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DISTRICT III

August 13, 2019

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

2018AP969-CR State of Wisconsin v. Terrence C. Stokes (L. C. No. 2006CF1139)

Before Stark, P.J., Hruz and Seidl, 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).

Terrence Stokes, pro se, appeals an order denying his motion for sentence modification. Stokes claims that lesser sentences of other Brown County defendants convicted of the same crime constitute a new factor justifying sentence modification. 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 (2017-18).[1] We reject Stokes's arguments and summarily affirm the circuit court's order.

In the early morning hours of October 28, 2006, Stokes set fire to an apartment building with six people sleeping inside, and he left the scene without alerting emergency personnel. After the fire, Stokes told his girlfriend, who lived in the apartment building but was not home at the time of the fire, that he had started the fire because he was angry with her. He also told her not to call the police or she would "get beat up." The State charged Stokes with burglary of a building, arson, and six counts of first-degree reckless endangerment. The State voluntarily dismissed the burglary charge at the conclusion of its case-in-chief. The jury found Stokes guilty on the remaining counts.

Stokes faced maximum sentences of forty years' imprisonment for the arson conviction and twelve years and six months' imprisonment for each of the reckless endangerment convictions. *See* WIS. STAT. § 939.50(3)(c), (f). The State recommended a total sentence of twenty-five to thirty years of initial confinement followed by a "long term" of extended supervision of an unspecified length. Stokes recommended five years of initial confinement on the arson charge and one year of initial confinement on each of the reckless endangerment charges, all to be served concurrently. The circuit court sentenced Stokes to twenty-five years of initial confinement and fifteen years of extended supervision on the arson conviction. On each of the reckless endangerment convictions, the court sentenced Stokes to two years and six

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

months of initial confinement and five years of extended supervision, with the sentences to be served concurrent to each other but consecutive to the arson sentence.

In 2018, Stokes filed the underlying motion for sentence modification, claiming his sentence was "remarkably higher" than the sentences of other Brown County defendants convicted of arson, and particularly when compared to specific defendants with case histories "substantially similar" to that of Stokes. Stokes asserted that "the sentences of other individuals convicted of the same crime" constituted a new factor justifying sentence modification. The circuit court denied Stokes's motion, and this appeal follows.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the [circuit court] 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." ***Id.***, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38. The existence of a new factor, however, does not automatically entitle a defendant to sentence modification. ***Id.***, ¶37. If a new factor is present, the circuit court, in the exercise of its discretion, determines whether the new factor justifies sentence modification. ***Id.***

On appeal, as in his motion for sentence modification, Stokes provides statistics from 2005 to 2017, claiming that approximately 80% of the thirty-four defendants convicted of arson in Brown County during that time received less than five years in prison. Among the 20%,

including Stokes, who were convicted of arson and received more than five years in prison, Stokes identifies four defendants who, he argues, are similarly situated to him but received lesser sentences.

When discretion is properly exercised during sentencing, disparity between sentences imposed on similarly situated defendants is not a basis for setting aside the harsher sentence. ***Ocanas v. State***, 70 Wis.2d 179, 187-88, 233 N.W.2d 457 (1975). A sentence may only be set aside because of disparity between sentences if the disparity itself is arbitrary or the result of improper considerations. ***Id.*** at 187. While Stokes correctly notes that "the Constitution requires substantially the same sentence for persons having substantially the same case histories," a disparity between the sentences of even co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. *See* ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). Moreover, leniency in one case does not transform a reasonable punishment in another case into a cruel one. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

Citing ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990), Stokes argues that "a co-defendant's prior jail term, making him more comparable to the defendant, is highly relevant and considered a new factor." Because ***Ralph*** is distinguishable on its facts, Stokes's reliance on it is misplaced. There, the sentencing court was aware of the sentence recommendation for a co-defendant when it sentenced Ralph. ***Id.*** at 437-38. The co-defendant ultimately received a sentence identical to the recommendation for that co-defendant. ***Id.*** at 437. This court held that the co-defendant's sentence, identical to the recommendation of which the court was aware, was not a new factor. ***Id.*** at 439. Although we concluded that the co-defendant's prior unknown jail term *was* a new factor where the court had expressed a desire

for parity in the sentences, we declined to address whether this factor alone warranted sentence modification. ***Id.*** at 438. Instead, we concluded that the circuit court properly modified the defendant's sentence based on its harshness compared to that of the similarly situated co-defendant. ***Id.*** Unlike the defendant and his accomplice in ***Ralph***, the defendants identified by Stokes were not co-defendants but, rather, committed distinct crimes under distinct circumstances.

Further, we agree with the circuit court that "not one" of the four defendants Stokes identified in his motion "was similarly situated" to him. Stokes was sentenced for a total of seven offenses—including the arson conviction—which was "substantially more" than the other defendants. Three of the defendants entered no-contest pleas while Stokes was convicted after a jury trial. Stokes's crime was motivated by "underlying issues of domestic violence" compounded by threats he made to his girlfriend in an attempt to cover up his crimes. Additionally, Stokes placed six people, including three young children, at risk of death; exhibited a lack of remorse; and had a prior criminal history consisting of a "chronic, constant pattern" of misdemeanors. The sentencing court stated that, short of homicide, it had not seen a more serious case. The court considered proper sentencing factors, individualized Stokes's sentence to the facts of his case, and did not express a desire for parity with other Brown County arson defendants. Ultimately, because the identified defendants were not similarly situated, their respective sentences were not highly relevant to the imposition of Stokes's individualized sentence and, therefore, not a new factor warranting sentence modification.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. 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