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October 15, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP261-CR State of Wisconsin v. Phillip L. Ronning (L.C. # 2011CF71)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Phillip Ronning appeals a multi-count judgment of conviction and an order denying his postconviction motion. The postconviction motion sought modification of his sentence on a sexual assault count on two grounds: (1) that Ronning's testimony against the victim's father—who had initiated the assault before Ronning joined in—constituted a new sentencing factor; and (2) that Ronning's sentence was unduly harsh in comparison to those of two other men who had participated in other assaults on the same victim, also made in concert with the victim's father.

After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

A new sentencing 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 original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Ronning points out that the circuit court referred during its discussion to the rejected standard of whether the information about his subsequent testimony had "frustrated" the purpose of his sentence. *See* ***id.***, ¶48. The circuit court's reference is irrelevant to our consideration, however, because whether a particular set of facts constitutes a new factor is a question of law that we review *de novo*. ***Id.***, ¶33.

At the time of Ronning's sentencing, the circuit court was aware, from the parties' written statement of the plea agreement, that Ronning had agreed to provide testimony against the victim's father. The court was also aware, based on Ronning's allocution at the plea hearing, what the basic substance of Ronning's testimony would likely be. However, the court was not aware—because the facts were not yet then in existence—that Ronning would in fact testify against the victim's father, exactly what that testimony would entail, and that the father would be convicted on all of the counts relating to the assault in which Ronning was also involved.

This court has previously held that the fruits of a defendant's postconviction assistance to law enforcement may be considered a new factor for sentencing purposes—even if the court was

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

already aware of the defendant's ongoing or anticipated assistance at the time of sentencing—if the defendant establishes by clear and convincing evidence that the subsequent assistance or fruits of prior assistance would be highly relevant to sentencing. ***State v. Boyden***, 2012 WI App 38, ¶¶5, 11, 340 Wis. 2d 155, 814 N.W.2d 505. This rule promotes the "sound public policy" of encouraging already-convicted defendants to provide or to continuing providing assistance to law enforcement. ***Id.***, ¶13 (quoting another source). There is a five-part test for evaluating the relevance of a defendant's assistance to law enforcement:

> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
>
> (5) the timeliness of the defendant's assistance.

State v. Doe, 2005 WI App 68, ¶9, 280 Wis. 2d 731, 697 N.W.2d 101.

As to the first factor, the State did not explicitly comment on the significance or usefulness of Ronning's testimony in securing some of the convictions against the victim's father. We are persuaded, however, that the plea deals the State offered in exchange for the testimony of Ronning and two other men who had participated in separate sexual assaults of the victim in conjunction with the victim's father show that the State considered the conviction of the victim's father to be of paramount importance, and that the corroborative testimony of witnesses other than the victim herself was significant to the father's prosecution. In addition,

the father's convictions on the counts about which Ronning testified at least suggests that his testimony may have been useful. We therefore weigh the first factor in Ronning's favor.

As to the second factor, the State advised the circuit court that it considered Ronning to have testified more or less truthfully at the victim's father's trial. The State did note that Ronning's testimony was not complete, however, in that it did not address what preplanning had led to Ronning to drive a tractor to meet the victim and her father in a deserted field. The circuit court was less impressed with the truthfulness of Ronning's testimony than was the State, pointing out multiple instances in which Ronning had contradicted the victim's account in order to minimize his own role. For instance, the circuit court was skeptical of Ronning's failure to recall participating in the most violent portions of the assault described by the victim; was scornful of Ronning's testimony that the limited violence he did acknowledge inflicting on the victim was a matter of "self-defense;" and found Ronning's assertion that he had gone along with the assault due to fear of the victim's father to be an egregious excuse, noting that Ronning had brought his camera along to take pictures of the assault. We have no reason to question the circuit court's view of the self-serving nature of Ronning's testimony in terms of relative culpability, but acknowledge that the court appeared to conclude that Ronning seems to have been mostly truthful about basic facts of the assault. Given Ronning's general truthfulness about the basic facts, but his lack of candor and evasiveness concerning aspects of his own conduct, we deem the second factor to be a wash.

As to the third, fourth, and fifth factors, the nature of Ronning's post-sentencing assistance was to follow through on a plea agreement he had made to provide testimony against the victim's father in exchange for the dismissal of two additional felonies and a cap on the State's sentencing recommendation. At the time Ronning entered the plea agreement, he had

already provided a recorded confession to the police. When Ronning took the stand at trial, he invoked his fifth amendment rights and was accorded immunity for his testimony. There was no evidence presented to the court that Ronning suffered any threats or injuries in retaliation for giving his testimony.

