COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1841-CR **Cir. Ct. No. 2013CF667**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE H. BURNSIDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Bruce Burnside appeals his conviction for second-degree reckless homicide and an order denying his postconviction motion. Burnside frames his sole issue on appeal as whether the circuit court's "erroneous perception of the sentences usually imposed for comparable single-fatality OWI

homicide cases in Dane County" constitutes a new factor warranting sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 Multiple eyewitnesses observed and reported that Burnside: had been swerving back and forth over the rumble strip as he drove on a state highway on a Sunday afternoon; accelerated and lost control of his vehicle while exiting the highway; knocked down a traffic light post while going through a red light at the bottom of the ramp; hit and killed a pedestrian who had been standing on the median; struck another vehicle; came to a brief rest facing the wrong way in a lane of traffic of the intersecting highway; then drove his car into and around a nearby parking lot without checking on the victim, while several bystanders followed him and attempted to keep him from leaving the scene. A preliminary breath test administered after Burnside failed sobriety tests at the scene registered an alcohol concentration of 0.128.

¶3 Burnside entered a guilty plea to the charge of second-degree reckless homicide, expressly admitting that at the time of the accident he had been speeding and was distracted by an exchange of voice texts, by adjusting his radio, and by having his GPS unit fall to the floor of his vehicle. However, Burnside maintained that his blood alcohol level was attributable to wine he had drunk the prior evening into early morning, and not from drinking bloody marys the morning of the accident; that he did not believe he was impaired; and that he had driven into the parking lot only to remove his car from the dangerous situation of sitting in a lane of traffic rather than with intent to flee the scene. As part of the plea deal, the State dismissed but read in five additional charges relating to conduct that Burnside disputed or partly disputed—namely, homicide by intoxicated use of a

vehicle; homicide by use of a vehicle with a prohibited alcohol concentration; hit and run involving death; hit and run; and a first offense of operating with a prohibited alcohol concentration.

¶4 Burnside submitted a sentencing memorandum in which he suggested that the circuit court use data from ten years of sentences issued in the Fifth Judicial District for homicide by intoxicated use of a vehicle as a point of comparison with this case. According to Burnside's analysis, no one in the district in that time period had received a sentence of longer than five years unless the defendant had caused death or injury to more than one person, the defendant had one or more prior OWI or other criminal convictions, or the defendant committed bail jumping while the case was pending. Based upon the data in his memorandum, Burnside argued that it would not diminish the gravity of his own offense to impose a sentence of less than five years, and that a defendant with no prior OWI convictions did not deserve as harsh a penalty as someone who did have prior OWI convictions.

¶5 In response to Burnside's argument, the circuit court created its own spreadsheet of recent cases that it deemed most comparable to this case, and also advised the parties at the beginning of the sentencing hearing about points of clarification the court would make to several of the sentences and sentencing factors included in Burnside's chart. The circuit court rejected Burnside's contentions that he had not been drinking bloody marys the morning of the accident; that the accident had more to do with speeding, voice texting, and distractions than with intoxication; and that Burnside had not attempted to flee the scene. The circuit court characterized those contentions as "an exercise in bad faith." Instead, the court relied upon Burnside's blood alcohol content to conclude that Burnside was "substantially drunk" and "incapable of safely controlling his

vehicle" at the time of the accident. The circuit court reasoned that all of Burnside's reckless conduct was ultimately attributable to his intoxication because:

> That's what drunk people do. They drive carelessly. They are distracted easily. They speed. They can't control their car. This is a drunk driving homicide.

The circuit court then proceeded to address three factors that it deemed most relevant to the severity of the offense in conjunction with the read-in offenses.

¶6 The circuit court first noted that Burnside had directly endangered many more people than was typical for a drunk driving case because the accident had occurred at a crowded intersection during midday. Burnside had then endangered even more people in his attempt to leave the scene.

¶7 The circuit court next observed that the offense was aggravated by the fact that Burnside had engaged in deception when he told the officer on the scene that he had not been drinking.

¶8 The circuit court also deemed Burnside's failed attempt to flee the scene rather than rendering help as an aggravating factor, evincing either consciousness of guilt or extremely poor judgment stemming from intoxication.

