COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2008

David R. Schanker
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. 2008AP645-CR **Cir. Ct. No. 2006CF3714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAMERON DESHAWN JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cameron Deshawn Johnson appeals from a judgment of conviction and from two postconviction orders, one denying suppression of his custodial statements and the other modifying his sentence. We affirm.

BACKGROUND

¶2 Warren Douglas was shot twice and died from his wounds. The State charged Johnson and a co-actor, Chino Moore, with felony murder. Johnson gave both written and oral statements while in custody. In his written confession of July 16, 2006, Johnson admitted that he and Moore made plans to rob Douglas, whom they were meeting for a drug transaction. Johnson described taking the pistol offered to him by Moore, firing a single shot at Douglas "on accident," and dropping the gun. In this statement, Johnson claimed that Moore fired the second shot. On July 17, 2006, Johnson gave an oral statement in which he admitted shooting twice.

¶3 The criminal complaint includes both of Johnson's statements. Additionally, the complaint includes a summary of Moore's custodial statement in which Moore ascribed to Johnson all of the responsibility for the shooting.

¶4 Johnson moved to suppress his statements and the circuit court conducted a ***Miranda-Goodchild*** hearing.[1] Two police detectives testified on behalf of the State. Johnson called no witnesses and personally waived his right to testify. Based on the testimony of the detectives, the circuit court denied the motion to suppress, concluding that Johnson knowingly, intelligently, and voluntarily waived his ***Miranda*** rights.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). "[A]t a ***Miranda-Goodchild*** hearing the issues to be decided are the voluntariness of the statements, the proper giving of the ***Miranda*** warnings and the intelligent waiver of the ***Miranda*** rights." ***Norwood v. State***, 74 Wis. 2d 343, 362, 246 N.W.2d 801 (1976).

¶5 Johnson decided to plead guilty to an amended charge of first-degree reckless homicide while armed. During the plea colloquy, Johnson agreed that the criminal complaint established a factual basis for his plea. However, he explained through his counsel that "as … to Mr. Johnson's statement in the complaint, [Johnson] agrees with that, but there's a substantial difference in what Mr. Moore had indicated about the defendant. So the basis for the plea is as it relates to Mr. Johnson's statement in the criminal complaint …" The court accepted the plea.

¶6 The matter proceeded to sentencing. The circuit court imposed a thirty-year term of imprisonment, bifurcated as twenty years of initial confinement and ten years of extended supervision. In its sentencing remarks, the circuit court noted that Johnson had taken a life and made "a forever decision … when you did subsequently pull that trigger." The circuit court explained to Johnson that it did not view his culpability as identical to Moore's because "[Moore] brought the gun to you. You used it."

¶7 Johnson filed two postconviction motions. First, he moved for sentence modification, arguing that the circuit court imposed its sentence in reliance on a factual basis that Johnson disputed, namely, that Johnson fired two shots. At the hearing, Johnson asserted that he entered his plea on the basis that he fired one shot and Moore fired the other. The circuit court agreed that it "placed too much weight" on Johnson firing two shots. It modified the sentence by reducing Johnson's extended supervision from ten years to eight years.

¶8 Johnson filed a second postconviction motion, in which he sought suppression of his custodial statements. In support, he submitted a letter and affidavit asserting that he had not been properly advised of his ***Miranda*** rights and

that he gave his statements involuntarily without knowingly and intelligently waiving his rights. The circuit court denied this motion without a hearing.

¶9 Johnson appeals. He contends that the circuit court erroneously denied his suppression motion and that he should have received a more substantial modification of his sentence.

DISCUSSION

¶10 We first consider Johnson's claim that the circuit court erred by refusing to suppress his custodial statements.[2] When the State seeks to admit a defendant's custodial statements into evidence, the State must show, first, "that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them." ***State v. Santiago***, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). The necessary advisements include the right to counsel and the right to remain silent. ***State v. Ross***, 203 Wis. 2d 66, 73, 552 N.W.2d 428 (Ct. App. 1996). Second, the State must show that the accused's custodial statements were given voluntarily. ***Santiago***, 206 Wis. 2d at 19. We review an order granting or denying a motion to suppress evidence under two different standards. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. "We uphold a circuit court's findings of fact unless they are clearly erroneous. We then independently apply the law to those facts *de novo*." ***Id.*** (citations omitted).

