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DISTRICT I

January 12, 2021

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

2019AP254-CR

State of Wisconsin v. Gale Johnson (L.C. # 1995CF953143A)

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

Gale Johnson, *pro se*, appeals the order denying his postconviction motion seeking sentence modification.¹ Johnson argues that the disparity between his sentence and his co-actor's sentence is a new factor warranting 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).² Upon review, we summarily affirm.

In 1995, the State charged Johnson and Terrell Thomas in a joint complaint with first-degree intentional homicide and attempted first-degree intentional homicide for the murder of C.J. and the attempted murder of C.J.'s girlfriend, A.L. Johnson and Thomas had separate trials. The jury found Johnson guilty of both charges. The jury found Thomas guilty of first-degree intentional homicide and not guilty on the charge of attempted first-degree intentional homicide.

The same circuit court judge presided over both trials and sentencing hearings. The circuit court sentenced Thomas to life imprisonment with eligibility for parole on November 9, 2031. The circuit court subsequently sentenced Johnson. After explaining why Johnson's crimes were more aggravating than Thomas's crimes, the circuit court sentenced Johnson to life imprisonment with eligibility for parole on May 5, 2037—six more years than Thomas. The circuit court additionally imposed a concurrent term of twenty-five years of imprisonment on the charge of attempted first-degree intentional homicide.

¹ The Honorable Joseph R. Wall issued the order denying Johnson's postconviction motion. The Honorable John A. Franke presided over Johnson's trial and sentencing.

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

We affirmed the judgment of conviction in Johnson’s direct appeal, *see State v. Johnson*, No. 1999AP1650-CR, unpublished slip op. (WI App June 20, 2000), and the Wisconsin Supreme Court denied his petition for review.

Johnson subsequently filed a postconviction motion seeking sentence modification based on an alleged new factor: the disparity between his sentence and Thomas’s sentence. The circuit court denied Johnson’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 analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37.

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 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See 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.

Johnson argues that the disparate sentence he received constitutes a new factor warranting sentence modification. However, the circuit court’s sentencing remarks clearly convey the distinctions it drew between Johnson and Thomas, which prompted it to impose the sentences that it did.

For instance, the circuit court noted: “Because of your age and because this is not the most serious type of homicide that we see, I’ve decided not to make this a life means life sentence, but to impose something slightly longer than the sentence imposed in terms of a parole date on the co-[actor (i.e., Thomas)].” The circuit court continued:

I’m imposing a longer sentence because of the aggravating circumstances the State identified, the nature of the weapon that you used, and your unwillingness to accept what I would characterize as meaningful responsibility for your conduct, and also because the evidence, while perhaps not overwhelming, is close to overwhelming that you were the one who actually caused this death.

That may not distinguish your conduct in a great way between you and your co-[actor], but we hold people responsible for the consequences of their acts, as well as for the abstract nature of their conduct, and it’s pretty clear that you were the one and it was your weapon that caused this death. And those are all things that cause me to view this as somewhat more aggravated than the case of the co-[actor].

Insofar as Johnson disagrees with the circuit court’s assessment of his culpability—that disagreement does not amount to a new factor. Here, the circuit court provided a detailed assessment of Johnson’s individual culpability and character, set forth various reasons as support for its assessment, and concluded that a disparate sentence was warranted. Johnson has failed to demonstrate the existence of a new factor warranting sentencing modification.³ See *State v. Toliver*, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994) (holding that if court does not express a desire for parity in sentences between co-defendants, a disparity in co-defendants’

³ On appeal, Johnson explains that his references in his postconviction motion to his conduct and achievements while in prison were offered to justify modification of his sentence. Because we conclude that he has not presented a new factor, we do not consider his argument that the strides he has made since incarceration warrant modification. See *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828 (explaining that “if a court determines that the facts do not constitute a new factor as a matter of law, ... it need not determine whether, in the exercise of its discretion, the sentence should be modified”).

sentences is not a new factor), *clarified or modified on other grounds by Harbor*, 333 Wis. 2d 53, ¶48.

IT IS ORDERED that the order is 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