COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0397-CR **Cir. Ct. No. 99 CF 718**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NKOSI K. BROWN,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Nkosi K. Brown appeals from a judgment of conviction entered after he pled guilty to two counts of robbery with the threat of force, as a party to a crime. *See* WIS. STAT. §§ 943.32(1)(b) and 939.05 (1997–

98).[1] He also appeals from an order denying his postconviction motion to modify his sentence. Brown alleges that: (1) the trial court erred when it denied his motion to suppress a statement he made to the police because, he claims, the statement was tainted by illegally obtained evidence; and (2) his post-sentencing cooperation with the federal government is a new factor warranting sentence modification. We affirm.

I.

¶2 Police officers went to Nkosi K. Brown's house on February 6, 1999, to investigate a "shots fired" complaint. During a search of the house, police officers discovered a .380 stainless steel Larson handgun and identification cards that belonged to three armed-robbery victims. The police showed a photographic array containing Brown's photograph to the victims. Two of the victims positively identified Brown, while the third victim tentatively identified him.

¶3 Brown fled to California after he learned that the police were looking for him, but returned to Milwaukee approximately one year and four months later to find a job. On September 17, 2000, approximately one year and seven months after the police found the identification cards, Brown gave them a statement. He told the police that on February 6, 1999, he and some friends "test fired" a gun in a field near Vincent High School. According to Brown's statement, Brown then took the gun back to his house and went to the "Southside." Brown acknowledged that the police had recovered two or three driver's licenses

[1] All references to the Wisconsin Statutes are to the 1997–98 version unless otherwise noted.

from his house. In his statement, he told the police that the identification cards were "collateral" from people who owed him money for marijuana.

¶4 Brown filed a motion to suppress the identification cards. He alleged that the police illegally searched for and seized them because the "criminal character" of the identification cards "was not apparent on a mere surface inspection." Brown also filed a motion to suppress the out-of-court witness identifications and his statement to the police claiming that, under the fruit-of-the-poisonous-tree doctrine, they were tainted by the allegedly illegal search and seizure of the identification cards.

¶5 The State argued that the police officers had probable cause to seize the identification cards under the plain-view doctrine because the cards were evidence of stolen property. In the alternative, the State argued that Brown's statement was admissible because it was sufficiently attenuated from the seizure of the identification cards.

¶6 The trial court held a hearing on Brown's suppression motion. Officer George Schad testified that he went to Brown's house to investigate a "shots fired complaint." Brown's wife, Deidra Brown, answered the door. Schad testified that he asked Deidra Brown if the police could look around the house for her husband and a gun. Schad also testified that the officers were looking for the suspect's true identity because all they had was a nickname for Nkosi Brown.

¶7 Officer Edward Ciano testified that Deidra Brown signed his memo book to indicate that she was giving the police permission to search the house for a shooting suspect and a gun. While Ciano was searching the bedroom, he saw driver's licenses and identification cards on top of a dresser. He testified that he

could read the name of a man on at least one of the driver's license without touching it.

¶8 Ciano then asked Deidra Brown if she knew who the people on the identification cards were. According to Ciano, Deidra Brown told him that she did not know who the people were or where the identification cards had come from. Ciano testified that he then became suspicious:

> Because they were people who just didn't live in the house. She [Deidra Brown] stated that she lived with her husband and her child, minor child. Both her [sic] and her minor child, her husband wasn't [sic] there, and [I] was just looking for an explanation of why he would have a driver's license of someone else in their bedroom.

Ciano also testified: "The idea in the back of my mind was maybe these are taken in an armed robbery, maybe these are taken out of someone's car."

¶9 Schad testified that he also saw a "pile" of driver's licenses and identification cards on a nightstand. He testified that the identification cards "raised [his] curiosity" because the cards contained photographs of white males, while the house was occupied by an African-American couple. Schad picked up or separated the cards, read the names, and ran a records check to see if any of the men on the identification cards were victims of a crime. He testified that he could "see that there were pictures of three white males on the driver's license[s]" and that he could read two of the names on the licenses "for sure" before he separated the cards. As noted, the records check revealed that the identification cards belonged to armed-robbery victims.

¶10 The trial court granted Nkosi Brown's motion to suppress the identification cards. Despite Deidra Brown's testimony to the contrary, the trial court found that Deidra Brown gave the police officers consent to search for Nkosi

Brown and a gun. It also found that "perhaps one of the cards was face up so that the officers could read the name of the person to whom the identification card or driver's license was issued," and that "the police seized the identification cards when Officer George Schad picked up the card and shuffled through the cards."

¶11 The trial court concluded, however, that the seizure of the identification cards violated Nkosi Brown's privacy rights because "there was no consent given to look at the documents and no search warrant which would have justified the police in seizing the documents." It also concluded that "[t]he seizure of the identification cards was not justified under the plain view doctrine [because t]he police did not have probable cause to seize the cards as specified criminality, the fruits of a crime, or evidence of a crime."

¶12 The trial court also granted the motion to suppress the out-of-court witness identifications because the identifications "were the fruit of the unlawful search and seizure" of the identification cards. It denied Nkosi Brown's motion to suppress his statement, however, because Nkosi Brown was "arrested on a judicial warrant based upon probable cause."

¶13 Nkosi Brown pled guilty and the trial court sentenced him to ten years in prison on the first count of robbery and withheld sentence and placed him on eleven years of probation on the second count of robbery. Nkosi Brown filed a postconviction motion for sentence modification based upon his post-sentencing cooperation with federal authorities. The trial court denied the motion, concluding that Nkosi Brown's post-sentencing cooperation with the authorities was not a new factor.

II.

A. *Admissibility of Statement*

¶14 Nkosi Brown alleges that the trial court erred when it denied the motion to suppress his statement because the statement was tainted by the allegedly illegal seizure of the identification cards. We disagree and affirm the admission of the statement because the police lawfully seized the identification cards under the plain-view doctrine. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990) (we may sustain a trial court's determination on an independent basis). Accordingly, we do not address Nkosi Brown's argument that his statement was tainted by the seizure of the identification cards because the seizure was legal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶15 A trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Wilson***, 229 Wis. 2d 256, 262, 600 N.W.2d 14, 17 (Ct. App. 1999). The application of the facts to the constitutional principles is a question of law that we review *de novo*. ***Id.***, 229 Wis. 2d at 262–263, 600 N.W.2d at 17–18.

¶16 It is well established that the police may seize evidence without a warrant when the evidence is in plain view. *See* ***State v. Johnston***, 184 Wis. 2d 794, 809, 518 N.W.2d 759, 763 (1994). The plain-view exception for warrantless seizures applies when: (1) the evidence was within plain view of the discovering officer; (2) the officer had a prior justification for being in the position from which the plain view discovery was made; and (3) the item seized, by itself or in

combination with facts known to the officer at that time, provided probable cause to believe that there was a connection between the evidence and the criminal activity. ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911, 914 (Ct. App. 1994).

¶17 The first two plain-view elements are satisfied. The police officers found the identification cards in plain view on top of a nightstand or a dresser. Additionally, the officers had a lawful right of access to the bedroom where the identification cards were found because, as found by the trial court, Deidra Brown gave the officers permission to search the house for Nkosi Brown and a gun. *See* ***Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980) (trial court final arbiter of witnesses' credibility). Thus, the issue is whether the officers had probable cause to believe that the identification cards were evidence of criminal activity.

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief[]" that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, 460 U.S. 730, 742 (1983) (quoted sources omitted).

¶18 The identification cards and the circumstances surrounding their discovery provided the police officers with probable cause to believe that the identification cards were connected to criminal activity. The officers testified that they could see at least one, if not two of the identification cards without moving them. As we have seen, the trial court found specifically that "perhaps one of the cards was face up so that the officers could read the name of the person to whom

the identification card or driver's license was issued." The card or cards bore names that were different from the Browns' and showed photographs of white males, while the Browns are African-American. Contrary to Nkosi Brown's argument, this is not an improper use of racial characteristics; it goes directly to what the officers perceived and reasonably suspected at the time—namely that there were only three persons living in Nkosi Brown's house and none of them was white. *See* ***State v. Drogsvold***, 104 Wis. 2d 247, 255, 311 N.W.2d 243, 247 (Ct. App. 1981) (standard is whether "'police officers of reasonable caution could have believed the defendant probably committed the crime.'") (quoted source omitted).

¶19 Moreover, when asked about the identification cards, Deidra Brown told the officers that she did not know who the people on the identification cards were or where the cards had come from. Thus, it was reasonable for the officers to suspect that the identification cards could have been stolen. The identification cards did not belong to anyone in the Brown household and Deidra Brown could not explain how the cards had gotten there. Accordingly, the police lawfully seized the identification cards under the plain-view doctrine and Nkosi Brown's statement is admissible because it cannot be "tainted" by evidence that was lawfully seized.

B. *New Factor*

¶20 Nkosi Brown also alleges that his sentence should be modified on the basis of a new factor. 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). "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).

¶21 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).

¶22 Nkosi Brown claims that his "enthusiastic" post-sentencing cooperation with the federal government in an unrelated case is a new factor. We disagree. "Post-sentence conduct is not a new factor for sentence modification purposes." ***State v. Kaster***, 148 Wis. 2d 789, 804, 436 N.W.2d 891, 897 (Ct. App. 1989). Nkosi Brown's cooperation with the authorities and his favorable progress in the prison rehabilitation system are matters to be considered by parole authorities, not the courts. *See* ***State v. Kluck***, 210 Wis. 2d 1, 8, 563 N.W.2d 468, 471 (1997).

¶23 Moreover, Nkosi Brown's post-sentencing cooperation with the authorities does not frustrate the purpose of the original sentence. The trial court

selected the sentence in part because Nkosi Brown refused to identify a co-actor in the robberies: "I also express my concern that Mr. Brown has not identified the coactor who participated in the armed robberies."[2] Thus, Nkosi Brown's subsequent willingness to cooperate with law enforcement authorities is not a proper basis for sentence modification—indeed, it is evidence that the sentence is achieving its purpose. *See* ***id.***, 210 Wis. 2d at 10, 563 N.W.2d at 472 ("it flies in the face of reason and logic to modify a sentence that is achieving its purpose").

By the Court.—Judgment and order affirmed.

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

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[2] Indeed, the trial court had the following colloquy with Nkosi Brown at his plea hearing:

> THE COURT: Who was the accomplice with whom you acted?
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> THE DEFENDANT: I don't know his full name, Your Honor.
>
> THE COURT: Well, what was the nickname of your accomplice?
>
> THE DEFENDANT: "Mike."
>
> ….
>
> THE COURT: Why haven't you cooperated with police in identifying "Mike" to the police?
>
> THE DEFENDANT: Well, at the time I was focused on lying.