COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2012

A. John Voelker
Acting 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. 2011AP570 **Cir. Ct. No. 2008CF4297**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONDON TEIAIRES DABNEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. London Teiaires Dabney, *pro se*, appeals from an order denying his motion to withdraw his guilty plea or modify his sentence. On appeal he argues that he is entitled to resentencing because the sentencing court failed to explain why Dabney received the same sentence as his brother despite

differences in their criminal records and Dabney's willingness to testify at his brother's trial. He also argues that because the presentence investigation report (PSI) incorporated a while armed weapon enhancer that was dismissed, he was sentenced on the basis of an inflated recommendation and inaccurate information. We affirm the circuit court's determination that Dabney did not present any new factors supporting sentence modification.

¶2 Dabney and his brother, Anthony, were involved in an altercation that resulted in one man being shot in the back and killed. Dabney and Anthony were both charged with first-degree reckless homicide, as a party to the crime. At the plea hearing the prosecutor indicated that Dabney would enter a plea to the amended charge of second-degree reckless homicide while armed, as party to the crime, and that the while armed enhancer increased the maximum sentence to twenty years' initial confinement and ten years' extended supervision. Dabney's trial counsel confirmed that the prosecutor had correctly stated the plea agreement and indicated that the entire agreement was set forth in a letter attached to the plea questionnaire. The letter indicated that under the plea agreement, "[i]f needed London Dabney would testify consistently with the statement he gave to Detective Keith Kopcha on August 21, 2008." Dabney personally confirmed that the recitation of the plea agreement was accurate. Dabney entered a guilty plea to the amended charge. A PSI was ordered.

¶3 Sentencing was conducted on June 23, 2009. At sentencing the prosecutor asked the sentencing court not to consider the while armed portion of the charge. The prosecutor explained that just weeks earlier Anthony had entered a guilty plea to second-degree reckless homicide with the penalty enhancer and that Anthony's plea was brought about because Dabney was willing to testify against his brother. The prosecution asked to withdraw or dismiss the enhancer as

to Dabney "in fairness." The sentencing court amended the charge to dismiss the while armed enhancer and obtained the parties' confirmation that the maximum sentence was now fifteen years' initial confinement and ten years' extended supervision. Dabney's trial counsel pointed out that the PSI should be corrected to reflect that the while armed portions "no longer exist." Counsel further pointed out to the sentencing court that the PSI recommendation for a sentence of nine and one-half years to twelve and one-half years took into consideration the while armed portion and so the recommendation should have been less. Dabney was sentenced to ten years' initial confinement and five years' extended supervision.

¶4 In January 2011, Dabney filed a *pro se* motion under WIS. STAT. § 974.06 (2009-10),[1] to withdraw his guilty plea or, in the alternative, for sentence modification or resentencing. With respect to plea withdrawal, Dabney pointed out that the prosecution had agreed to only recommend substantial confinement with no specific term. He argued that by permitting the conviction to go to the PSI stage with the while armed enhancer and then dismissing the enhancer at sentencing, the prosecution breached the plea agreement by obtaining an excessive PSI recommendation. Dabney sought sentence modification on the basis of a new factor. He pointed out that Anthony received the same sentence from the same circuit court judge. He suggested this was not fair because his case involved mitigating circumstances not present in Anthony's case. He identified as mitigating circumstances that the fatal shot was not from his gun, that he was willing to testify against Anthony and that caused Anthony's case to be resolved by a guilty plea, and that he had taken full responsibility for his conduct. He

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

acknowledged that the sentencing court indicated a willingness to give him credit for being willing to testify against his brother, for taking responsibility, and for showing remorse. He asserted that the fact that he and Anthony received the same sentence meant the sentencing court only gave "lip service" to the mitigating circumstances.

¶5 The circuit court denied Dabney's motion. It concluded that it had not relied on the PSI recommendation in fashioning the sentence and that it was fully aware at sentencing that the while armed enhancer was not in play. It explained that because it was not definitively determined which brother fired the fatal shot, it deemed them both equally culpable and imposed the same sentence. It determined that no new factor existed.

¶6 On appeal Dabney first argues that the sentencing court failed to give him requisite consideration or credit for his willingness to testify against his brother and that the sentencing court failed to explain why the two brothers received the same sentence.[2] These contentions are nothing more than a claim that the sentencing court erroneously exercised its sentencing discretion. Dabney did not timely file a motion for sentence modification based on an erroneous exercise of discretion and the sentencing court's "inherent power" to review a sentence at any time applies only if a defendant demonstrates the existence of a new factor.

[2] Dabney includes in his list of issues that the prosecution breached its promise to not make a sentencing recommendation for a specific term by introducing a specific recommendation "under the guise of recapitulating the victim's family's sentence request." This issue was not raised in the circuit court and is not developed in the argument portion of the appellant's brief. Issues not presented to the circuit court will not be considered for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 598, 604, 563 N.W.2d 501 (1997). Further, we need not consider arguments not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). Dabney also states in the conclusion to his brief that he conclusively withdraws his plea withdrawal contention.

