COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP114 **Cir. Ct. No. 1994CF586**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL AGUILAR,

DEFENDANT-APPELLANT.

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

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Daniel Aguilar appeals pro se from an order denying his motion for sentence modification. He argues that parole circumstances, new evidence, and inaccurate information about the crime are new factors supporting sentence modification. He also claims that the circuit court

prejudged his motion and erroneously exercised its discretion in denying his motion for the appointment of counsel and for in-court appearance. We reject his claims and affirm the order denying the motion for sentence modification.

¶2 Aguilar was convicted as a party to the crime of two counts of armed robbery, two counts of attempted armed robbery, and five counts of first-degree recklessly endangering safety. He was sentenced to concurrent terms totaling thirty years in prison and fifteen years' probation. His conviction was affirmed on appeal. ***State v. Aguilar***, 1997AP516-CR, unpublished slip op. (Wis. Ct. App. Mar. 11, 1998). The denial of his pro se motion for postconviction relief under WIS. STAT. § 974.06 (2005-06),[1] was also affirmed on appeal. ***State v. Aguilar***, 1999AP540, unpublished slip op (WI App Aug. 9, 2000). Recently, his ***Knight***[2] petition for a writ of habeas corpus on the ground of ineffective assistance of appellate counsel was denied. ***State ex rel. Aguilar v. Endicott***, 2005AP1858-W, unpublished order (WI App Oct. 15, 2007).

¶3 Aguilar moved for sentence modification based on new factors. Sentence modification because of a new factor requires the defendant to first demonstrate by clear and convincing evidence that there is a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether a fact is a new factor warranting resentencing is a question of law. *See* ***id.*** at 8. A new factor "refers to 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

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

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). The new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990).

¶4 Once a defendant has demonstrated the existence of a new factor, the circuit court determines whether the new factor justifies modification of the sentence. ***Franklin***, 148 Wis. 2d at 8. The defendant must persuade the circuit court that the original sentence is unjust before the court can correct the sentence. *See* ***id.*** at 14. This decision is assigned to the circuit court's discretion and we review the decision under the erroneous exercise of discretion standard. ***Id.*** at 8.

¶5 The bulk of Aguilar's appeal is based on the circuit court's sentencing comment: "Mr. Aguilar, you're a young man. You'll be eligible for parole in 7 years. You already got a year and half or 2 years in, so you're only looking at 3 or 4 or maybe 5 years in the state prison system." Aguilar contends that this comment evidences that the sentences were "based on Aguilar's prospects for parole and [the court's] belief that Aguilar would not spend much time in the prison system." Aguilar claims sentence modification is justified because he was not in fact eligible for parole for seven years and six months, he has been denied parole, and he has now served more than twice the seven-year eligibility term mentioned by the sentencing court.

¶6 The circuit court concluded that Aguilar's sentences were not based on parole eligibility within seven years.[3] We agree and reject Aguilar's basic premise that parole eligibility was a factor in the sentences. After concluding that confinement was necessary to protect the public and provide Aguilar with correctional and rehabilitative treatment, the sentencing court pronounced the terms Aguilar would serve on each conviction. The comment about parole came after the prison terms had already been announced. The court's comment about parole was followed by the following observation: "Mr. Aguilar, I would hope—you seem to be an intelligent young man, that you take this as an opportunity to hopefully get yourself straightened out and change your life around so that when you get out you're not even looking at greater times in the state prison system." The comment about parole was part of the court's charge to Aguilar to turn his life around should he be released on parole and to instill in Aguilar a sense of purpose. It did not signal that parole eligibility was a driving factor behind the sentences.

¶7 We agree with the circuit court's assessment that a November 2, 2001 letter from the sentencing court to the parole commission voicing the court's strenuous objection to Aguilar being considered for parole further demonstrates that the sentences were not based on Aguilar's release after serving seven years.[4] The letter also stated that Aguilar should serve to his mandatory release date. The court would not have sent such a letter if it believed that Aguilar should be

[3] Aguilar was sentenced in 1996 by Racine County Circuit Court Judge Emmanuel Vuvunas. The motion for sentence modification was heard and decided by Racine County Circuit Court Judge Dennis J. Barry.

[4] Judge Vuvunas authored the November 2, 2001 letter to the parole commission. The trial court may submit a written parole recommendation upon notice that a defendant is being considered for parole. ***State v. Whiteside***, 205 Wis. 2d 685, 693-94, 556 N.W.2d 443 (Ct. App. 1996).

released in seven years. We summarily reject Aguilar's contention that the letter itself was an erroneous exercise of discretion because it ran counter to the court's intent at sentencing.