[2] A circuit court's order denying a suppression motion may be reviewed on appeal notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶11 At the suppression hearing, Detective John Wesley testified that he questioned Johnson on July 16, 2006, and Detective Christopher Blaszak testified that he questioned Johnson on July 17, 2006. Both officers described reading Johnson his ***Miranda*** rights and securing Johnson's assurances that he understood his rights and wanted to talk. Both officers denied making any threats or promises to induce Johnson's statements, and both officers testified that Johnson did not appear to be under the influence of any intoxicants or drugs.

¶12 Detective Wesley testified that Johnson asked for an attorney during the July 16, 2006, interview but then withdrew the request and asked to continue talking without an attorney present. According to Detective Wesley, Johnson eventually indicated that he wanted to write out a statement himself, and he was permitted to do so. Detective Blaszak testified that Johnson never asked for an attorney during the interview on July 17, 2006.

¶13 After the officers testified, Johnson's trial counsel told the court that Johnson would not present any witnesses. The circuit court conducted a colloquy with Johnson, and Johnson confirmed that he chose not to testify after discussing the matter with counsel. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485 (discussing necessity of colloquy to ensure valid waiver of defendant's right to testify at trial). The circuit court then made findings that Johnson was advised of his constitutional rights prior to giving his statements, that he was not impaired by drugs or alcohol, and that neither of the officers threatened him or promised him anything to secure a confession. The court found that Johnson asked Detective Wesley for an attorney, but then withdrew that request and voluntarily continued the interview.

¶14 "We give deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the [custodial] statements." ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. Moreover, we defer to both explicit and implicit credibility findings of the circuit court. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). Johnson points to no error in the conduct of the suppression hearing and no basis on which to conclude that the circuit court improperly credited the testimony of the officers. Nonetheless, Johnson asserts that the circuit court erred because it refused to entertain the evidence that he proffered in the letter and affidavit filed with his postconviction motion.

¶15 The admissibility of a defendant's custodial statement must be resolved by an evidentiary hearing before the circuit court. *See* WIS. STAT. § 971.31(3); *see also* ***State v. Armstrong***, 223 Wis. 2d 331, 346, 588 N.W.2d 606 (1999). In essence, then, Johnson's postconviction motion was a motion to reopen the suppression hearing and to reconsider the outcome. Whether to grant such a motion is a discretionary decision for the circuit court. *See* ***Franklin v. State***, 74 Wis. 2d 717, 720-21, 247 N.W.2d 721 (1976). "All that 'this court need find to sustain a discretionary act is that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted).

¶16 In its order denying Johnson's motion, the circuit court found that Johnson could have testified at the suppression hearing but that he knowingly, intelligently, and voluntarily waived his right to do so. The circuit court therefore concluded that Johnson's belated proffer "c[ould] not be heard." Johnson did not argue in his postconviction or appellate submissions that his waiver of the right to

testify was invalid. Indeed, he did not mention the waiver. On this record, we conclude that the circuit court appropriately exercised its discretion in refusing to hear additional evidence. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (deliberate choice of strategy is binding on a defendant).

¶17 The evidence presented at the suppression hearing is the only testimony in the record as to the circumstances surrounding Johnson's custodial statements. That testimony fully supports the circuit court's factual findings. In light of those findings, we agree with the circuit court's conclusion that Johnson made his custodial statements voluntarily after receiving proper ***Miranda*** warnings.

¶18 We next consider the propriety of the circuit court's decision to modify Johnson's sentence. At the postconviction hearing, Johnson argued that the circuit court gave undue weight to statements identifying Johnson as the sole shooter because Johnson's guilty plea was premised on his admission that "[Johnson] did the one shot. Chino Moore did the second shot." The circuit court agreed, and reduced the length of Johnson's extended supervision from ten years to eight years. Johnson maintains that the circuit court "did not fully consider" his motion and afforded him inadequate relief.

¶19 We must first determine the basis of Johnson's appellate challenge. Johnson argues in his brief-in-chief that the sentence imposed "remains unduly harsh and unconscionable." The State responds that Johnson failed to show a new factor justifying sentence modification. A new factor is a fact or set of facts highly relevant to sentencing but not known to the sentencing judge at the time of sentencing, either because the fact was not in existence or because it was unknowingly overlooked. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69

(1975). Johnson's appellate submissions do not include an argument that a new factor warrants modification of his sentence. To the contrary, Johnson correctly observes in his reply brief that a circuit court may modify a sentence that is unduly harsh or unconscionable even though no new factors are presented. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990). We are satisfied that Johnson does not rest his appeal on a claimed new factor.

¶20 This does not end our inquiry, however, because Johnson's reply brief includes an argument that "the trial court actually relied on inaccurate information at [the original] sentencing." A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who alleges that a sentencing decision is based on inaccurate information must prove both that the information was inaccurate and that the circuit court actually relied on the inaccurate information. ***Id.***, ¶26. Johnson did not include an argument in his brief-in-chief that the circuit court violated his right to due process by relying on inaccurate information. Rather, he argued that the circuit court erroneously exercised its discretion by basing its sentencing decision on "unresolved facts." Arguments made to this court only in a reply brief will not be addressed on appeal.[3] *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. Therefore, we will not address Johnson's due process argument.

[3] We observe that, even in his reply brief, Johnson does not show that the circuit court relied on inaccurate information when imposing the original sentence. Johnson gave a custodial statement admitting that he fired two shots. Johnson now repudiates that statement in favor of a different custodial statement in which he admitted firing only one shot. Johnson does not point to objective data in the record demonstrating that his repudiated confession is false. A circuit court may rely on disputed evidence at sentencing, including unproven criminal conduct. *See* ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992).

We limit our review to the issue of whether Johnson's sentence is unduly harsh or unconscionable.

¶21 Sentencing decisions are vested in the circuit court's discretion and a defendant who challenges a sentence has the burden of showing that the sentence was unreasonable. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The primary factors a sentencing court must consider are "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Additionally, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197.

¶22 In this case, the circuit court discussed the gravity of the offense, describing it as "horrific." The court considered Johnson's character, noting that Johnson failed to exercise the intelligence and capacity for leadership that his friends and family described during the sentencing proceeding. The court discussed the effect of the crime on the community and noted the importance of conveying the consequences of taking a life. The court determined that the appropriate purpose of the sentence was punishment because the victim was shot in the head at close range in furtherance of a robbery. Thus, the court considered proper factors and chose a reasonable objective in its original sentencing decision.

¶23 A circuit court may reduce a defendant's sentence upon concluding that the original sentence was unduly harsh or unconscionable. ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979). When the court orders a modification

on this ground, it should state the reasons for its conclusion on the record. ***Id.*** Here, the circuit court agreed with Johnson that it placed too much weight on a version of the offense that Johnson did not concede.[4] The circuit court modified Johnson's sentence to "tak[e] into consideration the defendant's account, knowing that two shots were fired."

¶24 We will not reverse a sentencing court's decision based on appropriate factors unless 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). Johnson pled guilty to recklessly causing the death of another human being under circumstances that show utter disregard for human life. A twenty-eight year term of imprisonment for firing a single deadly shot into the body of another person at close range is not excessive, unusual, or disproportionate.

By the Court.—Judgment and orders affirmed.

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

[4] It is unsurprising that the circuit court sentenced Johnson as the sole shooter because Johnson's trial counsel explicitly conceded the point. At sentencing, counsel argued: "I do think though, Mr. Johnson even though he is the shooter, even though he was the person that is the actual cause of the death, I think both Chino Moore and Cameron Johnson were probably equal even though Mr. Moore is not the one who pulled the trigger." Johnson voiced no objection to his counsel's statements during his own rather lengthy allocution.