COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP1238-CR

Cir. Ct. No. 1993CF934598

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALAAM JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Salaam Johnson appeals from an order denying his motion seeking to modify his sentence. Johnson claims the trial court erroneously exercised its discretion when it denied his motion to modify his sentence. Because the motion for sentence modification was untimely, because

the trial court did not erroneously exercise its sentencing discretion by imposing all consecutive sentences, and because a new factor was not presented to warrant sentence modification, we affirm.

BACKGROUND

¶2 On May 23, 1994, Johnson was convicted of five counts of armed robbery, one count of attempted robbery, and one count of robbery, contrary to WIS. STAT. §§ 943.32(1)(b) & (2), and 939.32 (1993-94).[1] For the armed robbery convictions, he received five consecutive fifteen-year sentences. For the attempted robbery, he received a three-year sentence, consecutive to all other sentences. For the robbery conviction, he received an eight-year sentence, consecutive to all other sentences. All totaled, Johnson received an indeterminate sentence of eighty-six years of incarceration with parole eligibility of twenty and one-half years of which he has now served twelve years. Johnson filed a direct appeal. This court affirmed the convictions and the supreme court denied his petition for review.

¶3 On April 20, 2006, Johnson filed a postconviction motion to modify his sentence, proffering two reasons. First, the sentencing court did not provide specific reasons for the lengthy, consecutive sentences, as required by ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41. Second, a new factor was present; i.e., he was not aware that his agreement to have one count of armed robbery dismissed and read into the record meant that he was admitting he

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

committed the crime and this factor could be considered at sentencing. The trial court denied the motion. Johnson now appeals.

ANALYSIS

A. Untimely Claim.

¶4 Johnson contends that the trial court erred in denying his request for sentencing modification on the basis that Johnson's sentencing claim was untimely. We reject his contention.

STANDARDS OF REVIEW AND APPLICABLE LAW

¶5 WISCONSIN STAT. § 967.01 states: "Chapters 967 to 979 shall govern all criminal proceedings …." WISCONSIN STAT. § 973.19 reads: "A person sentenced to imprisonment … may, within 90 days after the sentence … is entered, move the court to modify the sentence …." WISCONSIN STAT. § 974.02 entitled: "**Appeals and postconviction relief in criminal cases**" refers to WIS. STAT. § 809.30 which dictates a deadline of twenty days to file a notice of intent and sixty days after service of a transcript or record to file a postconviction motion or appeal. *See* § 809.30(2)(b) and (h).

APPLICATION

¶6 Here, as noted by the trial court in its order denying Johnson's postconviction motion:

> A motion for modification based on erroneous exercise of discretion … must be brought pursuant to sec. 973.19, Wis. Stats., within ninety days of sentencing, or pursuant to sec. 809.30, Wis. Stats., within the appellate time limit. The defendant was sentenced in 1994, and his sec. 809.30 appellate time limits have expired. Under the

> circumstances, his abuse of discretion claim is untimely and will not be considered.

The trial court's analysis was correct. Under these statutes, Johnson's motion cannot be entertained as it is untimely.

¶7 Johnson attempts to avoid this result by claiming that his motion is based upon WIS. STAT. § 806.07(1)(h).[2] The State asserts that this statute does not apply to criminal postconviction motions as evidenced by WIS. STAT. § 967.01's statement that "Chapters 967 to 979 shall govern all criminal proceedings" and the fact that within these chapters are specific statutory sections pertaining to sentence modification motions. Johnson responds that § 806.07(1)(h) should apply based on the statement contained within WIS. STAT. § 972.11(1) that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction."

¶8 We reject Johnson's contention for several reasons. First, the criminal statutes have specific subsections, which address the sentencing motions

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[2] WISCONSIN STAT. § 806.07 provides, in pertinent part:

> **(1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(2)** The motion shall be made within a reasonable time ….
>
> **(3)** A motion under this section may not be made by an adoptive parent ….

he asserts. Thus, his failure to abide by those statutory sections renders his motion in this case untimely. Second, WIS. STAT. § 972.11(1) refers to *rules of evidence*. Johnson's sentencing motions do not involve rules of evidence. Third, WIS. STAT. § 806.07(2) requires motions to be brought within a *reasonable* time. Johnson's delay of much more than one year in bringing this motion renders his timing *unreasonable* under the facts of this case. Thus, we conclude that Johnson's motion was untimely.

