COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2931-CR **Cir. Ct. No. 2009CF4788**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTAE L. RUSSELL,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Dontae L. Russell appeals from a judgment of conviction, entered on his guilty plea, for robbery with threat of force, contrary to

WIS. STAT. § 943.32(1)(b) (2009–10).[1] He also appeals from an order denying his motion for sentence modification. Russell challenges the sentence imposed on several bases and also argues that the imposition of a significantly lesser sentence on Russell's co-defendant three weeks after Russell was sentenced constituted a new factor warranting sentence modification. We conclude that the trial court properly exercised its sentencing discretion and that the sentence subsequently imposed on Russell's co-defendant was not a new factor that justified sentence modification. Therefore, we affirm.

BACKGROUND

¶2 Russell was charged with one count of robbery with threat of force in connection with the robbery of a sixteen-year-old boy. According to the criminal complaint, the victim was standing outside when he saw a car pull up. Russell was driving the car and a man named Mario Hinds was in the passenger seat. Russell got out of the car and approached the victim while displaying a screwdriver. Russell told the victim to empty his pockets. Russell took four dollars in cash, as well as the victim's wallet, which contained identification, a debit card and a Visa gift card. The victim asked Russell if he could have his identification back. Hinds, who had remained in the car during the robbery, told Russell to give the identification back to the victim, but Russell refused.

¶3 Shortly after the robbery, the police located Russell and Hinds at an Open Pantry store, where Hinds had unsuccessfully attempted to use the debit card bearing the victim's name. It was subsequently learned that Hinds had

[1] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

successfully used the victim's Visa gift card at a Walgreen's. Hinds was charged with the unauthorized attempted use of personal identifying information documents, a felony.

¶4 In December, 2009, Russell pled guilty pursuant to a plea bargain with the State. He faced a maximum penalty of fifteen years of incarceration, but the State agreed to recommend eighteen months of initial confinement and eighteen months of extended supervision. Russell was free to argue for a lesser sentence. In February, 2009, the trial court imposed a sentence consistent with the State's recommendation, rejecting Russell's request for probation.

¶5 Three weeks later, Hinds reached a plea bargain with the State and pled guilty before a different branch of the trial court. The State, with the trial court's consent, amended the single felony charge to two misdemeanor charges: theft, as a party to a crime, and fraudulent use of a financial transaction card. The trial court imposed a sentence of six months' jail time on each crime, consecutive to one another, and then stayed the sentences and placed Hinds on probation for one year.

¶6 Russell filed a postconviction motion seeking modification of his sentence. He argued that Hinds's sentence was a new factor that warranted sentence modification and that Russell's sentence was "overly harsh and excessive when compared with his co[-]defendant's sentence." The trial court denied Russell's motion without a hearing, concluding that Russell's sentence was not unduly harsh and that Hinds's sentence was not a new factor that justified sentence modification.

DISCUSSION

¶7 Russell challenges the trial court's exercise of sentencing discretion and asserts that Hinds's sentence is a new factor that justifies sentence modification. We begin by reviewing the trial court's exercise of sentencing discretion. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 557–558, 678 N.W.2d 197, 207. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the court's discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. The sentencing court is "'generally afforded a strong presumption of reasonability,'" and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference'" with the trial court's sentencing determination. ***Id.***, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203 (citations omitted).

¶8 In this case, the trial court followed the dictates of ***Gallion***. It discussed the circumstances of the robbery, noting that Russell was "the primary actor" in a crime committed against a sixteen-year-old boy who was "scared for his life." The trial court also addressed Russell's character, including the fact that Russell had secured a job but also had a cocaine problem. It recognized that Russell had been released from probation in the past, but observed that while on

probation, Russell had committed additional crimes, including criminal damage to property and battery. The trial court concluded that giving Russell probation again "would unduly depreciate the seriousness of what [he] did." The trial court also found that Russell was not eligible for the Challenge Incarceration Program or Earned Release Program, due to the violent nature of his crime. The trial court followed the State's recommendation and imposed a three-year sentence, which was one-fifth the maximum sentence that could have been imposed. This sentence was not unduly harsh. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶9 Russell argues that the trial court erroneously exercised its discretion because it "did not consider Mr. Russell's need to support his four children, high probability of rehabilitation, and co[-]defendant's equally contributing role at sentencing." He further contends that the imposition of a prison sentence "strains reason, particularly when viewed in light of the sentence of his co[-]defendant." We are not convinced.

¶10 First, Russell's trial lawyer told the trial court that Russell wanted to get drug treatment and then return to work so that he could support his children. The trial court recognized that Russell had four children, but ultimately concluded, after considering appropriate sentencing factors, that incarceration was warranted. Second, the trial court considered Russell's potential for rehabilitation. The fact that it did not consider Russell's potential for rehabilitation to be "high," as Russell asserts on appeal, does not render the sentence improper. Russell committed two crimes while on probation for misdemeanors in the past and had recently developed a cocaine problem that led him to commit the robbery at issue at sentencing. We discern no erroneous exercise of discretion.

¶11 Next, Russell complains that the trial court did not consider Hinds's "equally contributing role" at sentencing, but he does not explain how that would have affected his sentence. The trial court was aware that Hinds remained in the car during the robbery and later tried to use the victim's debit and Visa cards. No argument was presented that Hinds was the mastermind of the robbery or forced Russell to commit it. In short, it is not clear what Russell would have wanted the trial court to discuss with respect to Hinds, who was not before the same trial court for sentencing. We decline to develop Russell's argument for him. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988) (we need not consider undeveloped arguments).

¶12 Russell's final argument is that Hinds's sentencing constitutes a "new factor" warranting sentence modification, and that the trial court therefore should have granted his sentence modification motion. "Within certain constraints, Wisconsin [trial] courts have inherent authority to modify criminal sentences," but "[a] court cannot base a sentence modification on reflection and second thoughts alone." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 837. A trial court "may base a sentence modification upon the defendant's showing of a 'new factor.'" ***Ibid.*** (citation omitted). In ***Harbor***, the Wisconsin Supreme Court clarified the analysis used with motions for sentence modification:

> Deciding a motion for sentence modification based on a new factor is a two-step inquiry. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Whether the fact or set of facts put forth by the defendant constitutes a "new factor" is a question of law. The requirement that the defendant demonstrate the existence of a new factor prevents a court from modifying a sentence based on second thoughts and reflection alone.

> The existence of a new factor does not automatically entitle the defendant to sentence modification. Rather, if a new factor is present, the [trial] court determines whether that new factor justifies modification of the sentence. In making that determination, the [trial] court exercises its discretion.
>
> Thus, to prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. Accordingly, if a court determines that the facts do not constitute a new factor as a matter of law, "it need go no further in its analysis" to decide the defendant's motion. That is, it need not determine whether, in the exercise of its discretion, the sentence should be modified. Alternatively, if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law.

Id., 2011 WI 28, ¶¶36–38, 333 Wis. 2d at 72–73, 797 N.W.2d at 838 (citations omitted).[2]

¶13 Applying those standards here, we affirm the trial court's order denying the motion to modify Russell's sentence. "The fact that a different judge imposed a lesser sentence upon an accomplice is not a 'new factor'" justifying

[2] In ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, the Wisconsin Supreme Court held that a party does not need to show that an alleged new factor must also frustrate the purpose of the original sentence. *See* ***id.***, 2011 WI 28, ¶52, 333 Wis. 2d at 78, 797 N.W.2d at 840. ***Harbor*** explicitly withdrew language from ***State v. Michels***, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), and its progeny that held otherwise. *See* ***Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53 at 79, 797 N.W.2d at 840. Because frustration of the purpose of the original sentence is no longer a consideration, we do not address the parties' discussion of that issue.

sentence modification.[3] ***State v. Studler***, 61 Wis. 2d 537, 541, 213 N.W.2d 24, 26 (1973). Moreover, the trial court did not erroneously exercise its discretion when it determined that the lesser sentence Hinds received from another judge failed to justify a modification of Russell's sentence. As the trial court pointed out, there were notable differences in the two men's crimes and backgrounds. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994) ("A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation."). Russell was convicted of a felony, while Hinds was convicted of two misdemeanors. Hinds remained in the car, while Russell confronted the victim. Russell had a criminal history, which included the commission of new crimes while on probation, while Hinds had never before been convicted of a crime. These differences justified the different sentences imposed.

By the Court.—Judgment and order affirmed.

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

[3] Russell argues that ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990), compels a different result. In ***Ralph***, we reversed a trial court's determination that a new factor had been established, noting that while the co-defendant's subsequently imposed sentence was not a fact that could have been known to the trial court at sentencing, the trial court knew what the State was planning to recommend as a sentence for the co-defendant. *See* ***id.***, 156 Wis. 2d at 437, 456 N.W.2d at 659. Russell contends that because the trial court here, unlike the trial court in ***Ralph***, did not know what the prosecutor would recommend in his co-defendant's case, the lower sentence imposed on Hinds was a new factor. We are not convinced by Russell's reasoning. Our analysis in ***Ralph*** was case-specific and involved a different factual scenario. Moreover, establishment of a new factor would not automatically entitle Russell to sentence modification; the trial court must also have erroneously exercised its discretion in determining that sentence modification was unwarranted by the alleged new factor. *See* ***Harbor***, 2011 WI 28, ¶¶37–38, 333 Wis. 2d at 73, 797 N.W.2d at 838. For the reasons explained in this opinion, we conclude that the trial court did not erroneously exercise its discretion in determining that sentence modification was unwarranted.