COURT OF APPEALS
DECISION
DATED AND RELEASED

October 3, 1995

No. 95-0404-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FELEIPE HARRIS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Feleipe Harris, *pro se*, appeals from an order denying his post-conviction sentence-modification motion. Harris argues that the trial court erroneously exercised its discretion by imposing a fifteen-year sentence following his guilty plea to the crime of first-degree reckless homicide, and that the trial court should have modified his sentence based upon a "new factor." Further, Harris argues that the State was required to disclose the entire amount of restitution being requested as part of his plea bargain. We affirm.

Harris pled guilty to first-degree reckless homicide in connection with the death of Muhamed El-Amin. According to the record, Harris thought that El-Amin had raped Harris's grandmother. Harris then beat El-Amin to death. The trial court sentenced Harris to fifteen years in prison and ordered him to pay restitution for El-Amin's funeral expenses.

First, Harris challenges the fifteen-year sentence imposed by the trial court, arguing that, during the sentencing hearing, the trial court improperly emphasized the "severity of the offense." Because trial courts have wide discretion in sentencing, our review is limited to whether the trial court erroneously exercised its discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors that must be considered when sentencing a defendant are "the gravity of the offense, the character of the offender, and the need for protection of the public." ***Id.***, 141 Wis.2d at 427, 415 N.W.2d at 541. The weight to be given to each factor is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

In imposing sentence, the court indicated that it was "appalled by the viciousness of that crime." The trial court stated that while it could "understand [how Harris] may have felt[,] given his grandmother's state and past history that she was vulnerable, it didn't appear to [the trial court] that there was any need for any type of forcible involvement with Mr. Harris at that particular time." The trial court noted all of the letters it received on Harris's behalf as well as the efforts Harris had made while out on bail to make progress with his life. The trial court, however, indicated that a lengthy sentence was necessary to "deter Mr. Harris from any further criminal activity" and to "communicate to the community that laws must be obeyed or serious repercussions will follow." The trial court noted that Harris appeared remorseful and, as a result, a sentence of fifteen years would be "an appropriate and serious response" to the crime.[1] The trial court's sentence was well within the ambit of its discretion.

Next, Harris argues that a "new factor" justified sentence modification. Although pleading guilty, Harris denied that he had stomped on

[1] The maximum penalty for first-degree reckless homicide is twenty years.

El-Amin's head, even though the medical examiner found shoe sole imprints on El-Amin's head. Harris claims that the trial court should have modified his sentence because the "size and measurement of the shoe sole imprint patterns" on El-Amin's body shows that he was not responsible for all of El-Amin's injuries, particularly the head injuries.

"A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor." ***State v. Michels***, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). "[T]he phrase `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 the 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." ***Id.*** (citation omitted). A "new factor" must be an event or development which "frustrates the purpose of the original sentencing. There must be some connection between the factor and the sentence—something which strikes at the very purpose for the sentence selected by the trial court." ***Id.***, 150 Wis.2d at 99, 441 N.W.2d at 280. Whether a set of facts is a "new factor" is a question of law which we review without deference to the trial court. ***State v. Hegwood***, 113 Wis.2d 544, 546-547, 335 N.W.2d 399, 401 (1983). Whether a "new factor" warrants modification of sentence rests within the trial court's discretion. ***Id.***, 113 Wis.2d at 546, 335 N.W.2d at 401.

The "new factor" Harris sets forth in his argument is not a "new factor" within the meaning of ***Michels***. The trial court was fully aware that Harris denied kicking El-Amin in the head; at the sentencing hearing Harris's attorney told the trial court that. Further, the trial court noted during the sentencing hearing that the cause of death established by the medical examiner was loss of blood due to blows to the liver, spleen and heart—injuries Harris admitted inflicting upon the victim.

