COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1502-CR **Cir. Ct. No. 1994CF940199**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUENTIN CORTEZ WARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Quentin Cortez Ward, *pro se*, appeals from an order denying his postconviction motion for sentence modification. Ward asserts that certain post-sentencing assistance that he provided to law enforcement warranted an adjustment to his sentence. The circuit court concluded that Ward

had not fulfilled the necessary burden and denied the motion. We agree with the circuit court's conclusion, so we affirm.

BACKGROUND

¶2 In 1994, Ward was convicted on one count of first-degree recklessly endangering safety, one count of second-degree sexual assault, and one count of armed robbery. He was sentenced to an aggregate thirty-five years' imprisonment under the indeterminate sentencing scheme. He has made multiple unsuccessful attempts at postconviction relief.

¶3 While in prison, Ward met fellow inmate David Day, who was imprisoned for sexually assaulting a young boy. According to Ward, Day solicited him in 2007 to kidnap the victim or a relative as a way to force the victim to recant his sexual assault allegations. Ward informed the prison security director and the Dodge County district attorney of Day's plot. Ward also wrote directly to the victim's family to warn them. In 2008, Day was convicted on charges relating to the kidnapping plot in Dodge and Washington Counties.[1]

¶4 On March 21, 2011, Ward moved the circuit court in this case for sentence modification based on his assistance to law enforcement regarding Day. By order dated March 30, 2011, the circuit court denied the motion for the time, but told Ward that if he could obtain additional information, the circuit court would again consider his motion. In particular, the circuit court directed Ward to provide "a full description of each act of cooperation for which credit is being

[1] According to Ward, Day had originally hired someone in Washington County to commit the kidnapping, but that person reported Day to authorities.

sought," "the government agency [he] worked with and the specific officer(s) or agent(s)," "a letter from the government agent or officer confirmation each act of cooperation … [and the agent] should express an opinion with regard to the value of the services performed and whether credit should be given," and "the outcome for each act of cooperation."

¶5 Ward filed a response, which he called a motion for reconsideration, on April 19, 2011. He had obtained correspondence from Dodge County circuit court judge Steven G. Bauer, the former Dodge County district attorney. The entire substantive content of Judge Bauer's letter was: "I have verified with law enforcement here in Dodge County, that you did indeed provide information and assistance in an ongoing case against David Allen Day. Should you require anything further, please contact my office." Upon receipt of Ward's response, the circuit court ordered the parties to brief the matter.

¶6 On May 3, 2011, the circuit court received a letter from the Washington County district attorney. That letter told the circuit court that Day had been convicted in Washington County. However, Ward had not been a witness and provided no information for the Washington County case, and the district attorney thus believed that Ward was not entitled to any sentencing consideration. The Washington County district attorney did acknowledge that Ward might have provided assistance in Dodge County, but that Washington County would have no knowledge thereof.

¶7 The State, in its circuit court response brief, asserted that post-sentencing assistance to law enforcement warrants sentence modification only in truth-in-sentencing cases, not indeterminate-sentence cases. Alternatively, it argued that Ward was not entitled to any modification because he provided no

assistance in Washington County and because his information to Dodge County was provided *after* Day had already been charged there. Further, Ward had not been named as a potential witness in the Dodge County case.

¶8 The circuit court denied Ward's motion after briefing. It noted that it was inclined to agree with the State regarding availability of modification, but nevertheless addressed the merits of Ward's motion. It explained:

> The court has reviewed the materials submitted and cannot find anything to demonstrate that Ward was the lynchpin behind David Allen Day's convictions … arising out of Dodge County. Although Ward sent the [victim's] family a letter in March of 2007, the fact of the matter is that Day was charged in September of 2006. It is completely unknown what assistance Ward provided to law enforcement authorities prior to Day being charged. Although Ward claims that the information he provided led to increased charges against Day after September of 2006 … there is no information from law enforcement to substantiate his claim.… The letter from Judge Bauer … merely refers the court to law enforcement personnel. It does not detail any specific assistance provided by Quentin Ward in the Day case. Under the circumstances, the court does not find that the defendant has met his burden.

¶9 Ward moved for reconsideration, offering another letter from Judge Bauer. This letter stated, "This letter will acknowledge your assistance contributed to the conviction of David Day in the [Dodge County] case." The circuit court denied reconsideration, stating it had already considered Judge Bauer's letter. Ward appeals.