State v. Noll, 2002 WI App 273, ¶11, 258 Wis. 2d 573, 653 N.W.2d 895. A motion under WIS. STAT. § 974.06, cannot be used to challenge a sentence on an erroneous exercise of discretion. ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765. To the extent that Dabney tries to raise a constitutional issue cognizable under § 974.06, by claiming that due process requires the sentencing court to explain why the same sentence was imposed, he offers no legal authority to support that claim.[3] Moreover, Anthony was sentenced one month after Dabney and the sentencing court could not have been aware at Dabney's sentencing that the two brothers would receive the same sentence and therefore, would not be required to explain why. "The court is not required to base its sentence determination on the sentences of other defendants." ***State v. Tappa***, 2002 WI App 303, ¶20, 259 Wis. 2d 402, 655 N.W.2d 223.

¶7 We turn to Dabney's claim that the fact that he and Anthony received the same sentence is a new factor. A new factor "refers to 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). Whether a fact is a new factor warranting resentencing is a question of law reviewed *de novo*. ***State v. Lechner***, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998).

[3] As the State points out, the cases Dabney cites discuss disparity in sentencing, not the imposition of identical sentences. Even if disparity cases are relevant, disparity in sentencing alone does not violate due process. ***Jung v. State***, 32 Wis. 2d 541, 553, 145 N.W.2d 684 (1966).

¶8 That Anthony received the same sentence is a fact which arose after Dabney's sentencing. That only makes it a new fact, not a new factor. Dabney contends that fact is relevant to the imposition of sentencing because it reflects that the sentencing court gave him no credit for his willingness to testify against his brother. Dabney also contends, for the first time on appeal, that his sentence should be less because Anthony was convicted of the while armed penalty enhancer and he was not.

¶9 Dabney's claim that a lack of disparity between his sentence and Anthony's sentence is a new factor is based, in part, on his misperception that their conduct was different. At sentencing the sentencing court specifically addressed Dabney's suggestion that he was less culpable. It explained that it was not known whose gun fired the fatal shot and it considered Dabney "no more innocent than your brother…." It acknowledged that it would give credit to Dabney for his willingness to testify against Anthony. The sentencing court's remarks reflect that the sentence was based on Dabney's personal circumstances reflected by his prior criminal conduct despite being very intelligent. Where, as here, the sentence is based on the individual's culpability and rehabilitative needs, disparity in sentencing, or lack thereof, is not improper. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994), *clarified or modified on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. *See also* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 435-36, 351 N.W.2d 758 (Ct. App. 1984) (each defendant should have individualized sentences even though they may have committed the same offense). There is no suggestion that the sentencing court ever intended Dabney to have a shorter sentence than Anthony. Therefore, that Anthony received the same sentence is not highly relevant to the imposition of Dabney's sentence and does not constitute a new factor.

¶10 Finally, Dabney places emphasis on the fact that the PSI recommendation was based on the while armed enhancer and he contends he was sentenced on the basis of an inflated recommendation and inaccurate information.[4] A defendant has a due process right to be sentenced based upon accurate and valid information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, the defendant "must show both that the information was inaccurate and that the [sentencing] court actually relied on the inaccurate information in the sentencing." ***Id.***, ¶26 (internal quotation marks omitted).

¶11 The sentencing court was very much aware that the while armed penalty enhancer no longer applied to Dabney; it had just dismissed that portion of the charge at the commencement of the sentencing proceeding. It repeated the correct maximum sentence. The sentencing court did not mention the PSI recommendation at any time. On Dabney's postconviction motion the sentencing court confirmed that it had not relied on the PSI recommendation in fashioning the sentence but rather relied on the seriousness of the offense, Dabney's personal background, and the need to protect the public. The record reflects the accuracy of the sentencing court's postconviction assertion of non-reliance. *See* ***State v. Groth***, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163, *modified on other grounds by* ***Tiepelman***, 291 Wis. 2d 179 ("A postconviction court's assertion of non-reliance on allegedly inaccurate sentencing information is not dispositive. We may independently review the record to determine the existence

[4] To the extent that Dabney believes he entered a plea to the charge without the while armed enhancer, he is factually wrong. There was no impropriety in the PSI recommendation being based on the charge to which Dabney entered his guilty plea—second-degree reckless homicide while armed, as a party to the crime.

of any such reliance." (citation omitted)). Dabney did not establish that the sentencing court relied on inaccurate information or an inflated recommendation.

¶12 Any reliance on the PSI's reference to the while armed enhancer would be deemed harmless. The sentencing court was aware that Dabney possessed a gun during the crime. Under ***State v. Bobbit***, 178 Wis. 2d 11, 17, 503 N.W.2d 11 (Ct. App. 1993), the sentencing court may look to the circumstances surrounding the offense to reach its conclusion. Dabney is not entitled to resentencing.

By the Court.—Order affirmed.

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