COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2160-CR **Cir. Ct. No. 1995CF446**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK D. BARNSTABLE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Derek Barnstable appeals an order denying his motion to modify sentences imposed in 1996 following his no contest pleas to conspiracy to commit first-degree murder and mutilating a corpse as a party to a crime with a gang-related penalty enhancer for both offenses. He also appeals an

order denying his motion for reconsideration. The trial court concluded that Barnstable established a new factor, but declined to modify the sentences. Barnstable argues that, by finding a new factor, it necessarily follows that the court's original assessment of the least amount of punishment consistent with the purpose of the sentence was skewed. The State argues that Barnstable failed to establish a new factor. We conclude that it is not necessary to determine whether Barnstable established a new factor because the trial court properly exercised its discretion when it declined to modify the sentences.

¶2 The original complaint charged Barnstable with involvement in the killing of Jermaine Gray. Barnstable was the leader of a criminal gang and orchestrated Gray's murder and the destruction of his corpse. Three other participants in the conspiracy later died in an apparent suicide pact. Barnstable eventually entered no contest pleas to two charges in exchange for the State's agreement to recommend thirty-six years' imprisonment on the homicide change and fifteen years' consecutive probation for the destruction of corpse count, as well as dismissal of two misdemeanor charges. At sentencing, a youth pastor described Barnstable's change of character in the preceding eighteen months and Barnstable's assisting the pastor to gain access to troubled youth. The court sentenced Barnstable to forty-five years in prison and a consecutive fifteen-year probation, stating that it did not know whether Barnstable had undergone a conversion, "[b]ut if I have to make an error, Mr. Barnstable, I am going to error [sic] in favor of the community." The court specifically considered the seriousness of the offenses and indicated a difficulty balancing that factor against

the unknown sincerity of Barnstable's conversion or redemption, and left it to the parole commission[1] to determine Barnstable's sincerity.

¶3 Ten years later, Barnstable filed a motion to modify the sentences based on his exemplary behavior in prison. He acknowledges that post-sentencing rehabilitation is not a new factor, but argues that his post-sentence behavior sheds additional light on his character at the time he was sentenced, resolving the trial court's question of whether Barnstable had actually reformed before sentencing. The trial court agreed that Barnstable established a new factor, that is,

> a fact or set of facts highly relevant to the imposition of sentence, but which is 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.

See ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 60 (1975). The trial court agreed that Barnstable's new evidence further enlightened the court on aspects of his character at the time of sentencing, but denied the request to modify the sentence, stressing the seriousness of the offenses and their effect on the community.

¶4 Barnstable's argument that the court misused its discretion when it denied sentence modification after finding a new factor fails to apply the dual questions the court must address before modifying the sentence. First, the court must determine whether a new factor exists, a question of law. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). If a new factor exists, the

[1] These offenses were committed before the effective date of the truth-in-sentencing law. Therefore, release on parole is possible for these offenses.

court must determine, in its discretion, whether the new factor justifies modifying the sentence. *See* ***State v. Hegwood***, 113 Wis. 2d 554, 546, 335 N.W.2d 399 (1983). The existence of a new factor does not automatically entitle a defendant to modification. ***Id.***

¶5 The court properly exercised its discretion when it denied sentence modification based on its finding that Barnstable's character was not pivotal in determining the length of the sentences. At the sentencing hearing, the court stressed the seriousness of the offenses and the impact on Gray's family and the community. The court also noted the need to punish Barnstable with a lengthy sentence due to the aggravated nature of these offenses. Although Barnstable's character was a legitimate consideration at sentencing, the weight to be given the various sentencing factors is a matter for the sentencing court to determine. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 193 (Ct. App. 1984). The trial court reasonably concluded that the brutality of the crime and its effect on the community merited the sentence initially imposed despite evidence that Barnstable engaged in exemplary behavior under circumstances where he was confined, monitored, and had an incentive to impress the court or the parole commission.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).