B. Consecutive Sentence/Hall Analysis.

¶9 First, Johnson argues that the trial court failed to give specific reasons for the length of the consecutive sentences it imposed. In reviewing the record and Johnson's contentions, we are not convinced that the trial court's sentencing decision was erroneous.

STANDARDS OF REVIEW AND APPLICABLE LAW

¶10 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988).

¶11 WISCONSIN STAT. § 973.15(2)(a) provides: "the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." "The decision whether consecutive sentences are

necessary is one within the trial court's discretion …." ***State v. LaTender***, 86 Wis. 2d 410, 432, 273 N.W.2d 260 (1979). It is entirely reasonable to impose consecutive sentences for separate counts involving different victims at different times and locations. ***State v. Hamm***, 146 Wis. 2d 130, 157, 430 N.W.2d 584 (Ct. App. 1988).

APPLICATION

¶12 Our review of the record reveals the following. Johnson was convicted of seven separate robbery-related counts. An additional armed robbery charge was dismissed but read into the record for the purpose of sentencing without objection. These criminal acts occurred while Johnson was on parole for an attempted robbery in Indiana. At sentencing, Johnson's trial counsel recommended that he receive two, consecutive eleven-year sentences with all the remaining sentences being imposed but stayed with probation, after being released from prison. In doing so, he acknowledged that his client had a "significant criminal history." The pre-sentence writer recommended a maximum sentence for each count which amounted to over 120 years. The State recommended a sentence of forty-five years.

¶13 In its succinct sentencing remarks, the trial court noted that Johnson was arrested for the first time at the age of fifteen for shoplifting. At the age of seventeen, Johnson was sent to Ethan Allen School for a charge of armed robbery. He was out on parole for an attempted robbery conviction in Indiana at the time of the current subject crimes and had been delinquent in his reporting responsibilities. From additional information supplied to it, the sentencing court observed that Johnson was an intelligent person, not handicapped by any mental or learning

disabilities, but was afflicted by a serious drug problem that provoked his criminal activity.

¶14 In terms of community caretaking, the court pointed out the traumatic and long-term effect that Johnson's actions could have on the individual victims and the community as a whole. There are "serious consequences and fall-out when one armed robbery occurs" and here he was "responsible for a whole series" of such crimes. The traumatic effect multiplied with each robbery. From our independent review of the record and the summary of the trial court's sentencing remarks, there can be no gainsay that the trial court appropriately considered: (1) the seriousness of the offenses including the effect on the community; (2) the need to protect the community; and (3) Johnson's character and needs. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). There is no question but that the court stressed the importance of not depreciating the seriousness of the offenses that he committed.

¶15 Johnson also relies heavily upon ***Hall***, 255 Wis. 2d 662, for his allegation that the trial court failed to specifically explain why the sentences on each count were imposed consecutively. His reliance on ***Hall*** is misplaced for reasons to be stated. He cites language in ***Hall*** referring to the ABA Standards for Criminal Justice Sentencing § 18-6.5(c)(ii), at 230, which reads: "[W]here the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently." ***Hall***, 255 Wis. 2d 662, ¶14.

¶16 Johnson, in addition, points to other language in the standards as cited in ***Hall*** which state: "The imposition of consecutive sentences of total confinement, where such sentences are permitted, should be accompanied by a statement of reasons for the selection of consecutive terms." ***Id.*** (quoting ABA Standards § 18-6.5(c)(ii), at 213 n.2).

