

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 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.

Nos. 95-2477-CR
95-2940-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE CROCKETT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Andre Crockett appeals from a judgment of conviction and an order denying his motion for sentence modification. The issues are: (1) whether Crockett presented a new factor that justified resentencing; and (2) whether the trial court properly considered Crockett's gang affiliation in framing its sentence. We conclude that the facts alleged in

Crockett's motion do not constitute a new factor and that the trial court properly considered his gang affiliation. We affirm.

Crockett pled guilty to six counts of reckless endangerment while armed, as a party to a crime, and one count of felony bail jumping. The trial court sentenced Crockett to fifteen years in prison on each of the six endangerment charges, to run concurrently, and imposed an eleven-year consecutive sentence on the bail jumping charge. The trial court subsequently sentenced two of Crockett's codefendants to shorter prison terms.

The fact that Crockett's codefendants received shorter sentences does not constitute a new factor. A new factor consists of facts highly relevant to the sentence but unknown to the judge at the time of sentencing because they were not then in existence or unknowingly overlooked by all of the parties. *State v. Harris*, 174 Wis.2d 367, 379, 497 N.W.2d 742, 747 (Ct. App. 1993). A disparate sentence received by a codefendant is not a new factor. See *State v. Studler*, 61 Wis.2d 537, 541, 213 N.W.2d 24, 26 (1973). At the time of sentencing, the trial court was aware of the fact that it would need to sentence the various codefendants involved in the crimes and concluded that it would set a separate sentencing hearing for each because "these defendants each have different backgrounds, [and] there may be degrees of culpability." As the State argues, "[i]f a sentence from a different judge imposing a lesser sentence on an accomplice is not a new factor, ... a lesser sentence imposed on an accomplice by the same judge is [not] a new factor." The trial court properly refused to resentence Crockett based on the fact that his codefendants received lesser sentences.

Crockett next argues that the trial court should not have considered his gang affiliation in sentencing him. He argues that his gang affiliation was not relevant to the sentencing and is constitutionally protected speech under *Dawson v. Delaware*, 503 U.S. 159 (1992). *Dawson* is distinguishable. In that case, "the evidence [had] no relevance to the issues being decided" in the sentencing. *Id.* at 160. In this case, Crockett's gang membership was connected to his crime. Crockett and his codefendants chased men in a vehicle over a number of miles while shooting at the car because they apparently believed that the people in the car had acted disrespectfully to a

fellow gang member. The trial court properly considered the role Crockett's gang affiliation, and his apparent leadership in the gang, played in the crime.

By the Court. – Judgment and order affirmed.

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