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DISTRICT II

September 18, 2019

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

2018AP1246-CR State of Wisconsin v. Daniel J. Deroo (L.C. #2016CF512)

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

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).

Daniel J. Deroo appeals from a judgment convicting him of ten counts of possession of child pornography and from an order denying his postconviction motion for 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 affirm.

Police discovered hundreds of images of child pornography on Deroo's phone, several of which depicted the rape of very young children. The State charged Deroo with ten counts of possessing child pornography as a repeater, and he pled no contest to all counts. At sentencing, the court emphasized the severity of the offense, including that Deroo admitted masturbating to the images, as well as Deroo's extensive and varied criminal history, which included convictions for seven OWI charges, drug charges, disorderly conduct, battery, failure to pay child support, resisting an officer, burglary, bail jumping, and escape. The sentencing court considered Deroo's "multiple opportunities at rehabilitation," found that he posed "a danger to the community," and determined he was "not recoverable." The court identified three counts it considered particularly egregious and ordered that they run consecutive to each other. Ultimately, the circuit court imposed an aggregate sixty-year sentence, with thirty years of initial confinement followed by thirty years of extended supervision.

Postconviction, Deroo filed a motion for sentence modification alleging the following two new factors: (1) that Deroo received a substantially longer sentence than any other defendant sentenced for possession of child pornography over a six-year period in Winnebago County; and (2) that when he committed the offense, he was potentially experiencing an episode of bipolar hypomania which might be amenable to treatment. After hearing the parties' arguments, the circuit court stated it was "a little leery of calling these things a new factor"

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

especially given that some of the other offenders' sentences were imposed "by judges who I know have a different philosophical standpoint and background than I do." The circuit court invited Deroo to supplement his motion with authority that would "direct" the court to deem Deroo's "statistical analysis" a new factor. Deroo filed a supplemental letter and the circuit court denied the motion. Deroo appeals.

A circuit court may modify a sentence based on the existence of a new factor, which is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Second, the circuit court determines whether the new factor justifies sentence modification. ***Id.***, ¶37.

We conclude that the length of the other offenders' sentences does not constitute a new factor. *See* ***id.***, ¶36 (whether a new factor exists presents a question of law). First, the other sentences that pre-dated Deroo's were already in existence and were not "new." Second, the sentences received by other offenders, whether before or after Deroo's, were not highly relevant to the sentence imposed in Deroo's case. This is not a case where the circuit court identified uniformity as a sentencing objective. Rather, the court fashioned an individualized sentence based on: the severity of the offense, including the "extremely" and "incredibly disturbing" nature of several of the images and the degree of Deroo's culpability; the decades-long history of Deroo's legal troubles which had continued past the time many offenders get tired of being in the system and "tend to move out of it"; the varied nature of Deroo's criminal history which made

him a "versatile offender"; and the number of times he was incarcerated, revoked from supervision, or given "opportunities at rehabilitation" that "have not taken hold."

Deroo argues that when comparative sentencing information shows a "*substantial* disparity between the sentence imposed on the defendant and every other offender sentenced for the same crime within that same county, the information is highly relevant and constitutes a new factor." Even if we accept Deroo's characterization of his sentence as "substantially" disparate, we disagree that this information will always and as a matter of law constitute a new factor. Deroo offers no authority for this proposition and we agree with the State that the circuit court may, but is not required to, look at sentences handed down for similar crimes when fashioning an individual's sentence. There is certainly no authority obligating a circuit court to review later-imposed sentences for a possible disparity.

We also reject Deroo's claim that new information concerning his bipolar disorder diagnosis constitutes a new factor. First, Deroo's diagnosis and need for treatment was known to the circuit court at the time of sentencing and was not new.[2] Second, new information that he might have been committing the offenses during a potentially treatable hypomanic episode is inherently speculative and not highly relevant to the circuit court's sentence. Finally, the potential availability of treatment for Deroo does not change his substantial criminal history or the heinous nature of the offenses, the two primary factors considered at sentencing. Like the alleged disparity of his sentence, Deroo's specific treatment needs were not the court's primary focus at sentencing, so the availability of treatment was not highly relevant to its sentence.

[2] During the plea colloquy, Deroo told the court that he was taking medication for bipolar disorder and that it did not affect his ability to understand the proceedings.

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.

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

Sheila T. Reiff
Clerk of Court of Appeals