COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2190-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Xavier Lorenzo Brown,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

PER CURIAM. Xavier Lorenzo Brown appeals from the judgment of conviction for two counts of burglary, party to a crime. He also appeals from the trial court order denying his postconviction motions for sentence modification. Brown argues that he is entitled to have his sentence modified based on the following three alleged "new factors": (1) his co-defendant's lesser sentence; (2) his co-defendant's prior criminal history; and (3) the fact that the

sentencing court considered additional charges pending against Brown which were later dismissed after sentencing. Brown also argues that his sentence was unduly harsh. We conclude that Brown presented no "new factors" requiring modification of his sentence and that the trial court did not impose an unduly harsh sentence. Therefore, we affirm.

Brown and his co-defendant, Michael Love, were charged with three counts of burglary, party to a crime. Brown pled guilty to two counts of burglary for which he was sentenced to two concurrent nine-year sentences. Brown filed a postconviction motion for sentence modification, complaining that Love, who had been charged with four additional counts of burglary and who had previously been convicted of armed robbery, received two concurrent five-year periods of probation for the two burglaries he had committed with Brown.

The trial court denied Brown's motion, stating that it was aware of Love's sentence at the time Brown was sentenced and, thus, Love's sentence was not a "new factor." The trial court also concluded that "[a]lthough no mention was made of [Love]'s prior record or record of imprisonment at Brown's sentencing, [Brown] has failed to establish ... that Love's record constitutes a new factor for purposes of modification." Finally, the trial court concluded that Brown's sentence was not unduly harsh, noting that "several aggravating factors were present," including:

> [Brown]'s admission that he was on probation when he committed these offenses; the fact that [he] had absconded for a year and two months after entering his guilty plea; the fact that Brown had another felony pending in [another trial] court; the fact that [he] deceived the court with regard to his identity; the fact that he had an extensive and substantial record; and the fact that he took a major role in the offenses.

Brown subsequently filed another postconviction motion, arguing that his sentence should be modified because the pending felony charge considered as an aggravating factor at the time of sentencing had since been dismissed. The trial court also denied this second motion, based on its earlier order and based

on case law holding that a sentencing court can consider for sentencing purposes pending charges against a defendant or charges of which a defendant has been acquitted.[1]

"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). The defendant must show by clear and convincing evidence that a new factor exists which would justify sentence modification. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611 (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 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." ***Michels***, 150 Wis.2d at 96, 441 N.W.2d at 279 (citation omitted). A "new factor" must be an event or development which "frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***Id.*** at 99, 441 N.W.2d at 280. Whether a set of facts is a "new factor" is a question of law that we review *de novo*. ***Id.*** at 97, 441 N.W.2d at 279.

In its first order denying Brown's motion for sentence modification based on Love's sentence, the trial court stated that it had been aware of Love's sentence at the time it sentenced Brown. Although the transcript of Brown's sentencing has no mention of Love's sentence, Love's sentence, which was imposed by a different trial court prior to Brown's sentence, was entered in the judgment roll. Because Love's sentence was known to the sentencing court, it was not a new factor.

Brown also complains that Love's criminal history is a new factor. Brown alleged in his brief in support of his motion for postconviction relief that

---

[1] The trial court cited ***State v. Bobbitt***, 178 Wis.2d 11, 503 N.W.2d 11 (Ct. App. 1993) (sentencing court did not erroneously exercise discretion in considering violent acts surrounding attempted homicide charge of which defendant was acquitted by jury in sentencing the defendant on a robbery charge), and ***State v. Verstoppen***, 185 Wis.2d 728, 519 N.W.2d 653 (1994) (probationer's acquittal of charges underlying probation revocation did not compel modification of sentence imposed based on revocation).

Love was convicted of four other burglaries in addition to the two with Brown and that Love had spent four years in prison for a previous armed robbery. As earlier noted, the trial court stated that "[a]lthough no mention was made of [Love]'s prior record or record of imprisonment at Brown's sentencing, [Brown] has failed to establish ... that Love's record constitutes a new factor for purposes of modification."

Brown cites ***State v. Ralph***, 156 Wis.2d 433, 456 N.W.2d 657 (Ct. App. 1990), in support of his argument that sentence modification is required. In ***Ralph***, the court of appeals affirmed the trial court's decision to modify a defendant's sentence after it subsequently learned of the other defendant's criminal record. The trial court did so because it specifically wanted the defendant's sentence to be consistent with the accomplice's. ***Id.*** at 435-436, 456 N.W.2d at 658. Unlike ***Ralph***, the sentencing court here expressed nothing to indicate that it sought parity between Brown and Love's sentences. *See* ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994) ("A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation."); *see also* ***Ocanas v. State***, 70 Wis.2d 179, 187-189, 233 N.W.2d 457, 463 (1975). Therefore, Love's criminal history is not a "new factor" because it did not frustrate the purpose of the original sentencing.

Additionally, we reject Brown's argument that the subsequent dismissal of a pending felony that the sentencing court considered also requires sentence modification. A trial court can, indeed, consider pending or even acquitted charges at sentencing. *See* ***State v. Bobbitt***, 178 Wis.2d 11, 16-18, 503 N.W.2d 11, 14-15 (Ct. App. 1993).

Finally, we reject Brown's argument that his sentence was unduly harsh. In support of this claim, he repeats his "new factor" arguments. In reviewing claims of unduly harsh criminal sentences, our review is limited to a two-step inquiry. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). We first determine whether the trial court properly exercised discretion in imposing the sentence. ***Id.*** If so, we then consider whether that discretion was abused by imposing an excessive sentence. ***Id.***

The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the vicious or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495-496, 444 N.W.2d 760, 763-764 (Ct. App. 1989).

There is a strong policy against an appellate court interfering with a trial court's sentencing determination, and, indeed, an appellate court must presume that the trial court acted reasonably. *See* ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716, 720 (Ct. App. 1988). Further, the weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

Additionally, when a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis.2d at 185, 233 N.W.2d at 461.

We conclude that the trial court did not erroneously exercise sentencing discretion nor is Brown's sentence "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***id.*** In addition to noting the required sentencing factors and its consideration of the presentence investigation report, the trial court pointed out that Brown: (1) committed these offenses while he was on probation; (2) absconded for over a year following entry of his guilty plea; (3) had another felony charge pending in another trial court; (4) deceived the court with regard to his identity; (5) had an extensive criminal history, having twice

been successful in completing community-based supervision; and, (6) took a major role in the offenses. The trial court also noted that according to the PSI, Brown had "a lifestyle based on the criminal philosophy." The trial court's recitation does not reflect an erroneous exercise of discretion.

Additionally, Brown was subject to penalties of imprisonment for up to twenty years and fines not to exceed $20,000.00 as a result of the two burglary counts. *See* §§ 943.10(1) & 939.50(3)(c), STATS. He received two concurrent nine-year sentences. In light of the maximum potential penalties and in light of the applicable sentencing factors, Brown's sentence was not unduly harsh. *See* ***Ocanas***, 70 Wis.2d at 185, 233 N.W.2d at 461; *see also* ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-418 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). Therefore, we affirm the judgment of conviction and the order denying Brown's motions for postconviction relief.

By the Court. – Judgment and order affirmed.

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