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DISTRICT II

July 14, 2021

To:

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Circuit Court Judge
Electronic Notice

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District Attorney
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County
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Jacob J. Wittwer
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Colleen Marion
Assistant State Public Defender
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1502-CR State of Wisconsin v. Jerome J. Houston (L.C. #2016CF441)

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).

Jerome J. Houston appeals from his judgment of conviction after revocation of probation and from an order denying his postconviction motion. He seeks resentencing or sentence modification based on alleged sentencing court error and the COVID-19 pandemic as a "new

factor." 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 (2019-20).[1] We affirm.

In October 2016, Houston pled no contest to felony bail jumping, resisting an officer, and disorderly conduct. The court withheld sentence on the bail jumping count and placed Houston on probation for three years.[2] On December 1, 2017, Houston missed a scheduled meeting with his probation agent, and he remained in absconder status until March 11, 2019, when he was arrested in Iowa. Houston's probation was revoked in July 2019,[3] and he appeared before the circuit court for sentencing after revocation. The State sought two years' initial confinement and two years' extended supervision; defense counsel asked for a jail sentence of nine months, which would amount to time served. The court imposed two years' initial confinement and three years' extended supervision.

Houston filed a postconviction motion for sentence modification in August 2020, arguing that the COVID-19 pandemic constituted a "new factor" warranting sentence modification. In the alternative, Houston sought resentencing based on an erroneous exercise of sentencing discretion, arguing that the court (1) limited defense counsel's argument at sentencing, (2) had a preconceived sentencing policy against alcohol and drug treatment, and (3) had a preconceived

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

[2] Houston was also sentenced to 160 days in jail on the count of resisting an officer and time served on the disorderly conduct charge.

[3] The allegations were that Houston smoked methamphetamine, failed to report to his probation agent, failed to attend his sex offender treatment group, fled from police, gave a false name to police, possessed drug paraphernalia, ran from an officer, and was in Iowa without a travel permit.

sentencing "protocol" that it did not share with the parties. The court denied Houston's motion without a hearing. Houston appeals.

A court's sentencing decision is subject to deference, emanating from the circuit court's inherent advantage in considering the relevant sentencing factors and the defendant's demeanor. ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. "A discretionary sentencing decision will be sustained if it is based upon the facts in the record and relies on the appropriate and applicable law." ***State v. Travis***, 2013 WI 38, ¶16, 347 Wis. 2d 142, 832 N.W.2d 491. "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Gallion***, 270 Wis. 2d 535, ¶17. "[A] sentencing court or jury must be permitted to consider any and all relevant information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." ***State v. Sulla***, 2016 WI 46, ¶32, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted).

We conclude that Houston is not entitled to resentencing as the court considered the proper sentencing factors and did not erroneously exercise its discretion. Houston claims that during the revocation sentencing, the court prevented him from arguing mitigating factors. The record is clear, however, that the court was directing counsel to focus on relevant information. At the time of the court's remarks, defense counsel was explaining that Houston was "disappointed" that the administrative law judge did not consider alternatives to revocation. The court asked that counsel's "comments be cast more in a sentencing tone than to try to take and chastise … the revocation process, or the fact that [Houston] was in absconder status, or was

father of the year and he was a picture of Kodak father's day cards." Defense counsel then continued her sentencing argument, addressing (1) Houston's need for substance abuse treatment, which counsel argued he would be unable to obtain in prison; (2) his ability to participate in alcohol and drug treatment court in another county[4]; (3) his family history of alcoholism; (4) the fact that he had housing and employment prospects available; (5) his daughter's belief in his rehabilitative potential; and (6) his status as a new father and grandfather. In summary, the record does not support Houston's assertion that he was prevented from presenting relevant mitigating factors at sentencing.

Houston further argues that the sentencing court erred by relying on preconceived policies in imposing his sentence. "[O]ne 'unreasonable and unjustifiable basis' for a sentence is a trial judge's employment of a preconceived policy of sentencing that is 'closed to individual mitigating factors.'" ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996) (citation omitted). However, a court is not "prohibited from entertaining general predispositions." ***Id.*** at 573. The court errs only when the "predispositions [are] so specific or rigid so as to ignore the particular circumstances of the individual offender upon whom he or she is passing judgment." ***Id.***

During sentencing, the court stated, "I have a certain protocol I follow and I'm going to keep it to myself, but having said that, that's for another day," which Houston argues indicates "an inflexible approach to sentencing." We disagree. This statement must be viewed in context:

[4] Houston also had cases pending in La Crosse and Columbia Counties. Defense counsel explained that Houston had "been working with the drug court and the OWI court in La Crosse County" and they had "expressed a willingness to consider his participation in those programs for the Columbia County case."

the court had just ruled that Houston's sentence would be "consecutive to any other sentence" and noted that Houston was slated to be sentenced in the Columbia County case. Defense counsel had also argued that "sending him to prison in this case with then a consecutive prison sentence, because Columbia County doesn't do concurrent time, would just add a substantial amount of time that Mr. Houston will be in prison without the ability to get treatment." The court's comment was related to whether the Columbia County court would order his sentence to run consecutive to this sentence, explaining that "Columbia County will do whatever they want, all right? I'm not telling the judge how to decide that. That's their call." The court then followed up with its statement about protocol. The statement was in reference to exercising discretion, and since Houston was not serving any other sentence at the time he was sentenced in this case, any alleged "protocol" was clearly not applied.

Houston also argued that other remarks of the sentencing court indicate a preconceived policy against drug treatment court. We disagree. As previously addressed, Houston observed that if he were given a jail sentence in this case, he would be able to participate in treatment court, and the Columbia County court might take that into consideration in determining its sentence. The sentencing court responded, "I don't anticipate what Columbia County does, nor do I care, all right? … So if they have drug court, that's their call. I don't quite frankly believe in it, but they do it around here too, all right." As the State argues, it is clear from the sentencing court's overall discussion that this was a prison case and not a treatment court or treatment in the community case. The court considered prison necessary due to the seriousness of Houston's crimes, his failure to succeed on probation, his absconder status, and his other serious probation violations. The court's statements suggest merely a "general predisposition[]." *See* ***id.***

Finally, Houston argues that he is entitled to sentence modification based on the COVID-19 pandemic. He claims that he is "at increased risk of severe symptoms should he contract COVID-19" due to his "exceedingly high blood pressure" and his status as "a member of the Ho Chunk nation."[5] The "defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must establish the existence of a new factor by clear and convincing evidence. ***State v. Samsa***, 2015 WI App 6, ¶14, 359 Wis. 2d 580, 859 N.W.2d 149 (2014). We review the question of whether a new factor exists independently. ***Id.***

In this case, the court denied Houston's motion based on its finding that COVID-19 is not a new factor. We agree. The COVID-19 pandemic was certainly unknown to the court at the time of Houston's sentencing after revocation, but it was not "highly relevant to the imposition of sentence." The court addressed the proper factors at the revocation sentencing, focusing heavily on Houston's failure on probation and his absconder status. According to the court, Houston needed "a level of incarceration to, I think, offset your abhorrent behavior while on probation, coupled with the seriousness of these offenses, [and] the need to protect the public." We are cognizant of the impact the COVID-19 pandemic has had on our state and the unique

[5] Houston argues that "[d]ata shows that Native Americans are at an increased risk of serious COVID-19 effects, due in part to a disproportionately high prevalence of underlying health issues, secondary to individual and historical trauma."

danger a highly contagious virus poses to those incarcerated in the Wisconsin prison system. However, Houston has failed to meet his burden to establish that his health condition, status as a member of the Ho Chunk nation, or the conditions in the prison system were a consideration of the court, let alone "highly relevant," in imposing his sentence. At best, COVID-19 may impact his conditions of confinement, but not his sentence. Therefore, the emergence of COVID-19 does not constitute a new factor entitling Houston to sentence modification.

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