

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2002

Cornelia G. Clark
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. 01-0877-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99 CF 4314

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AIRRY MASSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Airry Massey appeals from a judgment of conviction entered after he pled guilty to one count of felony murder, as a party to

a crime, contrary to WIS. STAT. §§ 940.03 and 939.05 (1999-2000).¹ He also appeals from an order denying his postconviction motion for resentencing, or in the alternative, to modify his sentence. Massey claims that: (1) the trial court violated his due-process right to be sentenced on accurate information when it relied on information in an allegedly undisclosed sentencing memorandum; (2) the trial court erroneously exercised its sentencing discretion when it based Massey's sentence on the information in the undisclosed sentencing memorandum; and (3) his due-process right to be sentenced on accurate information was violated when the State and a co-defendant's attorney allegedly withheld information regarding the co-defendant's credibility from the sentencing court.² We affirm.

I. BACKGROUND

¶2 Airry Massey was charged with one count of felony murder, as a party to a crime, after he and co-defendant Charles Sheppard robbed a Rent-A-Center, and Sheppard shot and killed an employee. Sheppard was arrested first and gave the following account of the events. Massey planned to rob the Rent-A-Center and put pressure on Sheppard to help him because Sheppard owed Massey about \$200 after a drug deal went bad. Sheppard agreed to help and, on the day of the robbery, Massey drove Sheppard to the Rent-A-Center. Then, according to Sheppard, Massey gave a gun to Sheppard and told him to rob the Rent-A-Center. Sheppard entered the store, pulled out the gun, and told Aaron Pickering, who was behind the counter, "Give me your money." Pickering gave Sheppard some

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

² Massey's second due-process claim is a new-factor claim presented as a due-process argument. Thus, as discussed below, we will analyze this as an alleged new factor.

money and then grabbed for the gun. The gun went off, killing Pickering. Sheppard ran out to Massey's car and the two drove away. Massey took Sheppard to a hotel where Massey disposed of the gun. Sheppard claims that Massey kept most of the money from the robbery, giving Sheppard only about \$150.

¶3 Sheppard admitted that he shot Pickering; however, he claimed that Massey planned the robbery. When Massey was arrested, he admitted to driving Sheppard to the Rent-A-Center, but denied that he planned the robbery, and claimed that he was unaware of Sheppard's intent to rob the Rent-A-Center. Massey also denied that he gave Sheppard a gun, or that Sheppard owed him money.

¶4 Sheppard and Massey both pled guilty to the crime of felony murder. Sheppard was sentenced first. At Sheppard's sentencing hearing, the trial court relied, in part, on a sentencing memorandum that contained Sheppard's version of the events. Based on all of the information before it, the court ultimately determined that Massey was the "mastermind behind this crime," but sentenced Sheppard to sixty years in prison for pulling the trigger.

¶5 Eight weeks later, the same trial court sentenced Massey. It sentenced Massey to fifty years in prison based, in part, on its conclusion that Massey was "the mover and the shaker of the robbery."

¶6 Massey filed a postconviction motion to be resentenced, claiming that his due-process rights were violated when the sentencing court determined that Massey was the "mastermind" of the crime and sentenced him based upon information in Sheppard's sentencing memorandum. Massey claimed that this violated due process because the trial court failed to disclose its reliance on Sheppard's sentencing memorandum to Massey at Massey's sentencing. Massey

also asked to be resentenced on the basis of an alleged new factor, claiming that evidence that undermined Sheppard's credibility was not available to the trial court at the time of sentencing. We address each of his arguments in turn.

II. DISCUSSION

¶7 First, Massey claims that his due-process right to be sentenced based on accurate information was violated because, at the time of his sentencing, he was not aware of Sheppard's sentencing memorandum or the "fact that the court had so heavily relied upon it" when it found, at Sheppard's sentencing, that Massey planned the robbery. Massey claims that the trial court "withheld" this information from him; thus, he was denied notice and an opportunity to respond to Sheppard's version of the events. In a related argument, Massey claims that the trial court's failure to disclose its reliance on Sheppard's sentencing memorandum was an erroneous exercise of the trial court's sentencing discretion because the trial court's reliance on Sheppard's version of the events led the court to overemphasize the gravity of the offense. We disagree.

¶8 A defendant has a due-process right to be sentenced on the basis of true and correct information. *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630, 633 (Ct. App. 1992). To establish a due-process violation, the defendant has the burden of proving by clear and convincing evidence that the information used in sentencing was inaccurate and that he or she was prejudiced by the misinformation. *State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). *See also State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998) ("A defendant who requests resentencing must show that specific information ... was inaccurate and that the court actually relied upon the inaccurate information in sentencing.").

¶9 We reject Massey’s claim for two reasons. First, there is no evidence that the sentencing court relied upon the allegedly inaccurate information in Sheppard’s sentencing memorandum—the trial court never referred to Sheppard’s sentencing memorandum during Massey’s sentencing. The trial court sentenced Massey based upon all of the information before it, including Massey’s presentence investigation report.³ Massey’s presentence investigation report included Sheppard’s version of the events. Massey’s attorney acknowledged that he and Massey had received and reviewed the presentence investigation report and Massey’s attorney took the opportunity to make “minor cosmetic” corrections to Massey’s presentence investigation report at the sentencing hearing. Accordingly, there is no evidence that Massey was sentenced based on inaccurate information. *See Perez*, 170 Wis. 2d at 141, 487 N.W.2d at 634 (safeguards in the sentencing process include the defendant’s and defense counsel’s presence at the sentencing hearing and the chance to refute inaccurate information).