Thus, by the time Ronning provided his post-sentencing assistance, he had already obtained a significant benefit by providing assistance to law enforcement in exchange for his cooperation—namely, the reduction of his sentence exposure—and faced very little additional risk to himself by following through with testimony he would have been compelled to give anyway. In other words, the most significant aspect of Ronning's cooperation had already occurred by the time he was sentenced. Consequently, this is not a situation in which the State benefited greatly from being able to use the leverage of a sentence reduction in order to gain Ronning's continued post-sentence assistance. If Ronning had denied his prior confession on the stand, the State would simply have impeached him with it, and would still have had the victim's testimony, and the testimony of the two other men who had also assaulted the victim. We therefore weigh the third, fourth, and fifth factors against Ronning.

Given the mixed weight of the ***Doe*** factors in this case, we conclude that Ronning failed to satisfy his burden of showing by clear and convincing evidence that his post-sentencing assistance to law enforcement was highly relevant to his sentence. Because we conclude that Ronning's testimony at the trial of the victim's father did not, as a matter of law, rise to a new sentencing factor, we need not address whether a proper exercise of discretion would require sentence modification based upon that factor.

We turn, then, to the question of whether Ronning's sentence was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting another source). This analysis may take into account equal protection concerns about whether co-conspirators or other similarly situated defendants have been treated similarly. ***State v. Ralph***, 156 Wis. 2d 433, 439, 456 N.W.2d 657 (Ct. App. 1990). However, any such disparity must be arbitrary or based upon improper factors to warrant a reduction in sentence; the fact that different judges have weighed the seriousness of similar conduct differently, or that a judge or judges have taken into account the different culpability levels, criminal histories, character traits, or rehabilitative needs of different defendants can properly justify substantially different sentences for seemingly similar offenses. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 186-88, 233 N.W.2d 457 (1975); ***State v. Jung***, 32 Wis. 2d 541, 547-48, 145 N.W.2d 684 (1966).

We review a circuit court's decision whether to reduce a sentence as being unduly harsh under the erroneous exercise of discretion standard, considering whether the circuit court "applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***Grindemann***, 255 Wis. 2d 632, ¶30. Within that analysis, a determination as to whether defendants are similarly situated is a question of fact subject to the clearly erroneous standard of review. *See* ***Ralph***, 156 Wis. 2d at 439. A factual finding is not clearly erroneous unless—after accepting all credibility determinations made and reasonable inferences drawn by the fact finder—the great weight and preponderance of

the evidence supports a contrary finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

Ronning's argument that his sentence on the sexual assault count was unduly harsh is based upon two premises: (1) that he received a substantially longer sentence than two other men who had committed substantially similar or even more egregious assaults on the same victim in conjunction with the victim's father; and (2) the circuit court mentioned a number of improper and/or irrelevant factors in its discussion. We reject each of those premises.

First, we are not persuaded that the great weight and preponderance of the evidence show that Ronning's overall conduct was less egregious than that of the other two men who committed assaults against the victim on different occasions. Ronning points out that the victim was eighteen when he and her father sexually assaulted her, while the victim was only ten at the time her uncle participated with the victim's father in a number of sadistic assaults on her on a single day, and was only thirteen or fourteen when, on separate occasions, her father's roommate had assaulted her, once with her father and once on his own. However, Ronning completely ignores information contained in both the complaint and PSI that the victim had recounted at least three other uncharged incidents of molestation Ronning had perpetrated on her as a child outside the presence of her father, beginning when she was eight years old; that she had been "creeped out" by Ronning's unwelcome sexual advances for years; that she was "scared to death" of Ronning following the assault for which he was convicted; that the assault had contributed to her complete breakdown and institutionalization in a treatment facility; and that she was still having flashbacks about the violence Ronning had inflicted upon her. In contrast, the victim provided statements in the other two cases saying that she was relieved by her uncle's confession and working to forgive him, and that she bore the least amount of anger towards her father's

roommate, whose sentence recommendation she agreed with. That the victim considered Ronning's conduct to be the most egregious was a very strong basis for the court to conclude the same, when considered together with all the evidence.

Second, we do not agree that any of the factors discussed by the court were improper. The court's reference to judicial substitution was part and parcel of its explanation that it simply had a different view of the seriousness of the offenses than did the judge who sentenced the other two men. The court's expressed displeasure with the whole notion of having prosecutors provide sentence recommendations was in response to Ronning's argument that the court should take into account the fact that the State had given a higher sentence recommendation for the victim's uncle than for Ronning. The court was plainly correct that it was not required to weigh the relative culpability of the defendants in the same manner as either another judge or the prosecutor. The court's observations that it wouldn't be surprised if the public thought Ronning should be chemically castrated, and that the perpetrators of a high-profile rape case in India were facing the death penalty, directly related to whether the court believed that Ronning's sentence would "shock public sentiment" as contemplated in ***Grindemann***. In sum, we are satisfied that the circuit court was well within its discretion to deny Ronning's motion for sentence modification.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals