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DISTRICT II

January 15, 2020

To:

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

2019AP77-CR State of Wisconsin v. Johnny L. Hall (L.C. #2016CF328)

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).

Johnny L. Hall appeals from a judgment of conviction and an order denying his postconviction motion seeking sentence modification.[1] Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] We affirm the judgment and order.

Hall sold heroin to twenty-three-year-old T.S. and T.S.'s friend, C.S. T.S. died of heroin toxicity. Hall pled no contest to first-degree reckless homicide. Hall was sentenced to five years' initial confinement (IC) and five years' extended supervision (ES). Postconviction, Hall moved for sentence modification[3] on grounds he was not sentenced on entirely accurate information.

In March 2016, Hall was placed on eighteen months' probation subsequent to his conviction for delivery of heroin in a Milwaukee County case that was "part of a larger conspiracy" ultimately responsible for T.S.'s death. He argued in his postconviction motion that defense counsel did not explicitly argue at his January 2018 sentencing that he successfully completed that probation, such that he "was not sentenced on entirely accurate information,"

[1] The Honorable Thomas J. Gritton signed the judgment of conviction. The Honorable Teresa S. Basiliere signed the order denying Hall's postconviction motion.

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

[3] Hall's postconviction motion is labeled "Motion to Modify Sentence," but at the hearing on the motion, he requested resentencing. Here, he asks both that this court grant his postconviction motion (motion to modify) and that the case be returned to the trial court for resentencing. The State treats Hall's postconviction motion as one for resentencing. The postconviction court seemed to blend the concepts of sentence modification and resentencing.

Sentence modification and resentencing are not the same. *See* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81. Sentence modification is appropriate to "correct specific problems," while resentencing is appropriate "when it is necessary to completely re-do [an] invalid sentence." ***Id.***

leading to an unduly harsh sentence. The postconviction court concluded that the sentencing court did not erroneously exercise its discretion, as it had considered the necessary sentencing factors, was "fully aware" that Hall had completed his probation in his prior conviction, and imposed a sentence that was not unduly harsh. The court denied Hall's motion. He appeals.

A defendant seeking sentence modification generally must demonstrate that there is a new factor justifying a motion to modify a sentence. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Hall does not allege a new factor, and there is none, but contends it also lies within the circuit court's authority to modify a sentence that is unduly harsh or unconscionable. *See* ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979).

When a defendant argues that his or her sentence is unduly harsh, a court may find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). A sentence "well within the limits of the maximum" presumptively is not unduly harsh or unconscionable. ***Id.***, ¶32 (citation omitted).

The circuit court discussed the primary sentencing factors: the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409, and gave a "rational and explainable basis" for imposing the sentence it did, ***State v. Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). Further, T.S. died as a result of Hall's drug-distribution activities. Hall faced forty

years' imprisonment and got a bifurcated ten-year sentence. The sentence was not unduly harsh or unconscionable.

Hall also complains that he was sentenced on information that was not "entirely accurate," as his counsel did not "explicitly argue" at his sentencing that he successfully completed the probation on his related Milwaukee case, preventing the court from properly taking it into account. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. He or she may seek resentencing upon a showing that there was inaccurate information before the sentencing court upon which the court actually relied. ***Id.***, ¶2.

There was no inaccurate information. Counsel told the court that Hall "has just completed his probation on that case" and argued at length that Hall took responsibility by turning himself in when he learned there was a warrant out for him. The PSI stated that, per the Department of Corrections, while on probation Hall had reported as directed, had no known drug use, and completed an outpatient alcohol/drug treatment program. In regard to Hall's character, the court noted that, among other positives, "by getting through this probation period that you just finished" he had proved that his rehabilitative needs no longer were "that great," and that, along with the PSI, Hall's accountability was a "significant consideration" in persuading it to reduce its initial sentencing intention from "double digits" to five years' IC. Hall's successful completion of probation was brought to the court's attention and did not go unnoticed. The weight to be given each factor—here, Hall's character—is within the court's discretion. ***Harris***, 326 Wis. 2d 685, ¶28. It is not clear what else Hall thought should have occurred.

To the extent Hall's motion was one for sentence modification, we affirm the denial because he has shown neither a new factor nor that his sentence is unduly harsh. To the extent it was for resentencing, we likewise affirm the denial because he has not shown that any inaccurate information was presented to the sentencing court.

IT IS ORDERED that the judgment and 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