¶10 Second, this is not a case where the trial court “withheld” information, as Massey claims. Sheppard’s sentencing hearing was open to the public and the trial court’s basis for sentencing Sheppard was in the sentencing record. Thus, both Massey and his attorney had access to Sheppard’s sentencing proceedings. Nonetheless, there is no evidence that Massey ever requested a transcript of Sheppard’s sentencing or a copy of the sentencing memorandum. *See State v. Flores*, 158 Wis. 2d 636, 643–644, 462 N.W.2d 899, 902 (Ct App. 1990) (a defendant must allege that he or she affirmatively sought access to the presentence investigation report and was subsequently denied access to obtain an

³ The court also considered 100 pages of submissions and numerous letters that were submitted on Massey’s behalf.

evidentiary hearing on a due process violation), *overruled on other grounds by State v. Knight*, 168 Wis. 2d 509, 519 n.6, 484 N.W.2d 540, 544 n.6 (1992).

¶11 Furthermore, the fact that Sheppard gave police a different version of the events and implicated Massey as the mastermind behind the crime should not have come as a surprise to Massey. *See State v. Samuel*, 2001 WI App 25, ¶43, 240 Wis. 2d 756, 623 N.W.2d 565. Sheppard recounted his version of the story many times prior to Massey's sentencing, and, as noted above, Sheppard's version of the events was specifically included in Massey's presentence investigation report. The sentencing court acknowledged that it had two different versions of the events before it and both Massey and his trial attorney responded to Sheppard's accusations during Massey's sentencing. Thus, it is evident that Massey had notice of and was given an adequate opportunity to respond to Sheppard's allegations.

¶12 The trial court also properly exercised its sentencing discretion. 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." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). A strong public policy exists against interfering with the trial court's discretion in determining sentences, *see State v. 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).

¶13 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. Here, the trial court considered the appropriate factors when it sentenced Massey. Concerning the gravity of the offense, it stated that armed robbery is one of the “three most serious crimes that can be committed” and that this robbery resulted in the death of “a young man who had his whole life ahead of him.” The trial court also determined that Sheppard’s version of the events was more credible because Massey’s prior and pending charges for delivering cocaine gave a “drug angle” to the crime and “corroborat[ed]” Sheppard’s claim that Massey pressured him into robbing the Rent-A-Center to pay back a drug debt.⁵ Thus, Massey has not shown an unreasonable or unjustified basis in the record for his sentence.

¶14 Massey also claims that his due-process right to be sentenced on the basis of accurate information was violated when the State and Sheppard’s defense counsel “withheld” information that undermined Sheppard’s credibility. Massey does not, however, beyond mere assertion, indicate that any due-process right was violated. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). He originally brought this as a “new factor” claim in his

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 The court also considered Massey’s: employment record, educational background, character, family circumstances, involvement in the actual shooting, the interests of the community, and prior record.

postconviction motion and, despite his efforts to address this as a due-process violation on appeal, it is still a “new factor” claim.⁶ *State v. Scherreiks*, 153 Wis. 2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989) (“[s]imply to label a claimed error as constitutional does not make it so”).

¶15 The trial court has the discretion to modify a sentence if the defendant 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). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). 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).

¶16 Evidence that Sheppard was not a credible witness is not a new factor. First, Sheppard’s inconsistent statements were contained in police reports that were turned over to Massey’s counsel in anticipation of Sheppard’s testimony at Massey’s trial. Thus, this information was already in existence at the time

⁶ Indeed, even now, Massey cites the new factor standard in his brief, but claims this court “should not be so rigid ... under the facts here” in applying the new-factor analysis.

Massey was sentenced. Moreover, given the importance of Sheppard's testimony in implicating Massey, it is unlikely that either party was unaware of this information or unknowingly overlooked it.⁷

¶17 Second, the sentencing court was aware of and acknowledged that Sheppard and Massey presented different versions of the same events. The same trial court sentenced Sheppard and Massey; thus, after making its own credibility determination, the trial court sentenced Massey based upon its assessment of *Massey's* character, the gravity of the offense, and the corroborating circumstances surrounding the crime. Accordingly, Massey fails to show how his sentence would have been different had the court been aware of specific information regarding *Sheppard's* credibility.

By the Court.—Judgment and order affirmed.

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

⁷ Massey raises an ineffective-assistance-of-counsel claim, but appears to concede that his trial counsel was effective, stating “it is questionable whether trial counsel’s failure here to provide all the available information which would have challenged the Shep[pa]rd version of events would constitute ineffective assistance of counsel” and “it is reasonable to argue that [Massey’s lawyer’s] approach to sentencing, which was simply to argue the inherent unreliability of somebody in Shep[pa]rd’s position, satisfied the Sixth Amendment right to counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).” These allegations, without further support are inadequate. Thus, we decline to address this issue. See *Barakat v. Wisconsin Dep’t of Health and Soc. Servs.*, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398-399 (Ct. App. 1995) (an appellate court may decline to review an issue that is “amorphous and insufficiently developed”).

