COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP381-CR **Cir. Ct. No. 2009CM234**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVON J. ASH, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions*.

¶1 GUNDRUM, J.[1] Lavon J. Ash, Sr., appeals from a judgment of conviction for two counts of misdemeanor bail jumping as a repeater and from a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

postconviction order denying relief from the judgment. Ash argues that the trial court erred in denying his request for resentencing based upon new factors and an illegally structured sentence.

¶2 Ash has not met his burden to show the existence of a new factor. However, as Ash argues, and the State agrees, his sentence does not comply with the standards set forth in ***State v. Gerondale***, Nos. 2009AP1237-CR and 2009AP1238-CR, unpublished slip op. (WI App Nov. 3, 2009). Because we agree with the persuasive reasoning of ***Gerondale***,[2] we reverse the sentencing portion of the judgment and the postconviction order and remand with directions that Ash be resentenced in accordance with the standards set forth in ***Gerondale***.

Background

¶3 On January 21, 2009, Karen L. reported to police that she received two phone calls in violation of a temporary restraining order she had against Ash. A criminal complaint was filed in this regard. On February 16, 2009, Ash pled no contest to and was convicted of two counts of misdemeanor bail jumping as a repeater, at which time his sentence was withheld and he was placed on probation.

¶4 Based on allegations that Ash violated conditions of his probation, a revocation hearing took place before an administrative law judge (ALJ) on May 17, 2010. The ALJ concluded that Ash violated his probation by entering a bar, consuming alcohol, failing to inform his agent he had moved, failing to make a good faith effort to pay his court-ordered financial obligations, and physically

[2] WISCONSIN STAT. RULE 809.23(3)(b) provides in pertinent part: "[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under [WIS. STAT. §] 752.31(2) may be cited for its persuasive value."

assaulting Michelle J. on November 6, 2009. The ALJ ordered Ash's probation revoked.

¶5 Ash's sentencing-after-revocation hearing took place August 2, 2010. At that hearing, the trial court stated it had "received a copy of the Department of Corrections revocation order and warrant, revocation summary, the administrative law judge's decision, and their recommendations." The court noted that Ash's revocation "was subject to an administrative law judge hearing, and findings of fact, conclusions of law were provided to this Court for review." Ash's attorney argued that Ash "vehemently denied" the ALJ's finding that he battered Michelle. Counsel told the court Ash had "presented several witnesses at the [revocation] hearing that gave statements that brought into question the statement of [Michelle]" and that "[Michelle] gave, herself, three or four conflicting statements about the incidents surrounding this alleged battery." Ash told the court he was the one who got police involved in Michelle's "situation." The court stated it understood Ash disagreed with the evidence presented to the ALJ and that "it gives me pause because of the contradicting positions taken by the various parties." The court then stated the "bottom line" on the matters before it:

> I did in fact put you on probation on the two counts we are dealing with today. The revocation is—and I have no reason not to believe the information from the Department of Corrections nor the information in the administrative law judge's report that there was in fact some type of injury to the victim in this case, [Michelle].
>
> To me it's not significantly important who called the police or what happened there because the administrative law judge did find that this was a situation where apparently [Michelle] was intoxicated, but it's the assault that is of some concern in this case to me because it's the duplicitous type behavior that caused me to impose and stay [a] sentence in the 09-CM-72 case. And it was done

> while you were on not only probation on these matters but on an imposed and stayed sentence in the other case.

The court stated that Ash's behavior was assaultive and that while Ash had made some achievements while incarcerated, his probation was revoked for committing another serious battery. On each bail jumping count, the court sentenced Ash to one year of initial confinement and one year of extended supervision, concurrent.

¶6 Ash moved for postconviction relief on the grounds that there are "a number of new factors" warranting resentencing and the sentence imposed was "erroneously bifurcated" according to ***Gerondale***. The court denied the motion after a hearing. This appeal followed. Additional facts will be added as needed in our discussion.

Discussion

¶7 *New Factor*. As he did in his postconviction motion, Ash argues he is entitled to sentence modification based on new factors. We disagree. The term "new factor" refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court at the time of 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); ***State v. Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828. The trial court has discretion to modify a sentence upon a showing of a new factor. ***Harbor***, 333 Wis. 2d 53, ¶¶33, 36. Whether a "new factor" exists meriting sentence modification is a question of law we review de novo. ***Id.*** A defendant bears the burden of proving by clear and convincing evidence that a "new factor" exists. ***Id.***, ¶36. Ash has not met this burden.

