COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2410-CR **Cir. Ct. No. 1996CM611679**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTARIO ANTWAN DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded*.

¶1 CURLEY, J.[1] Ontario Antwan Davis appeals *pro se* the order denying his request for a new sentencing hearing. Davis argues that the trial court erred in concluding that no new factor was established warranting a new

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04).

sentencing hearing. Additionally, Davis contends the trial court erred in concluding that it did not rely on inaccurate information at his sentencing, as he has shown that the sentencing court mistakenly believed there were two victims of his more serious felony convictions, for which he was sentenced by another judge shortly before the sentencing in these cases. Because a new factor was established that frustrated the sentence imposed by the trial court, and because the sentencing court relied on inaccurate information, this court reverses the order and remands this matter for resentencing.

I. BACKGROUND.

¶2 On September 13, 1996, Davis, a minor who had been waived to adult court, was charged with three offenses, possession of a dangerous weapon by a child, carrying a concealed weapon, and resisting an officer. He pled guilty to possession of a dangerous weapon by a child, contrary to WIS. STAT. § 948.60(2) (1993-94),[2] and resisting an officer, contrary to WIS. STAT. § 946.41(1) (1993-94), both misdemeanors, and the carrying a concealed weapon charge was dismissed. He was sentenced to serve nine months in the House of Correction on each count to be served consecutively, and to be served consecutively to a twenty-four-year sentence in the Wisconsin State Prison System he received for unrelated homicide and reckless endangerment convictions, crimes he committed while he was awaiting sentencing in this case.

¶3 In Davis's direct appeal, his postconviction counsel filed a no-merit report which was affirmed in a one-judge opinion by this court. In June 2004,

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Davis brought a motion under WIS. STAT. § 973.155 seeking sentence credit, which resulted in his being granted 104 days of sentence credit. In August 2006, Davis filed another motion seeking a modification of his sentence, claiming both that a new factor existed and that the trial court relied on inaccurate information at sentencing, warranting a new sentencing hearing. The motion was denied and this appeal follows.

II. ANALYSIS.

¶4 Davis submits that he is entitled to a new sentencing hearing because of a new factor; that is, that the trial court's remarks at sentencing indicate that the trial court was unaware of the existence of WIS. STAT. § 973.03(2), which reads: "A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons." He also argues that he is entitled to a new sentencing hearing because of "abuse of discretion/inaccurate information" due to the fact that the sentencing court thought his convictions for second-degree reckless homicide, while armed, and first-degree reckless endangerment involved two victims, when, in fact, the charges involved only one victim.

¶5 We first address Davis's contention that a new factor exists. The trial court is vested with the discretion to modify a sentence if a defendant presents information that constitutes a new factor. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402 (1983). 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 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 (1975). In addition, in order to constitute a new factor, the information proffered must frustrate the purpose of the original sentence. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). The defendant has the burden of proving the existence of the new factor by clear and convincing evidence. ***Id.*** Whether the proffered information constitutes a new factor is a question of law that we decide independently. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Accordingly, in order to succeed on a motion for sentence modification, a defendant must satisfy two steps in the process: (1) the defendant must prove that a new factor warranting modification exists; and (2) if the defendant so proves, then the trial court must determine whether the new factor warrants modification. ***Id.***

¶6 It is clear from this court's review of the record that the sentencing court's comments indicate an unfamiliarity with WIS. STAT. § 973.03(2). The trial court stated:

> I order that you spend nine months in jail on both count one and count three, those sentences will be consecutive to each other, for a total of 18 months.
>
> I'll give you Huber release on your sentences so that you can seek work and perform work, but for no other purpose.
>
> I impose those sentences on the assumption that our community needs a lever over you when you're eventually eligible for parole from the State Penitentiary so that you can be reintegrated into our community gradually, that you can learn how to work, become a productive working member of our community, but still be under the watchful eye of the sheriff every night after you return from your job.
>
> I don't know when you're going to get paroled on your adult sentences, but I think that this additional leverage is important.

These comments indicate that the trial court believed that after Davis served his twenty-four-year sentence, he would begin serving his sentences in these cases in the county jail and be eligible for Huber release. Since the statute in question requires the sentences to be served in the state prison where Huber release is not possible, a fact unknowingly overlooked by all the parties, Davis has established a new factor warranting a hearing. Indeed, this court has obtained the no-merit brief filed earlier on Davis's behalf and there is no mention of the conflict between the trial court's comments and the operation of § 973.03(2).

¶7 We next address Davis's claim that the trial court sentenced him based on inaccurate information.

¶8 A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information "must establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. If the defendant meets his or her burden of showing that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. ***Id.***, ¶3. Here, the trial court mistakenly believed that Davis's earlier and more serious convictions involved two victims. The trial court said:

> THE COURT: It's unfortunate, umm, that you're in the circumstances you're in, I feel sorry for you, umm, but society requires a measure of justice, and you've taken one life and hurt another with your conduct that resulted in the 24-year sentence in felony court.
>
> ….
>
> My sentence that I'm going to impose this afternoon is heavily influenced by your conduct on January 24th when you committed the murder.

¶9 Clearly the trial court, in sentencing Davis, took into account the convictions for second-degree reckless homicide while armed and first-degree reckless endangerment, which the court felt involved two victims. Again, this court's review of the no-merit report reveals that the author failed to mention the trial court's sentencing remarks, which strongly suggested there were two victims.

¶10 As a result, Davis has proven that a new factor exists, and has satisfied this court that the trial court was mistaken about the number of victims involved in the murder charge and utilized this information in sentencing Davis. Consequently, Davis is entitled to a new sentencing hearing. Accordingly, we reverse and remand this case to the trial court for a new sentencing procedure.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.