance,

the trial court weighed the expert's testimony against its personal observations of Anderson and its own beliefs about the protective nature of doctors over their patients and reasonably rejected the expert's opinion.

Third, Anderson argues that the evidence does not support the court's conclusion that he attempted to evade responsibility for his crime because he confessed, pleaded guilty and accepted his punishment. But Anderson did not cooperate with his probation program, committed a new offense while on probation, and was removed from the Rock County Health Care Center for inappropriate sexual behavior and physically assaulting the staff. Thus, we conclude that the court fairly inferred from Anderson's overall behavior that he did not attempt to take responsibility for his behavior.

Fourth, Anderson claims that the evidence does not support the trial court's finding that his treatment plan must be tested in a confined setting because that testing had already occurred during his thirty-day confinement at the health care center. But here again, because Anderson failed to see his psychiatrist once a month and had previously failed to cooperate with his probation officer, the court inferred that a confined setting was necessary. Similarly, the court reasoned that mental health treatment was not incompatible with treatment in the criminal justice system. Therefore, we conclude the court's decision to confine Anderson was reasonable and based on inferable facts.

Anderson argues last that, in denying sentence reduction, the court relied on the public's opinion of the trial judge, which was an improper factor. To support his claim, Anderson cites the trial court's comment: "People ask what in the world was that crazy judge thinking based on this whole history of offense

after offense after offense violence? And now that crazy judge just lets the guy go. I mean, and the public's entitled to ask those questions, it seems to me."

But the quoted commentary is little more than that. Nothing in the record shows that the trial court relied on a fact that was not true or not relevant. The judge's dialogue about the public's opinion does not amount to a showing that the court relied on improper factors not relevant to sentencing. We conclude that the trial court based its decision to deny sentence modification on proper facts inferable from the record.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.