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DISTRICT II

April 15, 2020

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

2019AP16-CR State of Wisconsin v. Tarance L. Bryant (L.C. #2014CF1729)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Tarance L. Bryant appeals from a judgment of conviction and an order denying his postconviction motion. He seeks either resentencing or 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.

In the early morning hours of December 13, 2014, Bryant drove his car at a high rate of speed and collided with another vehicle, killing its driver. Bryant ran from the scene and was apprehended by police, who obtained a search warrant for his blood. Chemical testing revealed a blood alcohol concentration (BAC) of .089 as well as THC and Lorazepam.

Bryant eventually pled guilty to one count of hit and run involving death and one count of homicide by intoxicated use of a vehicle. A presentence investigation (PSI) report was filed. In his version of events in the PSI, Bryant indicated that he was at a party and had gotten into an argument with Larry Ellison, who shot at him. He claimed that he was fleeing from Ellison when he struck the victim's vehicle.

In its sentencing remarks, the circuit court noted the lapse in time between the crash and the test of Bryant's blood, stating, "[b]ased on [his] refusal to submit to a chemical test of [his] blood, officers had to wake someone up in the morning to obtain a search warrant. That was done and several hours after the accident [he] still tested with a BAC of .089." Ultimately, the court imposed an aggregate sentence of thirteen years of initial confinement and nine years of extended supervision. The sentence was primarily based on Bryant's criminal history, failure to rehabilitate, and the nature of the offenses.

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

Bryant filed a postconviction motion seeking either resentencing or sentence modification. He argued that the circuit court had improperly considered his refusal to consent to a warrantless blood draw as an aggravating factor at sentencing in violation of ***Birchfield v. North Dakota,*** 136 S. Ct. 2160 (2016).[2] He further argued that sentence modification was appropriate in light of additional information that was not presented to the court that lent credence to his claim that he was fleeing from Ellison when he struck the victim's vehicle.[3]

Following a hearing on the matter, the circuit court denied Bryant's motion. The court agreed that punishing Bryant at sentencing for his refusal to consent to a warrantless blood draw would have been improper; however, it disavowed doing so. The court also ruled that the additional information was not a new factor warranting sentence modification. This appeal follows.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A circuit court erroneously exercises its discretion when it "actually relies on clearly irrelevant or improper factors." ***State v. Dalton***, 2018 WI 85, ¶36. 383 Wis. 2d 147, 914 N.W.2d 120 (citations omitted).

[2] The Supreme Court in ***Birchfield*** determined that it is impermissible to impose criminal penalties for refusing to submit to a warrantless blood draw. ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2185-86 (2016).

[3] The additional information included reports of other incidents in which Ellison got into arguments and shot at people. It also included the fact that Bryant had told police about Ellison days after the crash. Finally, it corrected the prosecutor's misstatement about where the crash occurred so as to explain why an eyewitness would not have seen Ellison.

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 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 defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶37-38.

A new factor 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." ***Id.***, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***id.***, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See* ***id.***, ¶¶37, 66.

Here, we are not persuaded that the circuit court erroneously exercised its discretion at sentencing by actually relying on an improper factor. Although the court briefly referenced Bryant's refusal to consent to a warrantless blood draw in its sentencing remarks, it did so in the context of explaining the delay in testing and the fact that Bryant's blood alcohol concentration was still above the legal limit "several hours after the accident." Nothing in the court's remarks unequivocally state—or even suggest—that it imposed a harsher sentence as a direct result of Bryant's refusal.

Likewise, we are not persuaded that Bryant has demonstrated the existence of a new factor. The circuit court was well aware of Bryant's claim that he was fleeing from Ellison when he struck the victim's vehicle. Indeed, it acknowledged Bryant's version of events in its sentencing remarks.

In any event, additional information in support of Bryant's claim does not warrant sentence modification. As the court explained at the postconviction hearing, "[w]hether Mr. Bryant was provoked or not, whether he panicked, the fact of the matter is Mr. Bryant made a God awful decision that night to get in his car intoxicated and ultimately resulting in this hit and run accident and death of an innocent person."

Upon the foregoing reasons,

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