COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP678-CR
2005AP679-CR

Cir. Ct. Nos. 2000CF778
2001CF225

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM W. BAIR,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. In these consolidated appeals from Waukesha county, William Bair appeals from judgments convicting him of uttering and bail jumping and from orders denying his sentence modification

motion. On appeal, Bair argues that a subsequent consecutive sentence from Milwaukee county constituted a new factor and that the circuit court erroneously denied his sentence modification motion even though neither the State nor the victim objected to the motion. We are not persuaded, and we affirm.

¶2 After Bair pled guilty to uttering and bail jumping, the circuit court withheld sentence and imposed lengthy, concurrent terms of probation. Thereafter, Bair's probation was revoked, and he appeared for sentencing after revocation. For uttering, the circuit court sentenced Bair to twelve years, consisting of five years of initial confinement and seven years of extended supervision. The court imposed a concurrent sentence for bail jumping of six years, three years of initial confinement and three years of extended supervision. Bair subsequently received a consecutive two-and-a-half-year sentence in Milwaukee county.

¶3 Bair moved the Waukesha county circuit court to reduce his sentence for uttering to the term imposed for bail jumping and to run the sentences concurrent to each other or, in the alternative, to vacate both sentences and order a new sentencing hearing. Among the grounds offered in support of the motion, Bair cited the recently imposed Milwaukee county consecutive sentence as a new factor which might affect the Waukesha county circuit court's determination of Bair's eligibility for the Earned Release Program. Neither the State nor the victim objected to Bair's request to reduce the uttering sentence. The circuit court disagreed with Bair's new factor analysis, and the court also declined to reduce the uttering sentence because the sentence was not harsh and was the product of all of the information before the court. Bair appeals.

¶4 Sentence modification is within the circuit court's discretion. ***State v. Trujillo***, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933. "[T]o qualify for a sentence modification based on a new factor, the defendant must show: (1) a new factor exists; and (2) the new factor warrants modification of his [or her] sentence." ***Id.***, ¶13 (citation omitted). A new factor as "an event or development which frustrates the purpose of the original sentence," and is "more than a change in circumstances since the time of sentencing." ***Id.*** (citation omitted). A new factor is that which was unknown to the sentencing court at the time of the original sentencing. ***Id.*** Whether a new factor exists presents a question of law, which we review de novo. ***State v. Lechner***, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998).

¶5 We agree with the circuit court that the Milwaukee county sentence is not a new factor under the facts of this case. During sentencing after revocation, the circuit court demonstrated that it was aware of the pending charges in Milwaukee county. The court set Bair's eligibility for the Earned Release Program at eighteen months, expressing the view that releasing Bair any earlier would depreciate the seriousness of the crimes and would not assist him in achieving a drug-free lifestyle. That Bair must serve a consecutive Milwaukee county sentence does not frustrate the purpose of the Waukesha county circuit court's requirement that he serve at least eighteen months before becoming eligible for the Earned Release Program. *See* ***State v. White***, 2004 WI App 237, ¶2, 277 Wis. 2d 580, 690 N.W.2d 880, *review denied*, 2005 WI 21, 278 Wis. 2d 538, 693 N.W.2d 77 (circuit court determines earned release program eligibility).

¶6 In ***State v. Ramuta,*** 2003 WI App 80, ¶18, 261 Wis. 2d 784, 661 N.W.2d 483, *review denied*, 2004 WI 114, 273 Wis. 2d 655, 684 N.W.2d 136, the circuit court was aware that Ramuta had other charges pending against him, although those charges had yet to proceed to conviction and sentence. The court's

awareness of the pending charges meant that the subsequently imposed sentences for these charges did not amount to a new factor warranting sentence modification. *See* ***id.***, ¶20. The same holds true here. The sentencing court was aware of the Milwaukee county charges when it sentenced Bair after revocation of his probation.

¶7 Bair next argues that the circuit court erroneously exercised its discretion when it failed to consider that neither the State nor the victim objected to Bair's motion to reduce the uttering sentence. We disagree. In declining to reduce the uttering sentence, the circuit court referred back to its reasons for imposing the uttering sentence. The court exercised its discretion in declining to modify the sentence, even if it did not specifically discuss the absence of objections to the motion. A court does "not blindly accept or adopt sentencing recommendations from any particular source." ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990). And, a court need not be swayed by the absence of an objection to a sentence modification motion. The court independently evaluated Bair's motion and declined to grant it, notwithstanding the lack of objections to it.

By the Court.—Judgments and orders affirmed.

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