DISCUSSION

¶10 The circuit court may, in its discretion, modify a sentence if the defendant shows that a new factor exists. *See* ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact or 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) (reaffirmed by ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 74, 78, 797 N.W.2d 828, 838, 840). The defendant must establish the evidence of a new factor by clear and convincing evidence. ***Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d at 72, 797 N.W.2d at 838. Whether the facts constitute a new factor is a question of law we review *de novo*. ***Ibid.***

¶11 In ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, we addressed "whether post-sentencing substantial assistance to law enforcement is a new factor." ***Id.***, 2005 WI App 68, ¶8, 280 Wis. 2d at 739, 697 N.W.2d at 105. We observed that there is a federal rule which "expressly authorizes a reduction in a sentence if 'the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.'" ***Ibid.*** (citing FED. R. CRIM. P. 35(b)(1)(A)).

¶12 Thus, we adopted five factors, derived from the federal sentencing guidelines, to assist "in determining whether the post-sentencing assistance constitutes a new factor[.]" ***Doe***, 2005 WI App 68, ¶9, 280 Wis. 2d at 739, 697 N.W.2d at 105.

> The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

Id., 2005 WI App 68, ¶9, 280 Wis. 2d at 739–740, 697 N.W.2d at 105–106 (citation omitted).

¶13 Ward contends that the circuit court failed to follow ***Doe***.[2] He asserts that Judge Bauer's letters show that he did provide assistance in Day's prosecution, and he complains about the circuit court's finding that there was no evidence Ward was the "lynchpin," because ***Doe*** did not use that word. Ward also complains that the circuit court "did not take into consideration that Ward's information was so credible and accurate that Day had no choice but to plea out [*sic*] in the case."

[2] The question of the applicability of ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, to an indeterminate sentence arises because in adopting the federal standards, we noted that allowing circuit courts to modify sentences based on cooperation with law enforcement would "address some of the concerns expressed in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, about sentencing discretion in light of truth-in-sentencing changes[.]" ***Doe***, 2005 WI App 68, ¶10, 280 Wis. 2d at 740, 697 N.W.2d at 106. We need not decide here whether ***Doe*** applies when the defendant is sentenced under the indeterminate sentencing scheme because assuming without deciding that it does, the motion for sentence modification ultimately fails on its merits.

¶14 We agree with the circuit court that Ward has not met the burden of showing a new factor.[3] There is no indication of the "significance and usefulness" of Ward's assistance.[4] As the circuit court noted, Day had already been charged in Dodge County at the time Ward contacted officials.[5] This suggests that the "timeliness" factor does not inure to Ward's benefit. The "nature and extent" of Ward's assistance is also limited: Ward appears to have done little more than substantiate information that Dodge County authorities must have already acted on if charges had already been filed. Notably, Ward was not named as a witness against Day, further suggesting that Ward's role in Day's conviction was nominal. Judge Bauer's second letter states that Ward's information "contributed to" Day's conviction, but the letter does not indicate the extent of that contribution.[6] Though Ward asserts that his information led to additional charges against Day and that the information forced Day to enter a plea, Ward offers no record citation or other documentation to support such claims.

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[3] Ward relies on several unpublished cases to try to establish that he has fulfilled his burden. As a general proposition, however, Ward is not allowed to rely on such cases, *see* WIS. STAT. RULE 809.23(3)(a), nor are the cases of the type that may be cited for persuasive value, *see* RULE 809.23(3)(b). Even if Ward were permitted to rely on such cases, he has not included copies of them with his brief. *See* RULE 809.23(3)(c).

[4] We focus on whether Ward's efforts in regard to showing his assistance in Dodge County merit sentence modification, as he does not appear to dispute Washington County's statement that he provided no assistance in that case.

[5] The circuit court case number for Washington County indicates that Day was charged there in 2005.

[6] It is not clear whether the circuit court actually read Judge Bauer's second letter, despite its statement that it had considered the letter. Sentence modification was denied June 20, 2011, but Judge Bauer's second letter is dated June 25, 2011. Nevertheless, whether a set of facts constitutes a new factor is a question of law, and we conclude that Judge Bauer's second letter is not evidence of substantial assistance. At best, it indicates the outcome of Ward's assistance, but it contains neither an opinion as to the value of Ward's information nor an opinion as to whether credit ought to be given.

¶15 While Ward claims he was threatened once Day knew Ward had reported him, and while there is no reason to believe that Ward's information was false, the overriding factor here is the minimal role that Ward's information appears to have played: post-sentencing modification based on assistance to law enforcement must be based on *substantial* assistance. The circuit court's finding that Ward was not the "lynchpin" in the State's case against Day is merely another way of saying that his assistance was not significant or substantial enough to warrant sentencing modification. We agree with that conclusion.

By the Court.—Order affirmed.

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