COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP933-CR **Cir. Ct. No. 2007CF1452**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN ENSELMO MALACARA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Martin Enselmo Malacara appeals from a judgment of conviction and an order denying his motion for postconviction relief. Malacara contends that he is entitled to resentencing on grounds that the circuit court did not

articulate its reasons for imposing consecutive sentences and did not acknowledge and apply the "least punishment" principle at sentencing.[1] Additionally, he maintains that a new factor justified the modification of his sentence. We reject these arguments. Accordingly, we affirm the judgment and order of the circuit court.

¶2 Malacara was convicted following a guilty plea of second-degree reckless homicide and discharging a firearm from a vehicle towards a person, both as party to a crime. The charges stemmed from a drive-by shooting of brothers Torivio and Michael Melendez, while they were at the front door of a friend's house. Malacara, along with two others, allegedly fired several shots from a car, killing Torivio. Malacara was seventeen years old at the time of the shooting.

¶3 On the homicide count, the circuit court sentenced Malacara to fifteen years of initial confinement followed by seven years of extended supervision. On the discharging a firearm count, the court sentenced Malacara to seven years of initial confinement followed by two years of extended supervision. Before the sentencing hearing concluded, the following exchange took place regarding how the sentences would run:

> [PROSECUTOR]: Judge, I don't think you specified whether the counts are consecutive.
>
> THE COURT: They are consecutive. Anything else? Mr. Cafferty?
>
> [DEFENSE COUNSEL]: No, your Honor.

[1] By "least punishment" principle, Malacara is referring to the principle that the sentence imposed should call for the minimum amount of custody or confinement which is consistent with the primary sentencing factors. *See* ***State v. Gallion***, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197.

¶4 Malacara subsequently filed a motion for postconviction relief requesting that the circuit court either grant him a new sentencing hearing or modify his sentence. The grounds for the motion were (1) the court's failure to articulate its reasons for imposing consecutive sentences, (2) the court's failure to acknowledge and apply the "least punishment" principle at sentencing, and (3) that adolescent brain research and personal neurological impairments constituted a new factor. After a postconviction motion hearing, the court denied Malacara's motion. This appeal follows.

¶5 Malacara first contends that he is entitled to resentencing on grounds that the circuit court did not articulate its reasons for imposing consecutive sentences and did not acknowledge and apply the "least punishment" principle at sentencing. According to Malacara, the court's imposition of consecutive sentences was an "afterthought" that exceeded the minimum amount of custody or confinement which is consistent with the primary sentencing factors.

¶6 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶7 The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶23 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276,

182 N.W.2d 512 (1971)). However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, "minimum" does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483.

¶8 In order to permit meaningful review, the circuit court "must articulate the basis for the sentence imposed on the facts of the record." ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). The court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Nevertheless, if the court "fails to specifically set forth the reasons for the sentence imposed, this court is 'obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***State v. Leighton***, 2000 WI App 156, ¶52, 237 Wis. 2d 709, 616 N.W.2d 126 (quoting ***McCleary***, 49 Wis. 2d at 282).

¶9 At the postconviction motion hearing, the circuit court readily admitted that it "didn't do a very good job" at sentencing in articulating the basis for imposing consecutive sentences. Accordingly, in its written decision denying Malacara's postconviction motion, the court elaborated on its reasoning. The court explained that it was "outraged by the events that occurred" and therefore had followed the recommendations of the State and presentence investigation (PSI) writer to impose consecutive sentences. A review of the sentencing transcript confirms the court's sense of outrage.

¶10 The circuit court also used its written decision to address the "least punishment" principle. The court acknowledged its familiarity with the principle

along with the corollary command that sentencing courts should consider probation as a first alternative. ***Gallion***, 270 Wis. 2d 535, ¶44. However, the court noted that all parties, including Malacara, understood that this was a prison case due to the seriousness of the offenses. Indeed, defense counsel had argued that it would be equitable for Malacara to receive a sentence of fifteen years of initial confinement—just as another co-defendant had received. Because the court explained why Malacara's situation was different than the co-defendant's and deserving of greater punishment, it concluded that the failure to explicitly acknowledge and apply the "least punishment" principle did not warrant relief.

¶11 In the end, we are satisfied that the circuit court's statements at sentencing and in its postconviction decision demonstrate a proper exercise of discretion. We therefore reject Malacara's claim that he is entitled to resentencing.

¶12 Malacara next contends that a new factor justified the modification of his sentence. According to Malacara, his new factor had two components: (1) adolescent brain research, which explains the behaviors of all adolescents, including Malacara, and (2) his specific neurological impairments, as diagnosed by Dr. Mariellen Fischer, a neuropsychologist.

¶13 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 (1975).

¶14 The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether what the defendant presents is a new factor is a question of law. ***State v. Hegwood***, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983). If a defendant has demonstrated the existence of a new factor, then the circuit court must determine whether the new factor justifies modification of the sentence. *See* ***id.*** at 546. This determination is committed to the circuit court's discretion and will be reviewed under an erroneous exercise of discretion standard. *See* ***id.***

¶15 We conclude that the circuit court properly exercised its discretion in rejecting Malacara's argument. To begin, it is doubtful that Malacara even demonstrated the existence of a new factor. After all, the circuit court recognized and took into consideration Malacara's age, lack of maturity, poor judgment, and susceptibility to peer pressure at the time of his sentencing. Additional information about adolescent brain research would not have been highly relevant to the court's analysis. *See* ***State v. Ninham***, 2011 WI 33, ¶93, 333 Wis. 2d 335, 797 N.W.2d 451 (generalizations concluded within scientific studies on adolescent brain development are insufficient to support a determination about the culpability of a particular juvenile offender).

¶16 Even if Malacara had demonstrated the existence of a new factor, the circuit court did not erroneously exercise its discretion in concluding that it did not justify sentence modification. In its written decision denying postconviction relief, the circuit court characterized Fischer's report as "superficial at best." The court was entitled to conclude that Fischer's evaluation was not credible or convincing. Furthermore, the court cited two facts from Fischer's testimony and report that undermined Malacara's argument that he was less culpable than the court originally believed: (1) Malacara's intelligence was within normal range

and (2) notwithstanding his neurological impairments, he still understood how a gun worked; that is, "if there was a bullet in the gun and the gun was fired, the bullet would come out of the gun." Given these facts, the court could reasonably conclude that sentence modification was not warranted.

By the Court.—Judgment and order affirmed.

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