¶8 Since parole eligibility was not a factor in Aguilar's sentences, the fact that he was not eligible for seven years and six months and that he has been denied parole are not new factors and do not frustrate the intent of the sentences. *See* ***Franklin***, 148 Wis. 2d at 15 ("In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing."). The same is true of the 1994 letter from then Wisconsin Governor Tommy G. Thompson to the Department of Correction urging that all available legal avenues be used to block the mandatory release of violent offenders. Aguilar suggests that the sentencing court was unaware of the letter's existence when it sentenced him in 1996 and believed that Aguilar could be paroled in seven years. We have previously rejected the notion that the 1994 letter is a new factor when parole eligibility is not a factor in the sentence and held it has no application where a defendant has not yet reached his mandatory release date. *See* ***State v. Delaney***, 2006 WI App 37, ¶¶12-13, 16, 21, 289 Wis. 2d 714, 712 N.W.2d 368. The circumstances surrounding Aguilar's parole eligibility or denial of parole are not new factors frustrating the sentences.

¶9 Aguilar claims that new evidence about the identity and availability of the complaining witness is a new factor warranting sentence reduction. He explains that the complaining witness, Miguel Blas, committed perjury and testified falsely at the preliminary hearing. Blas's preliminary hearing testimony was used at trial when he was declared unavailable. Aguilar contends he has discovered that Blas gave a false alias and the person claiming to be Blas was

really not unavailable at trial. He argues that he was convicted on perjured and fabricated testimony, something the court was unaware of at sentencing.

¶10 Sentencing is not a time to consider whether or not the conviction is based on false evidence. The sentencing court must accept that the defendant has been convicted. Thus, the new evidence that Aguilar claims to possess goes only to attack his conviction and not the sentences imposed. In any event, Aguilar failed to meet his burden of proof that a new factor exists since he relies only on his conclusory statements that Blas is really someone else who was available at trial and a person who admitted to lying about Aguilar's involvement.

¶11 Aguilar's final claim for sentence modification is that the sentences were based on inaccurate information that victims were beaten and pistol-whipped. He points out that the one person witnesses said was hit with a gun was never proven to exist and the jury acquitted him of charges relating to that person. He also indicates that not one witness corroborated Blas's testimony that he was hit with a gun, that Blas did not initially report to police that he had been hit with a gun, and that Blas was never cross-examined on that point. The circuit court concluded there was sufficient evidence that at least one person was hit with a gun and it was the entire callous nature of the crime that drove the sentences rather than the particular act of pistol-whipping.

¶12 A defendant has a due process right to be sentenced based upon accurate and valid information. *See* ***Johnson***, 158 Wis. 2d at 468. To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentence. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. The State's burden is then to show that the inaccuracy was harmless. ***Id.*** Whether

a defendant has been denied the due process right to be sentenced upon accurate information is a constitutional issue that an appellate court reviews de novo. ***Id.***, ¶9.

¶13 We conclude Aguilar did not establish that the sentencing court relied on inaccurate information. The evidence Aguilar cites establishes that at least two persons had been hit with the gun. Aguilar's co-actor testified that he hit three people in their head and face area with the gun. Moreover, acquittal of the charges involving one individual hit by the gun does not preclude the sentencing court from considering the evidence. Acquittal only means that the prosecution failed to meet its burden of proof of guilt beyond a reasonable doubt. Under ***State v. Bobbitt***, 178 Wis. 2d 11, 17, 503 N.W.2d 11 (Ct. App. 1993), the sentencing court may look to the circumstances surrounding the offenses to reach its conclusion. This evidence, however, need not be accepted by the jury because the information which a court uses to make a sentencing decision, unlike the proof used to secure a conviction, need not be established beyond a reasonable doubt. *See* ***id.*** The sentencing court may consider conduct for which the defendant has been acquitted. ***State v. Marhal***, 172 Wis. 2d 491, 503, 493 N.W.2d 758 (Ct. App. 1992). Similarly, it does not matter that Blas's testimony that he was pistol-whipped was untested by cross-examination. The rules of evidence do not apply at sentencing and a sentencing court may even consider hearsay or suppressed evidence. *See* ***id.*** at 502-03; ***State v. Scherreiks***, 153 Wis. 2d 510, 521-22, 451 N.W.2d 759 (Ct. App. 1989).

¶14 Even if we considered the observation that persons were pistol-whipped during the robbery inaccurate, the sentencing court's remarks demonstrate that reliance on that observation was harmless. The sentencing court was truly struck by the callous and violent nature of the crime—planned entry of a

home and the intimidation of the victims by sticking a gun in their faces. The victims were made to feel their lives were in danger. The sentences would not have been any less without reference to pistol whipping-victims.

