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DISTRICT I

September 13, 2018

To:

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Milwaukee, WI 53233-1425

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

2017AP1924-CR State of Wisconsin v. Jermaine E. Terrell (L.C. #2015CF3792)

Before Kessler, P.J., Brash and Dugan, 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).

Jermaine E. Terrell appeals the judgment convicting him of attempted first-degree intentional homicide with the use of a dangerous weapon and possession of a firearm by a felon. *See* WIS. STAT. §§ 940.01(1)(a), 939.32, 939.63(1)(b) (2015-16), & 941.29(2) (through 2015

Wis. Act 109, Nov. 13, 2015).[1] He also appeals the order denying his postconviction motion for sentence modification.[2] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21.

Background

The factual underpinnings of this case are not in dispute. A jury convicted Terrell of attempted first-degree intentional homicide with the use of a dangerous weapon and possession of a firearm by a felon. During trial, the jury heard that a fingerprint from Terrell was found at the crime scene, and a witness identified him as the person who shot the victim in the head. The jury also heard that Terrell later admitted to another inmate, Jerrick Henderson, that he shot the victim.

On the charge of attempted first-degree intentional homicide with the use of a dangerous weapon, the trial court sentenced Terrell to fifteen years of initial confinement and ten years of extended supervision. On the charge of possession of a firearm by a felon, the trial court sentenced Terrell to concurrent terms of five years of initial confinement and three years of extended supervision. At the time of his sentencing, there was no discussion about Terrell's participation as a witness in a pending federal case.

[1] WISCONSIN STAT. § 941.29(2) no longer exists. It was repealed by 2015 Wis. Act 109, effective November 13, 2015. Terrell, however, was charged prior to its repeal. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable Frederick C. Rosa presided over Terrell's trial and entered the judgment of conviction. The Honorable T. Christopher Dee issued the order denying Terrell's postconviction motion.

Terrell filed a postconviction motion for sentence modification arguing that he was a material witness in a federal case and that his ongoing involvement in that matter was not discussed at his sentencing hearing. Terrell asserted that his assistance was a new factor warranting modification of his sentence. Following briefing and a hearing, the postconviction court denied the motion.

Discussion

On appeal, Terrell argues that the trial court erred when it concluded that Henderson was unavailable within the meaning of WIS. STAT. § 908.04 and allowed testimony that Henderson gave during Terrell's first trial, which ended in a mistrial, to be read to the jury under WIS. STAT. § 908.045. Terrell also argues that the postconviction court erred when it denied his motion for sentence modification. He believes he should have been credited for his service as a witness in a federal case. We set forth additional facts relevant to each issue in our discussion below.

A. Witness Unavailability

Before the start of the third day of Terrell's jury trial, the State informed the trial court that it had ordered Henderson, who was in custody for an unrelated crime, to be produced for the trial but was notified that Henderson refused to come to the courtroom to testify. The State asked the trial court to find Henderson "unavailable" for purposes of trial.

When questioned, the State explained that it relied on an order to produce as opposed to a subpoena because Henderson was already in custody. Henderson's attorney and the bailiff both subsequently confirmed for the trial court that Henderson refused to leave his cell to come to court.

In response to the trial court's inquiry as to Terrell's position on declaring Henderson unavailable, Terrell's trial counsel stated:

> As to that request, Judge, I mean, I honestly don't have much of an argument. Obviously the witness is refusing to appear in court, refusing to remove himself from his cell. I think that's sort of implicit that—or explicit that he doesn't want to testify. I don't see a need to send, you know, a CIRT [i.e., Critical Incident Response Team] team into his cell, risk possible injury to deputies, just to get the witness on the stand to tell us he doesn't want to testify. I think it's obvious.
>
> As for, you know, whether or not that falls under the appropriate analysis under the statute, I don't have an argument, Judge. I'll leave that up to you.

The trial court then analyzed whether Henderson qualified as an unavailable witness:

> I want to first indicate the witness, as I understand it, is not under subpoena. What the State did was they sent an order to produce because the witness is in State custody and not free to come here on his own. So in that regard, the effect of an order to produce, I think, has the same effect as a subpoena would have for a—an ordinary citizen witness who's free to come. It is a court order that obligates that individual to appear in court. The order to produce here clearly requires the witness to be produced to this courtroom. That witness has indicated that he's not willing to appear in the courtroom for whatever reasons.
>
> Now, the [c]ourt did send over deputies to secure the presence of the witness in the courtroom. He refuses to come. He refused to talk to his attorney yesterday, as well as any representatives from the State or from the police department.

Based on Henderson's refusal "to present himself to the jurisdiction and the authority of the [c]ourt," the trial court concluded that he fell within the definition of an unavailable witness under WIS. STAT. § 908.04(1)(b).

The trial court then allowed the State to read to the jury the transcript of Henderson's testimony at Terrell's first trial. The trial court made clear that the State was to "simply read" it

to the jury, warning that it should not re-enact or recreate "emotion or anything else. It's simply a straight reading of the transcript into the record."

The State submits that Terrell forfeited his right to appeal this issue by not challenging the trial court's admission of Henderson's testimony at trial. *See* ***State v. Bodoh***, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) ("It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." (citation omitted)). Terrell did not file a reply brief to refute the State's argument in this regard and therefore conceded it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

B. Sentence Modification

Alternatively, Terrell argues that the postconviction court erroneously exercised its discretion by not reducing his initial confinement time due to his cooperation in a federal case.

A trial court may modify a sentence if a defendant demonstrates by clear and convincing evidence both that a new factor exists and that this new factor justifies modification. ***State v. Harbor***, 2011 WI 28, ¶¶35-37, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" is a fact or set of facts highly relevant to the imposition of sentence that was unknown to the court at the time of the original sentencing. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The factor may be unknown either because it did not yet exist or because its existence was unknowingly overlooked by the parties. ***Id.*** Whether a new factor exists is a question of law that we review independently, but we review a trial court's decision regarding sentence modification due to a new factor for an erroneous exercise of discretion. *See* ***State v. Ninham***, 2011 WI 33, ¶90, 333 Wis. 2d 335, 797 N.W.2d 451 (explaining that "even if we determine that a new factor

exists, we will not overrule a [trial] court's decision regarding sentence modification unless the [trial] court erroneously exercised its discretion").

Here, the postconviction court concluded, and the State agrees, that Terrell's cooperation in the federal case constituted a new factor. The key question then is whether the new factor justifies modification.

In concluding that it did not, the postconviction court first went through the details of Terrell's cooperation and the troubling circumstances he endured while awaiting that trial in federal custody. The postconviction court then explained:

> [F]ocusing on the sentence itself, Mr. Terrell faced … 50 years of initial confinement and an additional 25 of extended supervision. Those would've been the maximums. If I'm reading this correctly. He got 15 and 10. And the [c]ourt in sentencing was, you know, given the information that there was some drug dealing relationship between the victim and Mr. Terrell.
>
> Something happened. It's not entirely clear. But at some point Mr. Terrell puts a gun in close proximity, if not right on [the victim]'s head, pulls the trigger three times, and it does fire on the third time…. Frankly, what was going on in the back of that car was an execution. It didn't work, but it was an execution.
>
> And while I commend Mr. Terrell in testifying for the federal government in the tax matter, I can't say that modifying his sentence is warranted[.]

The postconviction court properly exercised its discretion because it explained its reasons for determining that, notwithstanding Terrell's assistance, modification was not justified given the aggravated nature of the underlying crime.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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