**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 17, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP215-CR** **Cir. Ct. No. 2006CF246**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LOREN M. HARRIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Loren Harris appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the sentence the circuit court imposed was unduly harsh and that the court erred when it denied his motion to modify his

sentence based on a new factor. Because we conclude that the circuit court did not err when it sentenced Harris, we affirm the judgment and order.

¶2 Harris pled guilty to one count of burglary as a party to a crime. A second count of burglary as a party to a crime was dismissed and read in. Both counts involved a burglary of the same home, but in two separate incidents. Before conducting the plea colloquy, the circuit court judge informed the parties that the victim was a lawyer, that she had practiced in front of him on occasion and they had attended the same church at some time in the past. The judge also stated that this would not affect his ability to be fair and impartial. The judge repeated this again at the sentencing hearing.

¶3 At the sentencing hearing, the State, the writer of the presentence investigation report, and the defense all recommended that Harris receive probation. The victim said that she would not object to it. The court, however, sentenced Harris to three years of initial confinement and three years of extended supervision. Harris, who was twenty-one at the time, was one of four people involved in the burglaries. Two of his codefendants were sixteen and seventeen, and were sentenced to probation. The third was charged as a juvenile.

¶4 Harris subsequently brought a motion to modify his sentence. He alleged that the sentence he received was unduly harsh because the court failed to appropriately consider his character and his lack of any prior adult criminal record; secondly, the sentence imposed exceeded the sentence contemplated by all the parties; and thirdly, the circuit court's prior relationship with the victim unduly influenced its ability to be fair and impartial. He also argued at the hearing that the sentences his codefendants received constituted a new factor that entitled him to be resentenced.

¶5 The circuit court denied the motion. The court noted that while Harris did not have an adult conviction, he had been adjudicated a burglar as a juvenile, had spent a long time in a youthful offender facility as a result, and that had not helped him. The court also considered that he was significantly older than his codefendants and that he was a rather central figure in these burglaries. The court concluded that a significant prison sentence was "absolutely" necessary.

¶6 On appeal, Harris again argues that the circuit court erroneously exercised its discretion when it sentenced him. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised on a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State,*** 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). We may find that the circuit court erroneously exercised its discretion in setting the length of a sentence when "the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶7 Further, the circuit court may modify a sentence if the defendant shows that a new factor exists. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. 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). A new factor must be a development that frustrates the purpose of the original sentence, and must be proved by clear and convincing evidence. ***Champion***, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶8 Harris argues that his sentence was unduly harsh because the court failed to properly consider his character, the sentence was longer than that recommended by the parties, the court's prior relationship with the victim affected its ability to be fair and impartial, and the court did not adequately explain why it did not place him on probation.

¶9 First, Harris argues that the court "neglected to highlight" the positive aspects of his character. The record does not support his argument. The court acknowledged that Harris did not have any prior adult convictions and noted that he had obtained a high school equivalency diploma. The court also considered his success, or lack of it, as a result of his juvenile disposition, his employment history, his prior gang affiliation, and his personal relationships. The court thoroughly addressed Harris's character. It acknowledged the positive aspects of his character, but implicitly found on balance that these were

substantially outweighed by the negative aspects. This was not an erroneous exercise of discretion.

¶10 The court also explained why probation would not be appropriate. The court explained at length why a prison sentence was necessary, and noted that even when Harris was in custody, he was not able to follow the rules. The court then stated:

> You did a lot of time apparently for burglary, and I guess what's also interesting is that even when you were in custody, you weren't able to follow the rules. I wonder why this probation officer thinks that you're going to be able to follow rules on probation if you're out of custody. It's not adding up, it just doesn't add up.

We conclude that the record establishes that the court explained why probation was not appropriate.

¶11 We also conclude that the length of the sentence was not unduly harsh. Harris faced a possible sentence of twelve and one-half years, with seven and one-half years as initial confinement. The court sentenced him to substantially less than that. A sentence that is well within the maximum is not so disproportionate as to shock the sense of what is right and proper. ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶12 There is also nothing in the record to support Harris's contention that the court was unduly influenced by its "relationship" to the victim. The circuit court judge from the very beginning acknowledged that he knew the victim. The court made it clear, however, that he did not have a personal relationship with her. We again conclude that the circuit court judge acted properly when it acknowledged the relationship and explained that the relationship would not affect

his ability to be fair and impartial. We conclude that the circuit court did not err when it found that the sentence was not unduly harsh and refused to modify it.

¶13 Harris also argues that the sentences his codefendants received constituted a new factor that entitled him to have his sentence modified. The imposition of different sentences of a person convicted of the same offense does not, in and of itself, constitute an erroneous exercise of discretion. ***State v. McClanahan***, 54 Wis. 2d 751, 757, 196 N.W.2d 700 (1971). A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Although at the hearing on the postconviction motion the circuit court did not specifically address at length Harris's argument that this was a new factor, the court did explain why a longer sentence was appropriate for Harris.

¶14 The court noted once again that Harris was significantly older than his codefendants and he was the "main mover" in these crimes. The court again addressed Harris's burglary adjudication, and his lack of success while he was in custody for that adjudication. The court asked Harris's counsel if the codefendants had previously been adjudicated burglars, and Harris's counsel responded that he did not know. Once again, we conclude that the circuit court based its decision on the individual culpability of each of the co-actors. The court, therefore, properly exercised its discretion when it declined to consider the sentences imposed on Harris's codefendants as a new factor that entitled Harris to have his sentence modified. For the reasons stated, we affirm the judgment and order of the circuit court.

*By the Court.*—Judgment and order affirmed.

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