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December 5, 2013

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

2012AP2210-CR State of Wisconsin v. Anthony Maurice Bell (L.C. # 2010CF5201)

Before Lundsten, Higginbotham and Sherman, JJ.

Anthony Maurice Bell appeals an order denying Bell's motion for sentence modification. Bell contends that he established a new factor entitling him to sentence modification by offering a letter written by Bell's co-actor indicating that the co-actor was the more culpable party in the crime. Based upon our review of 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 summarily affirm.

In January 2011, Bell pled guilty to unauthorized use of another's personal identifying information to obtain a thing of value, as party to a crime. Bell was sentenced to three years of initial confinement and two years, ten months of extended supervision. In July 2011, Bell filed a postconviction motion seeking resentencing on grounds that the circuit court had incorrectly characterized Bell as the "ringleader" of the identify theft, when Bell's co-actor, LaDedria Smith, was the actual "ringleader" of the crime. The circuit court denied the motion, stating that it had sentenced Bell based on Bell's criminal record and pattern of dishonesty, and that the court had never characterized Bell as the "ringleader" of the crime.

In February 2012, Bell moved for sentence modification based on a new factor, and offered a letter by Smith indicating that Bell played only a minor role in the crime. The circuit court determined that its sentence had been based on Bell's substantial criminal record and Bell's character as evidenced by his statements to the court. It determined that Smith's letter did not constitute a new factor because the sentence was not based on whether or not Bell manipulated Smith, and that even Smith's letter continued to indicate that Bell participated in the crime from prison.

At the outset, we reject the State's argument that we lack jurisdiction over this appeal. The State argues that Bell's motion for sentence modification was really a motion for reconsideration of the order denying Bell's motion for resentencing. It contends that the order

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

denying Bell's motion for sentence modification is not appealable because the motion for sentence modification raised the same issue that was addressed in the order denying resentencing. *See* ***State v. Edwards***, 2003 WI 68, ¶8, 262 Wis. 2d 448, 665 N.W.2d 136 ("[A]n order [denying reconsideration] is not appealable where … the only issues raised by the motion were disposed of by the original judgment or order.") (citation omitted). The State also asserts that there is no appealable order in the record.

We determine that we have jurisdiction over this appeal. Bell's motion for resentencing was a timely postconviction motion under WIS. STAT. RULE 809.30(2)(h). More than seven months later, Bell moved for sentence modification, offering a letter by Smith as a new factor. Bell did not seek reconsideration of the circuit court's order denying his postconviction motion for resentencing, but rather sought sentence modification based on a new factor. Significantly, unlike a direct postconviction motion under WIS. STAT. RULE 809.30(2)(h), a motion to modify a sentence based on a new factor may be brought at any time. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11–12, 258 Wis. 2d 573, 653 N.W.2d 895. Thus, Bell's second postconviction motion was a new, different type of motion rather than a motion for reconsideration. Additionally, the final order as to Bell's motion for sentence modification was included in the record by a supplemental return.

Turning, then, to the merits of the appeal, we conclude that Bell has not established a new factor that would warrant sentence modification. A new factor is a fact or set of facts highly relevant to sentencing, but either unknowingly overlooked or not in existence at the time of sentencing. ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. Bell argues that Smith's letter is a new factor because Smith now asserts facts that are highly relevant to Bell's sentencing, but that Smith did not reveal prior to her letter. He argues that the circuit court

based Bell's sentence on the court's belief that Bell had manipulated Smith into obtaining credit card information and buying items for Bell's friend. Bell contends that this led the circuit court to believe that Bell did not deserve a rehabilitative sentence. He argues that Smith's letter is highly relevant to sentencing because it asserts that Bell did not manipulate Smith, that Bell played only a minor role in the crime, and that the individual Smith bought items for was Smith's cousin, indicating that a rehabilitative sentence would have been appropriate. For the reasons that follow, we determine that Smith's letter is not highly relevant to sentencing.

At Bell's sentencing, the State noted that the court had already heard the facts of the case at Smith's earlier sentencing. The State acknowledged that Smith was more culpable, but recommended the same sentence for both because Bell had fifteen prior convictions, and had done poorly on probation. The State also argued that Bell's behavior was particularly disturbing because he participated in the crime from jail, and asserted that Bell had used Smith as a vessel to buy things for his friend with someone else's credit card information.[2] Bell personally addressed the court, explaining his criminal record and accepting responsibility for his behavior in this case.

The court stated that it saw "a repeated pattern of dishonesty, minimizing your behavior and working the system for criminal means, and … holding yourself in a way above the law and above the rules." The court noted it found a defect in Bell's character structure based on "this amount of dishonesty and this amount of criminality in a relatively short period of time after … having been given the privilege of probation repeatedly…." The court then said:

[2] At Smith's sentencing, the parties agreed that Bell, from jail, told Smith to obtain credit card information and buy items, including gifts for Bell's friend, and that Bell's friend was a stranger to Smith.

"[M]anipulating Miss Smith so you could get some nice things for another inmate? That's really low, my friend." The court also said: "The crime is hurtful to others. It involved hurting Miss Smith as well and it's aggravated by the fact that you were … incarcerated … at the time. That's about as low as it gets. Committing crimes from behind bars, that's low." Finally, the court explained the length of the sentence it was imposing, stating: "This is not a rehabilitative sentence because I'm not convinced that you're rehabilitatible because of your character disorder that I discern quite easily."

We conclude that the circuit court's remarks as to Smith, viewed in context, were not significant to the court's sentencing of Bell. The court made clear that it was sentencing Bell based on his extensive criminal record over a short amount of time, his poor adjustment to probation and continuing to engage in criminal conduct even while incarcerated, and the court's personal evaluation of Bell's character based on Bell's statements to the court. None of those factors are altered by Smith's letter asserting that Smith played the lead role in the crime and that the individual she bought gifts for was her cousin, not Bell's friend.

Moreover, the court reiterated at the motion hearing that it had sentenced Bell based on his criminal record and continuing criminal behavior, not based on Bell's manipulation of Smith. The court also noted that, even according to Smith's letter, Bell participated in the crime while he was already incarcerated. We conclude that Bell has not set forth any new facts highly relevant to sentencing.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals