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**DISTRICT II**

March 12, 2014

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

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2013AP1453-CR                      State of Wisconsin v. Marshawn T. Venzant (L.C. # 1997CF910)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Marshawn Venzant appeals from a 1998 judgment of conviction and a 2013 order denying his WIS. STAT. RULE 809.30 (2011-12)<sup>1</sup> postconviction motion challenging his sentence.<sup>2</sup> Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> In 2012, we granted Venzant's petition for a writ of habeas corpus and reinstated his WIS. STAT. RULE 809.30 appeal rights from the 1998 conviction due to ineffective assistance of counsel. *State ex rel. Venzant v. Jenkins*, No. 2010AP2184-W, unpublished op. and order (WI App Aug. 1, 2012).

Venzant pled guilty to armed robbery and first-degree recklessly endangering safety (by use of a dangerous weapon) arising out of a Racine county bank robbery. On January 30, 1998, the circuit court sentenced Venzant's co-actor, Kala Baskin, to consecutive terms of twenty-five years for armed robbery and nine years for first-degree recklessly endangering safety. On February 13, 1998, the same judge sentenced Venzant to consecutive terms of thirty-four years for armed robbery and nine years for first-degree recklessly endangering safety.

In 2013, Venzant sought sentence modification due to a new factor. Venzant argued that he and Baskin were similarly situated, but the sentencing court neither considered the sentence Baskin received nor explained why the sentences were disparate. Venzant argued that Baskin's sentence and background were unknowingly overlooked by the parties and the court, resulting in a new factor requiring sentence modification. Venzant also argued that his lengthier sentence violated his equal protection rights.

A successor circuit court held a hearing on Venzant's postconviction motion. After reviewing Venzant's sentencing transcript, the postconviction court concluded that the sentencing court considered the appropriate factors and properly exercised its sentencing discretion. The postconviction court declined to find that the sentencing court was unaware of Baskin's sentencing because Venzant was sentenced by the same judge for the same crimes two weeks after Baskin was sentenced. In other words, the proximity of the two sentencings precluded an inference that the sentencing court was unaware of Baskin's sentence. The postconviction court declined to resentence Venzant because he did not establish a new factor. Venzant appeals.

On appeal, Venzant argues that the sentencing court's failure to consider Baskin's sentence was a new factor warranting resentencing. A new factor is a fact highly relevant to sentencing, "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." *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Any fact known to the court at sentencing cannot be a new factor. *Id.*, ¶57. A defendant must demonstrate the existence of a new factor by clear and convincing evidence. *Id.*, ¶36. Whether a fact constitutes a new factor presents a question of law. *Id.*

At Venzant's 1998 sentencing, defense counsel referred to Baskin and the fact that at his sentencing, Baskin took responsibility for the bank robbery and admitted that he encouraged Venzant to participate in the robbery. In its sentencing remarks, the circuit court noted Venzant's history of prior offenses, which the court deemed "very, very serious," Venzant's work and education history, and Venzant's compliance while on probation for a previous offense. The court observed that Venzant committed the bank robbery with Baskin, and Baskin gave Venzant the firearm. Venzant brandished the firearm at the bank, threatened people with the firearm, and fired the weapon at the pursuing police. The court characterized the bank robbery and the subsequent police chase and shooting as "incredibly aggravated." The court found that Venzant's degree of culpability was "absolutely total."

We agree with the postconviction court that Venzant did not establish by clear and convincing evidence that the sentencing court was unaware of Baskin's sentence. The sentencing court was aware of the circumstances of the crimes and the co-actors' conduct. The

court had sentenced Baskin two weeks earlier. Because Venzant did not establish the existence of a new factor, the postconviction court appropriately declined to modify his sentence. *Id.*, ¶38.

Venzant next argues that the sentencing court should have considered the exact sentence Baskin received in relation to the sentence it was going to impose on Venzant. A circuit court is not required to take this approach. While “a sentence given to a similarly situated codefendant is relevant to the sentencing decision, it is not controlling.” *State v. Giebel*, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted). Disparity in the sentences between codefendants is permissible if the sentences are based on the relative culpability and individual characteristics of the codefendants. *State v. Toliver*, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994).

Baskin and Venzant were not similarly situated. The sentencing court was aware of Baskin’s involvement in the crime, but the court distinguished Venzant’s conduct because Venzant brandished and discharged the firearm. The court properly exercised its discretion when it sentenced Venzant to a lengthier term based upon his culpability and his individual characteristics. Venzant’s sentence was neither harsh nor unconscionable.

We affirm the postconviction court’s refusal to modify Venzant’s sentence.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*