¶8 Ash contends that there are "a number of new factors that are highly relevant for the imposition of the sentence and were unknowingly overlooked by the trial court, the State, and the defense in this case, or not in existence on August 2, 2010" and that the "set of facts that comprise the new factor in this case stem from the original sentencing."

¶9 Ash argues that the trial court's rationale at the original sentencing on February 16, 2009, where his sentence was withheld and he was given probation, constitutes a new factor because it was relevant to the sentencing after revocation but was "overlooked." For proof of the court's rationale, Ash provides a quote and cites to a two-page document in his appendix with no corresponding citation to the record. We will not consider this document because it is not in the record. Accordingly, Ash does not succeed with this new factor argument based on unsupported assertions of fact from a document not in the record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981) (we will not consider documents attached to a brief but not in the record, and we will not consider assertions of facts not in the record). We address it no further.

¶10 Ash also contends "[t]he information presented at the postconviction motion hearing comprises the set of facts that constitute a new factor" and claims "these facts essentially include statements of the alleged witnesses that were used in Mr. Ash's revocation and statements of [Michelle] that are in essence letters in which she recants by questioning her own credibility." Ash's argument is a nonstarter.

¶11 The record of the sentencing-after-revocation hearing reveals that Ash's attorney informed the trial court that Ash "vehemently" denied battering Michelle and that statements of several individuals "brought into question the

statement of [Michelle]." The court also was told that Michelle had given multiple conflicting statements. Indeed, the court indicated that "the contradicting positions taken by the various parties" gave it "pause," but that it nonetheless agreed with the ALJ's finding that the assault had occurred. Thus, the court was aware there were significant conflicting statements related to the events of November 6, 2009. Ash, by simply listing additional conflicts in statements given by witnesses, has not met his burden to show these statements were highly relevant to the imposition of the sentence.

¶12 Likewise, Ash has not met his burden to show that Michelle's statements in her letters constitute a new factor. We have read the letters in their entirety. They are vague, do not clearly relate to the events of November 6, 2009, or cast doubt upon the foundation for the trial court's belief that the assaults did occur. To the extent they could be interpreted as relating to November 6, 2009, the letters present nothing new. The court was already aware at the sentencing-after-revocation hearing that Michelle had given conflicting statements surrounding the incident of November 6, 2009.

¶13 *Bifurcation standards*. Ash argues, and the State agrees, that he is entitled to resentencing under the standards set forth in ***Gerondale***. We also agree. Gerondale, like Ash, was convicted of misdemeanors as a repeater and given equally bifurcated sentences on the counts—one year of confinement and one year of extended supervision. *See* ***Gerondale***, Nos. 2009AP1237-CR, 2009AP1238-CR, unpublished slip op. ¶2. We noted in ***Gerondale*** that while various provisions of WIS. STAT. § 973.01—the bifurcated sentencing statute—appear to interact well enough when dealing with felonies, the statute breaks down when applied to misdemeanors. ***Gerondale***, Nos. 2009AP1237-CR, 2009AP1238-CR, unpublished slip op. ¶¶6-7. We further pointed out that the problems with the

statute are magnified by this court's interpretation of the statute to prohibit any of the repeater portions of a sentence from being applied to extended supervision. ***Id.***, ¶¶4, 8. We then settled on a construction which follows our case law interpretation relying on the plain language of § 973.01(2)(c) "to the extent possible," but which also requires the sentence to include the mandatory twenty-five percent minimum term of extended supervision, stating:

> [A] misdemeanor prison sentence based on a penalty enhancer may be bifurcated only to the extent required to comply with the 25% minimum extended supervision requirement. We believe this interpretation furthers the intent of the extended supervision sentencing component. Our interpretation is also consistent with the habitual criminality enhancer statute, which, rather than referring to either confinement or extended supervision, merely provides that the "maximum term of imprisonment ... may be increased." WIS. STAT. § 939.62(1). While our construction does not fully resolve the conflicts presented by WIS. STAT. § 973.01, the problem is one that the legislature must ultimately resolve.

Gerondale, Nos. 2009AP1237-CR, 2009AP1238-CR, unpublished slip op. ¶11. Under this rationale, we remanded to the trial court for resentencing consistent with our interpretation of § 973.01. ***Gerondale***, Nos. 2009AP1237-CR, 2009AP1238-CR, unpublished slip op. ¶13.

¶14 Ash's sentence imposed after revocation does not comply with our interpretation of WIS. STAT. § 973.01 in ***Gerondale***. Accordingly, we remand to the trial court to resentence Ash in accordance with the ***Gerondale*** standards.

By the Court.—Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.