¶9 After addressing a number of other factors relevant to Burnside's character and rehabilitative needs and to the protection of the public, the circuit court made the following comments about how the severity of the offense and appropriate sentence in this case related to the severity of the offenses and sentences imposed in other comparable cases:

> [A]s you and your attorney have acknowledged in your comments the gravity [of the offense] is such that however it may have been at one time, it's no longer acceptable in

> our community for a person to kill someone while intoxicated and to kill them recklessly and not go to prison. My focus is always on Dane County more than the rest of the other counties in our judicial district. Seven, eight years median time, it's the average as well. It's been that way for 11 years actually. It's been that way for the last five years. And for the last three years. And it's that way when one person is killed. I know [defense counsel] has focused on some of the details of those sentences in a different way … I disagree with his approach to that. I respect it and I understand why he's made those arguments, but [in] all of our recent cases, our pattern has been seven to eight years of confinement. There have been less and there have been more, and I'm focusing really just on the cases where a single person was killed.

The circuit court concluded that the severity of the offense was the overwhelming factor in this case, taking into account not only the impact upon the single victim who was killed, but also the number of others placed at risk due to the time of day, Burnside's level of intoxication, his denial and deception during the investigation, and his failure to remain on the scene to render aid. The court sentenced Burnside to ten years of initial incarceration followed by five years of extended supervision.

¶10 Burnside filed a postconviction motion for sentence modification on the grounds of a new sentencing factor—namely, the circuit court's "miscalculation and misinterpretation of the average initial confinement term imposed in Dane County for single death OWI homicides." We will set forth additional facts relevant to that issue in our discussion below.

STANDARD OF REVIEW

¶11 A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the circuit court at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d

53, 797 N.W.2d 828 (reaffirming test set forth in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). In order to obtain relief, a defendant must demonstrate both the existence of a new factor by clear and convincing evidence and that the new factor justifies sentence modification. ***Id.***, ¶¶36-38.

¶12 Whether a particular set of facts constitutes a new sentencing factor is a question of law subject to de novo review. ***Id.***, ¶36. However, the determination of whether a new factor warrants a modification of sentence lies within the circuit court's discretion. ***Id.***, ¶37. If a circuit court determines either that the defendant has failed to demonstrate that a new factor exists as a matter of law, or that the alleged new factor would not warrant relief within the court's exercise of discretion, the court need not address the other part of the test. ***Id.***, ¶38.

DISCUSSION

¶13 Burnside identifies several factors that he contends were unknown or overlooked by the circuit court at sentencing.

¶14 Burnside first argues that the circuit court "overlooked the significant legal distinction that several of the sentences involved in its analysis were for OWI homicides committed by defendants who, unlike Burnside, had previously been convicted of an OWI offense." In support of this argument, Burnside notes that the legislature has raised the severity of an OWI homicide from a Class D to a Class C felony when the offender has a prior OWI conviction.

¶15 Burnside makes a second argument that the circuit court "irrationally includes three cases in its analysis for which the original sentence was probation,

but includes them based on the ultimate sentence imposed sometime later after the probation terms were revoked."

¶16 Both of these arguments suffer from the same primary flaw—namely, that the circuit court's view of what other cases were comparable for purposes of sentence comparisons was a matter of discretion, not a factual determination. Moreover, the record demonstrates that the circuit court rejected, rather than overlooked, Burnside's view of what factors were the most relevant in determining which homicides were the most comparable to the present case—including whether the offender had past OWI offenses. As we have noted above, the court viewed the present offense as aggravated because of the number of people who were endangered, Burnside's attempt to flee the scene, and his deception during the investigation. Burnside does not assert that any of those factors were present in the other cases where lower sentences were imposed. In other words, the circuit court was, by necessity, comparing cases where different aggravating factors were present. As part of that process, the circuit court was entitled to give less weight to whether the defendants in other OWI homicide cases had prior OWI convictions, and to take into account sentences issued following revocation—i.e., different aggravating factors than were present in this case. We therefore conclude as a matter of law that neither of Burnside's assertions as to what sentences the circuit court should have treated as comparable constitutes a new sentencing factor.

¶17 Third, while Burnside acknowledges that the average and median lengths of sentences in the cases the circuit court chose to look at from the preceding eleven years were in fact seven to eight years, he asserts that the average and median lengths of the sentences that the circuit court determined were

comparable were actually lower than that for the preceding five and three year periods.

¶18 However, assuming without deciding that this was a factor overlooked by the circuit court, the court explained at length why the more recent lower sentences in comparable cases did not alter its view of the appropriate sentence here. That was a reasonable exercise of the circuit court's discretion to determine that no relief was warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).