COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP1998-CR **Cir. Ct. No. 1999CF345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARMEN L. HARRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Carmen L. Harrell appeals from an order following our remand, again denying his sentence modification motion. The issues are whether the trial court erroneously exercised its discretion: (1) by deciding that the new(ly declared) factor did not frustrate the sentencing court's original intent;

and (2) by considering Truth-in-Sentencing for offenses preceding its applicability. We conclude that the trial court properly exercised its discretion when it: (1) explained that the unforeseen consequences of imposing a lengthy sentence–postponing prompt drug treatment–did not frustrate its original sentencing intent; and (2) mentioned Truth-in-Sentencing in its remarks. Therefore, we affirm.

¶2 Our remand order provides much of the background for this appeal. *See* ***State v. Harrell***, No. 01-2064-CR, unpublished slip op. (WI App Sept. 27, 2002). "Harrell pled guilty to five counts of robbery with the use of force, contrary to WIS. STAT. § 943.32(1)(a) (1997-98). The trial court imposed four, ten-year consecutive sentences, and a five-year consecutive sentence." ***Id.***, unpublished slip op. at 2. It imposed "a lengthy prison sentence to facilitate its dual objectives of rehabilitation and community protection." ***Id.***, unpublished slip op. at 4.

¶3 "Harrell moved for sentence modification, contending that the lengthy sentence frustrated rather than facilitated his treatment while in prison." ***Id.***, unpublished slip op. at 3. We summarily reversed the trial court's order denying sentence modification, holding that the unforeseen consequences of Harrell's lengthy sentence "actually postponed rather than facilitated his prompt drug treatment," and thus, constituted a new factor. *See* ***id.***, unpublished slip op. at 4. We also remanded for the trial court to exercise its discretion in the context of our new factor ruling, to determine whether the "misperceived ramifications of the sentence it imposed," frustrated its original sentencing intent. *See* ***id.***, unpublished slip op. at 4-5.

¶4 We do not reiterate the standards for sentence modification since we previously explained why Harrell had established a new sentencing factor. We focus on the standard relevant to our remand: whether the new factor "frustrate[d] the sentencing court's original intent." ***Harrell***, unpublished slip op. at 4 (quoting ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994)). Once the "defendant has demonstrated the existence of a new factor, then the [trial] court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence." ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). "The trial court then must determine whether there is 'a nexus between the new factor and the sentence, i.e., the new factor must operate to frustrate the sentencing court's original intent when imposing sentence.'" ***Harrell***, unpublished slip op. at 4 (quoting ***Toliver***, 187 Wis. 2d at 362).

¶5 "This court reviews that determination for an erroneous exercise of discretion." ***Harrell***, unpublished slip op. at 4 (citing ***Franklin***, 148 Wis. 2d at 8). A proper exercise of discretion "contemplates a process of reasoning" in which the trial court reaches a reasoned and reasonable conclusion. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The fact that the trial court exercised its discretion differently than Harrell hoped, however, does not constitute an erroneous exercise. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶6 On remand, the trial court clarified its original remarks to explain why the unforeseen circumstances (our newly declared factor) did not frustrate its original sentencing intent. The trial court explained that while it sent Harrell to prison for drug treatment, "[t]he major component that [the trial court] … looked

at was also the need for community protection." The trial court clarified that the unavailability of prompt drug treatment did not "undermine[] what [it] was trying to do [or] in any way frustrate[] [the trial court's] original intent in imposing the sentence."

¶7 We directed the trial court on remand, to exercise its discretion to determine whether the unforeseen circumstances (that a lengthy sentence postponed rather than facilitated prompt drug treatment) frustrated its original sentencing intent. *See* ***Harrell*** unpublished slip op. at 4-5. The trial court considered the issue as directed, and exercised its discretion in doing so.

¶8 Harrell also contends that the trial court improperly considered Truth-in-Sentencing, despite its inapplicability to his sentence. Truth-in-Sentencing became effective for offenses committed after December 31, 1999, and required imposition of determinate sentences. *See* 1997 Wis. Act 283. Prior to that time, an inmate became eligible for parole after serving part of the then-imposed indeterminate sentence. *See* WIS. STAT. § 304.06(1)(b) (1999-2000).

¶9 Harrell's offenses occurred before the advent of Truth-in-Sentencing, and the trial court properly imposed an indeterminate sentence. On remand, the trial court explained why it was again denying Harrell's sentence modification motion. In doing so, it

> emphasized that at the time of doing [Harrell's] sentence [the trial court] was doing sentencings for [T]ruth[-]in[-S]entencing cases that had no possibility of parole in which [the trial court] could give a definite determined sentence, that [it] knew exactly how long somebody [wa]s going to stay in the prison. And [the trial court] was also doing cases like this that are indeterminate sentenc[es] where frankly [the trial court was] not sure what portion the defendant [wa]s going to serve [in prison].

¶10 The trial court did not improperly apply Truth-in-Sentencing to Harrell. It explained that it was imposing determinate and indeterminate sentences depending on the date of the offense. In Harrell's circumstance, it was imposing an indeterminate sentence. Thus, Harrell would be eligible for parole at some juncture when his rehabilitative progress or concerns could be addressed. Reviewing the trial court's remarks in their entirety demonstrates that Harrell's criticism that the trial court erroneously considered Truth-in-Sentencing when it imposed his sentence is unfounded.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).