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

**October 16, 2001**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**No. 01-0399-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EDWARD D. LEWIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and PATRICIA D. McMAHON, Judges. *Affirmed.*

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

¶1 PER CURIAM. Edward D. Lewis appeals from a judgment of conviction and sentence after he pled guilty to possession of a firearm by a felon,

contrary to WIS. STAT. § 941.29(2)(a) (1999-2000).[1] He also appeals from an order denying his postconviction motion to modify his sentence. Lewis claims: (1) the trial court erred in denying his motion to suppress a firearm found in a car during a traffic stop; (2) the trial court erroneously exercised its discretion when it determined that pending charges were not new factors warranting sentence modification; and (3) the trial court erroneously exercised its discretion when it imposed what he claims is an unduly harsh sentence. We affirm.

## I. BACKGROUND

¶2 Lewis was charged with one count of possession of a firearm by a felon. The firearm was discovered while Officers John A. Heim and Gonzalo Barinaga were attempting to secure identification from Lewis and a companion, who were parked, backed into a parking stall, facing a bank where there had been two attempted robberies in the preceding months. According to a citizen informant, the car did not have any license plates and its motor was running.

¶3 Officer Barinaga arrived on the scene while Officer Heim was speaking to the two men through the open driver-side window. Officer Barinaga approached the car from the passenger side, called out to Lewis, who was seated in the passenger seat, and knocked on the closed passenger window to get Lewis's attention. When Lewis did not respond, Officer Barinaga opened the passenger door to ask Lewis for identification and discovered a firearm between the passenger seat and the door.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Lewis moved to suppress the firearm, alleging that it was seized in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Article I of the Wisconsin Constitution, and WIS. STAT. ch. 968. Specifically, he alleged that Officer Barinaga had no reason to open the passenger door to the car because no criminal activity had been reported. The trial court denied the motion after a hearing, concluding that there was reasonable suspicion to justify both an investigative stop and Officer Barinaga's action of opening the door. Lewis pled guilty to possession of a firearm by a felon and was sentenced to eighteen months in prison and eighteen months of extended supervision to run consecutive to any existing sentence.

¶5 Lewis filed a postconviction motion to modify his sentence, claiming that there was a new factor. He alleged that the trial court took two pending offenses into account when sentencing him. He claimed that the dismissal of these charges two and one-half weeks after sentencing was a new factor. The trial court denied the motion after a hearing, concluding that the charges were not relevant to the judge's sentencing decision and, even if they were, it was proper for the judge to consider the then pending charges.

## II. DISCUSSION

### *A. Traffic Stop*

¶6 Lewis does not contest that the police officers had reasonable suspicion to approach the car and ask questions. He claims, however, that Officer Barinaga committed an unreasonable search in violation of the Fourth Amendment and WIS. STAT. § 968.24 when he opened the passenger door. We disagree.

¶7 Although the car was parked, albeit with its engine running prior to the incident, the parties agree that the lawfulness of the seizure of the gun can be analyzed under the law applicable to traffic stops. A traffic stop is a seizure triggering Fourth Amendment protections from unreasonable searches and seizures. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548, 554 (1987). The police must have reasonable suspicion, grounded in articulable facts and reasonable inferences from those facts, that the individual was violating the law before they may stop and question. ***Id***; ***Terry v. Ohio***, 392 U.S. 1, 21–22 (1968). "When a person admits that he or she was lawfully seized during a traffic stop but argues that subsequent police conduct violated the Fourth Amendment, the reasonableness inquiry does not focus on the initial stop." ***State v. Griffith***, 2000 WI 72, ¶ 38, 236 Wis. 2d 48, 613 N.W.2d 72. "Instead, the focus is on 'the incremental intrusion' that resulted from the subsequent police conduct." ***Id.*** (quoted source omitted). To determine whether the intrusion was unreasonable, we must weigh the public interest served by the questioning against the incremental liberty intrusion that resulted from the questioning. ***Terry***, 392 U.S. at 20–27.

¶8 WISCONSIN STAT. § 968.24 is a codification of the reasonable-suspicion standard announced by the United States Supreme Court in ***Terry v. Ohio***, 392 U.S. 1, 20–22 (1968). ***State v. Fields***, 2000 WI App 218, ¶ 10, 239 Wis. 2d 38, 619 N.W.2d 279. It provides, in pertinent part:

> a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct.

WIS. STAT. § 968.24.

¶9 In reviewing a trial court's denial of a suppression motion, we will "uphold the trial court's findings of fact unless they are clearly erroneous." ***State v. Harris***, 206 Wis. 2d 243, 249–250, 557 N.W.2d 245, 248 (1996). Whether the facts meet the Fourth Amendment's requirement of reasonableness is a question of law we review *de novo*. ***Harris***, 206 Wis. 2d at 250, 557 N.W.2d at 248**.**

¶10 Lewis argues that Officer Barinaga went beyond the scope of a valid traffic stop when he opened the passenger door to ask for identification. He claims that two officers cannot act together to conduct a search that one officer could not conduct alone. During a valid traffic stop a police officer can ask questions, request identification, and ask for consent to search without reasonable suspicion that is separate from the underlying stop. ***Florida v. Bostick***, 501 U.S. 429, 434–435 (1991). An officer can also order a passenger to get out of a car during a traffic stop for valid safety reasons. ***Maryland v. Wilson***, 519 U.S. 408, 414–415 (1997).

¶11 Here, Officer Barinaga's actions were reasonable. He called out to Lewis as he approached the passenger window of the car. When he did not receive a response from Lewis, he knocked on the closed window to get Lewis's attention. When Lewis continued to ignore him, Officer Barinaga opened the passenger door with the intent to ask Lewis for identification. Under these circumstances, Officer Barinaga's action in opening the door was no less intrusive than ordering Lewis to get out of the car. *See* ***State v. Ferrise***, 269 N.W.2d 888, 890 (Minn. 1978) ("there is little practical difference between ordering a [passenger] to open his door and get out of his car ... and opening the door for the [passenger] and telling him to get out"); ***Smith v. State***, 623 So. 2d 382, 386 (Ala. Crim. App. 1993) ("We see no reason ... why a police officer could not perform an investigatory stop involving the occupant of a vehicle, by ... opening one of the

car's doors."). When a police officer orders a passenger to get out of a car, he is in effect also ordering the passenger to open the door. *See* ***Ferrise***, 269 N.W.2d at 890. Moreover, Lewis had adequate notice that Officer Barinaga was trying to establish contact with him and Officer Barinaga's motive for opening the door was to obtain identification, a valid action for a police officer to take during a traffic stop. *See* WIS. STAT. § 968.24.

¶12 Furthermore, Officer Barinaga's interest in safety outweighed the minimal intrusion upon Lewis's privacy. *Compare* ***Mimms***, 434 U.S. at 110 (the governmental interest in officer safety during traffic stops is substantial) *with* ***Wilson***, 519 U.S. at 414–415 (the additional intrusion on a passenger in ordering him to get out of a car during a traffic stop is minimal). Accordingly, Officer Barinaga did not exceed the scope of a valid traffic stop when he opened the passenger door. There is no violation of WIS. STAT. § 968.24 or the Fourth Amendment to the United States Constitution; thus, the trial court correctly denied the motion to suppress.[2]

*B. New Factor*

¶13 Lewis claims that his sentence should be modified because the trial court considered pending charges that were later dismissed. He alleges this is a new factor. The trial court has the discretion to modify a sentence if the defendant

[2] The trial court subsequently found that the firearm was properly admitted because it was in plain view once Officer Barinaga opened the passenger door. *See* ***Harris v. United States***, 390 U.S. 234, 236 (1968) (per curiam) (items of evidence within the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be utilized as evidence). Lewis does not contend that the firearm was not visible once Officer Barinaga opened the door.

presents a new factor. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). 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, 73 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191, 195 (Ct. App. 1997). "There must be some connection between the factor and the sentencing—something [that] strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels,*** 150 Wis. 2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989).

¶14 The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***Id.,*** 150 Wis. 2d at 97, 441 N.W.2d at 279. Whether a set of facts constitutes a new factor is a question of law that we review *de novo*. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989).

¶15 Lewis claims that the trial court considered a pending armed robbery charge and a charge of bail jumping when determining his sentence. He alleges his sentence should be modified because the dismissal of the charges two and one-half weeks later is a new factor. We disagree. Although judges can generally consider pending charges for which there has been no conviction, *see* ***Murphy v. State***, 75 Wis. 2d 522, 531, 249 N.W.2d 779, 783 (1977), there is no evidence that

the sentencing judge placed any weight upon the pending charges in fashioning the sentence.[3] Instead, the trial court relied upon Lewis's conduct in this case to sentence Lewis. It was particularly concerned with Lewis's overall lack of judgment with regard to the events leading up to the traffic stop and emphasized that Lewis's portrayal of the events seemed unbelievable. There is no evidence that the dismissal of the pending charges frustrated the purpose of the original sentence—Lewis has not shown a connection between the pending charges and the sentencing that strikes at the very purpose for the sentence selected by the trial court.

*C. Sentencing Discretion*

¶16 Finally, Lewis claims that his sentence of eighteen months in prison and eighteen months of extended supervision should be modified because it is unduly harsh. He alleges that it is unduly harsh because the trial court considered the pending charges when sentencing him. As noted above, we disagree. Moreover, we will not disturb a sentence imposed by a trial court unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion "only where 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." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences, *see* ***State v.***

[3] The sentencing judge's only comment on either of the pending charges was "I don't know where things are going with the felony that is pending ..., but this one [possession of a firearm by a felon] ... is the more serious of the two felonies."

***Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984), and "[t]he trial court is presumed to have acted reasonably." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶17 The three primary factors that a sentencing court must consider are: the gravity of the offense, the character of the defendant, and the need to protect the public.[4] ***Sarabia***, 118 Wis. 2d at 673, 348 N.W.2d at 537. As noted above, the trial court did not expressly consider the pending charges when pronouncing the sentence. Moreover, an examination of the record shows that the trial court considered the appropriate factors: Lewis's lack of judgment in acquiring a firearm, prior warnings to stay away from firearms, the seriousness of the offense, his prior conviction for burglary, and his age. Lewis's sentence is also well within the maximum under current law.[5] Accordingly, Lewis has not pointed to anything in the record that indicates that the trial court erroneously exercised its sentencing discretion.

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

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[4] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495–496, 444 N.W.2d 760, 763–764 (Ct. App. 1989).

[5] Possession of a firearm by a felon is a Class E felony under WIS. STAT. § 941.29(2). Lewis was sentenced to eighteen months in prison and eighteen months of extended supervision, while the maximum penalty for a Class E felony is five years imprisonment, *see* WIS. STAT. § 939.50(3)(e)(subject to WIS. STAT. § 973.01 (bifurcated sentence)).

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