¶17 In response, we reiterate prior holdings of appellate courts of Wisconsin that have consistently refused to adopt the ABA sentencing standards. We also note that although the ***Hall*** court stated that the sentencing in that case "flies in the face of the ABA Standards," ***id.***, ¶13, it does not explicitly adopt the ABA Standards, or require their application in all Wisconsin cases, *see* ***id.***, ¶¶11-14. To the contrary, Wisconsin has adopted a more flexible approach to sentencing. ***State v. Paske***, 163 Wis. 2d 52, 471 N.W.2d 55 (1991). The dispositive question then is whether or not the court erroneously exercised its sentencing discretion.

¶18 The record reflects that Johnson performed his armed robberies at five different fast food locations at different times. As a matter of consequence, two of the locations, McDonald's and Arbys, were robbed twice at different times. Of further significance, at the Arbys location, the same two individuals were victimized twice. Thus, any common connection between the incidents serve as an aggravating, rather than a mitigating, factor. The trial court, in its sentencing remarks, was emphatic in expressing the enormity of the adverse impact that Johnson's separate, but serial, armed robbery activity had on the specific victims and the communities affected. Doubtless, the trial court stated a reasonable rationale for its imposition of consecutive sentences. Under our sentencing rubrics, it did not erroneously exercise its sentencing discretion. The facts and circumstances specific to this case support the trial court's decision to impose

consecutive sentences on each count. There were seven separate and distinct crimes. This fact, together with Johnson's extensive criminal history, justifies the imposition of consecutive sentences.

¶19 Moreover, the court in ***Hall*** was compelled to reverse for factors not present in Johnson's case. First, the sentence imposed in ***Hall*** was in essence life in prison. ***Hall***, 255 Wis. 2d 662, ¶15. Hall was sentenced to 304 years in prison, with a parole eligibility of 101 years. ***Id.***, ¶4. In the instant case, Johnson was sentenced to eighty-six years total, but was eligible for parole in twenty-one and a half years. Johnson has already served twelve of those years, so he is now eligible for parole in less than a decade. In addition, the ***Hall*** court noted that the sentencing court exceeded the presentence investigation recommendation by 200 years. ***Id.***, ¶¶15-16. Here, the court that sentenced Johnson imposed a sentence much less than the 120-year sentence recommended by the presentence report. Finally, the ***Hall*** court labeled Hall's sentence "meaningless" because it could never be served. ***Id.***, ¶18. Such is not the case for the sentence imposed on Johnson. Consequently, because the contents of the sentencing statement of the trial court here do not demonstrate the deficiencies disapproved in ***Hall***, Johnson cannot use ***Hall*** to obtain relief.

C. New Factor.

¶20 Johnson also asserts that a new factor arose warranting sentencing modification. He claims he did not know that the dismissed, but read-in, charge of the armed robbery of the Taco Bell restaurant would be considered as an admission of guilt for the purpose of sentencing.

STANDARD OF REVIEW AND APPLICABLE LAW

¶21 To succeed on a "new factor" claim for the purposes of sentence modification, "[t]he hurdle … is fairly high: the new factor must be 'highly relevant' to the sentence so that its newly revealed existence 'frustrates' the court's sentencing intent." ***State v. Ramuta***, 2003 WI App 80, ¶8, 261 Wis. 2d 784, 661 N.W.2d 483 (citation omitted). A defendant must prove by "clear and convincing evidence" that what he wants the sentencing court to consider is a "new factor." ***State v. Franklin***, 148 Wis. 2d 1, 9, 434 N.W.2d 609 (1989). We review *de novo* whether something is a new factor. ***Ramuta***, 261 Wis. 2d 784, ¶9. Whether a new factor justifies modification of the sentence is, however, within the discretion of the trial court. ***Id.***

¶22 After reviewing the record, we agree with the reasoning of the State that the end goal of Johnson's motion was to reduce the consecutive sentences to concurrent sentences. We can find, however, nothing in the record reasonably demonstrating that considering the read-in offense for the purpose of sentencing, vis-à-vis the seven robbery convictions, was "highly relevant" to the actual term of the sentence or that it "frustrated the court's intent." *See* ***id.***, ¶8. We further agree with the State's assertion in its brief: "It defies credulity to suggest that the trial court would have given Johnson concurrent sentences but for the read-in offense." Thus, Johnson's claim falls for failure to meet its burden of proof.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.