COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1996

No. 95-1497-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY COOK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Larry Cook appeals from a judgment convicting him of possession of a controlled substance with intent to deliver in violation of §§ 161.14(4)(t), 161.41(1m)(h)1 and 161.48, STATS., and sentencing him to four years in prison. He also appeals from an order denying his motion for sentence modification. He contends that the trial court erred when it determined that no new factor existed which could be considered for purposes of sentence modification. He also contends that the prosecutor breached a plea agreement with him by opposing his motion for sentence modification. We reject both arguments and affirm the judgment and the order.

Following entry of a no contest plea in this case, Cook testified favorably to the State in an unrelated criminal case against another defendant (the Britt case). Cook contends that his cooperation with the prosecutors in that case was anticipated at the time of sentencing in this case, but was not considered as a factor at sentencing because the Britt case had not yet been tried and he had not yet testified. He contends that cooperativeness is a relevant factor to be considered at sentencing and that the information regarding his testimony therefore constituted a new factor for sentencing purposes, necessitating consideration by the trial court of whether his sentence should be reduced.[1]

A trial court may in the exercise of 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). A defendant must establish the existence of a new factor by clear and convincing evidence. ***Id.*** at 97, 441 N.W.2d at 279. However, the issue of whether a set of facts constitutes a new factor for sentencing purposes presents a question of law which we review without deference to the trial court. ***Id.***

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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Id.*** at 96, 441 N.W.2d at 279. In addition, it must be an event or development which frustrates the purpose of the original sentence. ***Id.*** at 99, 441 N.W.2d at 280. There must be some connection between the factor and the sentencing which strikes at the very purpose for the sentence selected by the trial court. ***Id.***

Even if we accept Cook's claim that the information regarding his cooperation is "new" information, it is not highly relevant to his sentencing and clearly does not strike at the very purpose for the sentence chosen by the trial court. A review of the sentencing transcript reveals that the primary factors considered by the trial court in imposing sentence were Cook's rehabilitative

[1] While Cook asserts that he has been harassed and threatened in prison because of his testimony, he concedes that the threats and events in prison do not themselves constitute new factors for purposes of sentence modification.

needs and the need to protect the public. The trial court considered Cook's past offenses while on probation and parole, his drug problems, and his lack of employment and vocational skills. It concluded that Cook had to be removed from society until his drug abuse and vocational problems were dealt with and imposed a sentence directly related to that goal. There is no indication that it based the sentence on conclusions regarding Cook's moral character or similar factors as to which his cooperativeness would be relevant. Consequently, as determined by the trial court at the postconviction hearing, nothing in the information regarding Cook's postsentencing testimony in the Britt case was highly relevant to the sentence imposed by the trial court in this case or struck at the very purpose of that sentence. A new factor for purposes of sentence modification therefore was not shown.

Cook next contends that in exchange for his testimony in the Britt case, the prosecutor agreed to refrain from opposing any motion for sentence modification brought by him. He contends that the prosecutor breached that agreement when he argued that Cook's cooperation in the Britt case did not constitute a new factor for purposes of sentence modification.

Agreements between prosecutors and criminal defendants are analogous to contracts and courts may draw upon contract law principles for their interpretation. *See* ***State v. Windom***, 169 Wis.2d 341, 348, 485 N.W.2d 832, 835 (Ct. App. 1992). Wisconsin law provides that unambiguous contractual language must be enforced as it is written. ***Id.*** When the parties to a written agreement intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by any prior written or oral agreement in the absence of fraud, duress or mutual mistake. ***Dairyland Equip. Leasing v. Bohen***, 94 Wis.2d 600, 607, 288 N.W.2d 852, 855 (1980). Parol evidence is inadmissible to vary or explain unambiguous written contractual terms. ***Schmitz v. Grudzinski***, 141 Wis.2d 867, 872, 416 N.W.2d 639, 641 (Ct. App. 1987).

The record includes a memorandum drafted by Cook's counsel and approved by the district attorney's office dated April 6, 1994, one day before Cook testified in the Britt trial. It provided: "This memorandum will set forth the understanding and agreement negotiated for the truthful testimony of Larry Cook as a prosecution witness." In it, the prosecutor agreed that immediately after Cook's testimony in the Britt trial, he would write to the

chairperson of the parole board explaining that Cook had cooperated with the investigation and prosecution of Britt, had provided significant testimony on the State's behalf in that case, and had testified at personal risk to himself. The document was signed by Cook's attorney and the prosecutor, and stated that "[t]his memorandum correctly states our understanding."

Because this agreement, on its face, purports to set forth the final and complete agreement between the State and Cook, it may not be altered by parol evidence indicating that before its execution the prosecutor also told Cook that he would not oppose a motion to modify sentence.[2] Moreover, it is undisputed that the prosecutor fulfilled his agreement to write to the chairperson of the parole board. Consequently, no basis exists to conclude that the State breached any agreement with Cook or to disturb the trial court's order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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

[2] According to Cook's testimony in the Britt trial and at the postconviction hearing, the prosecutor made this representation to him in or about February 1994, after sentencing in this case but before execution of the written memorandum concerning the agreement.