Finally, Harris claims error because the trial court did not advise him of the possibility of restitution during the plea hearing. "When a defendant alleges that he or she did not know or understand the information which should have been provided at the plea hearing and shows that the trial court failed to follow the procedures necessary to properly accept a plea, he or she has made a *prima facie* case that the plea was not knowingly and voluntarily entered." ***State v. James***, 176 Wis.2d 230, 237, 500 N.W.2d 345, 348 (Ct. App. 1993). Whether

Harris has made a *prima facie* showing that his plea was entered involuntarily or unknowingly is a question of law that we review *de novo*. ***Id***.

In accepting a plea of guilty or no contest, the trial court has a mandatory duty to undertake a personal colloquy with a defendant to ascertain his or her understanding of the nature of the charge. ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). Such communication is statutorily mandated by § 971.08, STATS., which provides in part:

> **Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

A plea entered in violation of a defendant's due process rights, including the right to enter a knowing and voluntary plea after being informed of the criminal penalties is void and is entitled to be withdrawn. ***State v. Bartelt***, 112 Wis.2d 467, 485-486, 334 N.W.2d 91, 99-100 (1983). When "informing accused persons of their rights, courts are only required to notify them of the `direct consequences' of their pleas." ***James***, 176 Wis.2d at 238, 500 N.W.2d at 348 (quoting ***Brady v. United States***, 397 U.S. 742, 755 (1970)). Defendants have no due process right to be informed of the "collateral consequences" to a voluntary and intelligent plea of guilty. *See* ***State v. Madison***, 120 Wis.2d 150, 160, 353 N.W.2d 835, 841 (Ct. App. 1984). "[T]he distinction between `direct' and `collateral' consequences of a plea ... turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment." ***James***, 176 Wis.2d at 238, 500 N.W.2d at 348.

The issue raised by Harris was recently addressed in ***State v. Dugan***, 193 Wis.2d 610, 534 N.W.2d 897 (Ct. App. 1995). Dugan pled guilty.

The trial court engaged Dugan in a personal colloquy by eliciting Dugan's understanding of the plea bargain but did not address the possibility of restitution. At the sentencing hearing, Dugan was sentenced to eight years in prison and was ordered to pay the victim $40,000 in restitution pursuant to § 973.20, STATS.[2] Dugan filed a post-conviction motion seeking relief from the restitution order, arguing that restitution was "potential punishment" within the meaning of § 971.08, STATS., and that the court had erred in failing to warn him that restitution could be ordered. The trial court concluded that restitution was not "punishment" and denied the motion. ***Dugan***, 193 Wis.2d at 616, 534 N.W.2d at 899.

On appeal, ***Dugan*** determined that "even if restitution is `definite, immediate, and largely automatic' within the meaning of ***State v. James***, it is not a mandatory component of a valid plea colloquy under § 971.08, STATS., if it is not punishment." ***Dugan***, 193 Wis.2d at 618 n.4, 534 N.W.2d at 900 n.4 (citation omitted).

As required by ***Dugan***, we conclude that the restitution order here is not "potential punishment" as that term is used in § 971.08, STATS., and, therefore, the trial court was not required to notify Harris that restitution would be sought. We are not persuaded by Harris's argument that Federal Rule 11(c)(1) supports his position. Unlike § 971.08, STATS., Federal Rule 11(c)(1) specifically addresses the subject of restitution and expressly requires the court to inform the defendant that restitution might be ordered. The trial court did

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[2] Section 973.20(1), STATS., provides, in part:

> **Restitution. (1)** When imposing sentence or ordering probation for any crime, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of the crime or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record. Restitution ordered under this section is a condition of probation or parole served by the defendant for the crime. After the termination of probation or parole, or if the defendant is not placed on probation or parole, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to received restitution or enforced under ch. 785.

not err when it failed to advise Harris that the trial court could order restitution.[3]

By the Court.—Order affirmed.

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

[3] We also agree with the ***Dugan*** court that despite our holding that a restitution warning is not a mandatory component of a plea colloquy under § 971.08, STATS., it is better practice for a sentencing court to include the warning when taking a plea and to include the warning on the ***Moederndorfer*** questionnaire. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987).