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DISTRICT IV

June 27, 2018

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

2017AP2105-CR State of Wisconsin v. Jason P. Thomaschaske
(L.C. # 2014CF1489)

Before Sherman, Blanchard, and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jason P. Thomaschaske, pro se, appeals a circuit court order denying Thomaschaske's motion for sentence modification. Thomaschaske contends that he presented a new factor in his motion for sentence modification by showing that, after his sentencing, he provided testimony at his co-defendant's trial that led to a conviction. 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 (2015-16).[1] We summarily affirm.

In December 2014, Thomaschaske pled guilty to burglary. At sentencing, defense counsel argued as mitigating factors that Thomaschaske had cooperated with the authorities, that Thomaschaske had received a threatening letter after providing information about his codefendant, and that the State would need to use Thomaschaske if the codefendant went to trial. The court stated that Thomaschaske's cooperation was such that the court did not think the maximum sentence was warranted. The court also stated that Thomaschaske's record of criminal activity implicated the need to protect the public. The court imposed two years of initial confinement and five years of extended supervision.

In June 2017, Thomaschaske filed a pro se motion for sentence modification. Thomaschaske argued that sentence modification was warranted based on the new factor that, after sentencing, Thomaschaske had testified at his codefendant's trial and the codefendant had been convicted largely based on that testimony. The circuit court denied sentence modification.

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36–37, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" for sentence modification purposes is a fact or set of facts that is highly relevant to the imposition of sentence, but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

establishes the existence of a new factor, the circuit court must then determine whether the new factor justifies sentence modification. ***Harbor***, 333 Wis. 2d 53, ¶38. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. ***Id.***, ¶33. Whether the new factor warrants sentence modification is a matter left to the circuit court's discretion. ***Id.***, ¶37.

In ***State v. Doe***, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101, we held that "a defendant's substantial and important assistance to law enforcement after sentencing may constitute a new factor that the trial court can take into consideration when deciding whether modification of a sentence is warranted." We concluded that the five factors in the federal sentencing guidelines for substantial assistance to authorities are "quite helpful in determining whether the post-sentencing assistance constitutes a new factor for the purposes of a postconviction motion for sentence modification." ***Id.***, ¶9. Accordingly, "[w]e adopt[ed] these factors for the court's use in assessing whether the assistance constitutes a new factor":

> (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;
>
> (5) the timeliness of the defendant's assistance.

Id.

In ***State v. Boyden***, 2012 WI App 38, ¶11, 340 Wis. 2d 155, 814 N.W.2d 505, we held that "when fruits of a defendant's substantial presentence assistance to law enforcement

authorities are not known until after sentencing, those fruits, if highly relevant to the imposition of the sentence in light of the factors set forth in ***Doe***, can constitute a new factor." We determined that the fruits of a defendant's prior assistance to law enforcement may be a new factor even if the court was already aware of the defendant's ongoing assistance at the time of sentencing, if those fruits are highly relevant according to the ***Doe*** factors. ***Id.***, ¶¶10-17. We explained that the rule promotes the "sound public policy" of encouraging convicted defendants to provide assistance to law enforcement. ***Id.***, ¶15. We therefore adopted the ***Doe*** factors to assess whether post-sentence fruits of prior assistance are highly relevant to sentencing. ***Id.***

Thomaschaske contends that his post-sentencing testimony at his codefendant's trial was substantial assistance to the State, and that his codefendant's conviction was the fruit of his ongoing assistance. He contends that the testimony and conviction constitute a new factor because they had not yet occurred as of the time of his sentencing and they are highly relevant to sentencing according to the five factors set forth in ***Doe*** and ***Boyden***. He contends that the circuit court erred by determining that he had not established a new factor despite meeting the five ***Doe*** factors.

The State responds that the five factors set forth in ***Doe*** and ***Boyden*** are merely helpful to assess whether new information is highly relevant to sentencing. It contends that, even if a defendant establishes the five ***Doe*** factors, the defendant must still meet the ***Harbor*** definition of "'highly relevant,'" which the State asserts is a showing that the new information would "change[] the entire approach to sentencing." *See* ***Harbor***, 333 Wis. 2d 53, ¶50 (quoted source omitted). The State argues that Thomaschaske's post-sentencing testimony and the resulting conviction were merely additional evidence of Thomaschaske's cooperation, which the circuit court considered at sentencing. The State points out that, despite being aware of

Thomaschaske's cooperation, the court determined that Thomaschaske's criminal history and his threat to public safety required the sentence the court imposed. The State contends that the post-sentencing testimony and conviction do not constitute a new factor because they would not have changed the court's entire approach to sentencing.

We assume without deciding that Thomaschaske's post-sentencing testimony and his codefendant's conviction are a new factor, and conclude that the circuit court properly exercised its discretion by determining that the new factor did not warrant sentence modification.[2] The circuit court determined that Thomaschaske had met the ***Doe*** factors, but that the post-sentencing assistance and the fruits of the assistance were not highly relevant to sentencing because, at sentencing, the circuit court was aware of Thomaschaske's ongoing cooperation with law enforcement and credited him for that cooperation.[3] We read the court's decision as stating that Thomaschaske did not establish a new factor, but that, even if the new information did constitute a new factor, that new factor would not warrant sentence modification, because it was consistent with information considered by the court at the time of sentencing. The court therefore properly

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[2] Because we conclude that the circuit court properly exercised its discretion to deny sentence modification even if a new factor existed, we do not reach Thomaschaske's argument that the court erred by determining that Thomaschaske had not shown that the post-sentencing testimony and conviction were highly relevant to sentencing because the court found that they did not frustrate the purpose of the sentencing. *See* ***State v. Harbor***, 2011 WI 28, ¶48, 333 Wis. 2d 53, 797 N.W.2d 828 (holding that "frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by the defendant constitutes a new factor").

Thomaschaske also argues that the court made an erroneous finding that the most significant part of Thomaschaske's cooperation had already occurred by the time he was sentenced. The State fails to effectively rebut this argument. We ignore this particular finding in reviewing the court's exercise of its discretion in determining that no modification is warranted.

[3] The Honorable David T. Flanagan presided over sentencing. The Honorable Jill J. Karofsky entered the order denying the postconviction motion.

exercised its discretion to deny sentence modification, regardless whether Thomaschaske presented a new factor. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983) ("The existence of a new factor does not … automatically entitle the defendant to relief. Whether the new factor warrants a modification of sentence rests within the trial court's discretion.").

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals