COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP207-CR **Cir. Ct. No. 2006CF4879**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALTONIO LAROY CHANEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 FINE, J. Altonio Laroy Chaney appeals an order denying his sentence-modification motion following his conviction on his plea, pursuant to ***North Carolina v. Alford***, 400 U.S. 25 (1970) (defendants may plead guilty to crimes even though they contend that they are not guilty); *see* ***State v. Garcia***, 192

Wis. 2d 845, 857–858, 532 N.W.2d 111, 115–116 (1995) (***Alford*** pleas are permitted in Wisconsin.), to first-degree sexual assault of a child as party to a crime. *See* WIS. STAT. §§ 948.02(1)(b) & 939.05. Chaney argues that the circuit court should have modified his sentence because, he claims, there is a new factor that affects what his sentence should be. We affirm.

I.

¶2 In September of 2006, Chaney was at a party where 11-year-old Regine G. performed sex acts on eighteen or nineteen men and boys. Regine identified Chaney as a man at the party who was telling her what to do. Darnell Gurley, who was also at the party, told police that he saw "Chaney having an act of penis-to-mouth sexual intercourse performed by Regine on Chaney in the basement of the residence."

¶3 At the plea hearing, the circuit court asked Chaney: "Do you understand that on September 4, 2006, on 6th street in the city of Milwaukee you did have sexual intercourse with Regine born July 7, 1995, a person who did not attain the age of 13 years … [a]s a party to a crime. Do you understand that?" Chaney answered: "Yes, sir." The circuit court also asked Chaney about the concept of party to a crime: "You understand you don't have to directly have committed the offense. You understand that?" Chaney responded: "Yes sir."

¶4 The circuit court sentenced Chaney to sixteen years in prison (twelve years of initial confinement followed by four years of extended supervision). After various postconviction proceedings not pertinent here, including an appeal to this court, *see* ***State v. Chaney***, 2008AP395-CR, unpublished slip op. (WI App Feb. 10, 2009), Chaney sought to have the circuit court modify his sentence because Gurley recanted about seeing Chaney having sex with Regine. The circuit

court denied the request, finding that Gurley's retraction was not a new factor justifying modification of Chaney's sentence.

II.

¶5 ***State v. Harbor***, 2011 WI 28, ¶¶36–38, 333 Wis. 2d 53, 72–73 797 N.W.2d 828, 838, clarified the standards of reviewing a new factor claim:

> 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 existence of a new factor does not automatically entitle the defendant to sentence modification. Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence. In making that determination, the circuit 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.

(Citations omitted and formatting altered.) ***Harbor*** also held that a party does not need to show that an alleged new factor frustrated the purpose of the original sentence. *See* ***id.***, 2011 WI 28, ¶52, 333 Wis. 2d at 78, 797 N.W.2d at 840 (withdrawing language from ***State v. Michels***, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), and its progeny that held otherwise).

¶6 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). "[W]hen the newly discovered evidence is a witness's recantation, we have stated that the

recantation must be corroborated by other newly discovered evidence." *See* ***State v. McCallum***, 208 Wis. 2d 463, 473–474, 561 N.W.2d 707, 711 (1997).

¶7 Chaney argues that Gurley's recantation is a new factor that justifies resentencing because the circuit court relied on Gurley's statement when it imposed sentence. We do not agree. First, the circuit court did not focus on Gurley's claim that Chaney had sex with Regine when it imposed his sentence. Significantly, Chaney's lawyer told the circuit court at sentencing that Chaney did not have sex with Regine, that Regine said Chaney did not have sex with her, and that there was no DNA evidence to indicate sex between Chaney and Regine.

¶8 Second, to get resentencing because of an alleged new factor, Chaney has to prove by clear and convincing evidence that the circuit court relied on Gurley's original contention. *See* ***State v. Ninham***, 2011 WI 33, ¶¶95–96, 333 Wis. 2d 335, 387–388, 797 N.W.2d 451, 477–478. He has not done so. The sentencing court emphasized Chaney's presence at the party house, noting his role as the second-oldest person in the house and that Chaney's life experiences should have prompted him to stop what was happening to the 11-year-old victim. Although the circuit court refers to "the sexual assault … on this little 11 year old girl" and notes that "[o]bservations … put him having intercourse with that child either by name *or* recognized by force and by encouraging others," (emphasis added), the transcript also shows clearly that the circuit court based its sentence not on Gurley's claim that Chaney personally sexually assaulted Regine, but because Chaney "had the ability to change the course" of the multiple sexual assaults by others, and "had the ability to stop [the assault by others,] which he didn't."

¶9 Third, Chaney has not corroborated Gurley's recantation, which, as we have seen, is required. *See* ***McCallum***, 208 Wis. 2d at 473–474, 561 N.W.2d at 711 (new factor claim based on recantation requires corroboration). Significantly, Gurley's recantation was almost four years after his initial statement to law enforcement, which was contemporaneous with the events that statement described. We affirm.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.