¶15 Aguilar argues the circuit court erroneously exercised its discretion in denying his motion for the appointment of counsel to assist him at the sentence modification motion hearing.[5] The circuit court appoints counsel for an indigent only when "in the exercise of its discretion it deems such action necessary." *See* ***State v. Lehman***, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987). The decision to appoint counsel should be based on a determination of the needs of the circuit court and not the defendant. ***Id.*** at 77. Thus, counsel should only be appointed to further the court's need for the orderly and fair presentation of a case. ***Joni B. v. State***, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996).

¶16 Here the circuit court indicated it saw "no basis" for appointing counsel. It observed that Aguilar had filed an extensive memorandum in support of his motion. The circuit court's decision demonstrates that it was entirely capable of understanding Aguilar's various arguments for sentence modification without the advocacy of counsel. We conclude it was not an erroneous exercise of discretion to deny Aguilar appointed counsel for the sentence modification motion.

¶17 Aguilar next argues that the circuit court erroneously exercised its discretion in not allowing him to appear in person at the hearing rather than just

[5] Contrary to Aguilar's assertion, the circuit court had no responsibility to act under WIS. STAT. § 977.05(4)(j). That provision applies only to the State Public Defender.

telephonically. Aguilar claims that he was entitled to appear in person under ***State v. Vennemann***, 180 Wis. 2d 81, 96-97, 508 N.W.2d 404 (1993).

¶18 ***Vennemann*** held that the statutory right to be present under WIS. STAT. § 971.04(1), ends upon the pronouncement of judgment and the imposition of sentence. ***Vennemann***, 180 Wis. 2d at 93. However, a defendant should be present at a postconviction evidentiary hearing when there exist substantial issues of fact to be resolved. ***Id.***, at 94. If the motion papers raise substantial issues of fact as to events in which the defendant participated and do so by more than mere allegations, the defendant's personal appearance at the evidentiary hearing is required. ***Id.*** at 94-95. Appearance by telephone will not suffice in that instance. ***Id.*** at 97.

¶19 Aguilar's motion for sentence modification did not raise substantial issues of fact as to events in which Aguilar participated. What occurred at the sentencing hearing was reflected in the transcript of that proceeding. Aguilar's defense at trial was that he did not enter the residence where the robbery took place until after the victims had started a fight with the intruders. By his own testimony Aguilar was not present when victims were pistol whipped. Aguilar was not present when it was reported to certain persons that Blas had lied about his identity and about what occurred. He could not offer testimony about the facts he claimed supported his arguments for sentence modification. There was no reason for Aguilar to be physically present at the motion hearing.

¶20 Aguilar's final argument is that the circuit court prejudged the motion before listening to the evidence and, therefore, failed to act impartially. A fair and impartial decision maker is an undisputable minimal rudiment of due process. ***State v. Gudgeon***, 2006 WI App 143, ¶11, 295 Wis. 2d 189, 720 N.W.2d

114, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204 (WI Sept. 11, 2006) (No. 2005AP1528). Aguilar's claim presents a question of law that we review independently of the trial court. ***Thomas Y. v. St. Croix County***, 175 Wis. 2d 222, 229, 499 N.W.2d 218 (Ct. App. 1993).

¶21 "When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences." ***Gudgeon***, 295 Wis. 2d 189, ¶20. Objective bias, the type Aguilar claims here,[6] is demonstrated by either actual bias or the appearance of bias when "a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.***, ¶¶21, 24.

¶22 We have reviewed the transcript of the motion hearing. The circuit court acknowledged that in preparation for the hearing it had read Aguilar's motion and the extensive memorandum filed in support of the motion. For the purpose of determining whether counsel should be appointed, the court began to discuss the merits of Aguilar's claims. This revealed the court's perceived weaknesses in Aguilar's claims. However, that alone does not mean the court had prejudged the motion. *See* ***Tate v. Briggs & Stratton Corp.***, 23 Wis. 2d 1, 8, 126 N.W.2d 513 (1964) (quoting ***Ace Associates v. Nagy***, 13 Wis. 2d 612, 618, 109

[6] "The test for bias comprises two inquiries, one subjective and one objective. Either sort of bias can violate a defendant's due process right to an impartial judge. Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114 (citations omitted), *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204 (WI Sept. 11, 2006) (No. 2005AP1528). We assume that by presiding the judge believed that he could act in an impartial manner. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

N.W.2d 359 (1961), where the ultimate conclusion that testimony had little or no persuasive effect was well founded, the court's skepticism does not constitute error "because the expression of this disbelief was not postponed until the conclusion of the trial."). Aguilar was allowed to make his arguments during the hearing. Indeed, there was give and take discussion on the points Aguilar wanted to make. The circuit court did not treat Aguilar unfairly and that it rejected Aguilar's claims does not suggest that it had prejudged the motion. *See* ***Thomas Y.***, 175 Wis. 2d at 229-30.

By the Court.—Order affirmed.

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