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DISTRICT III

June 14, 2022

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

2020AP1177-CR State of Wisconsin v. Godfrey Joseph LaBonte
(L. C. No. 2018CF10)

Before Stark, P.J., Hruz and Gill, 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).

Godfrey Joseph LaBonte appeals a judgment of conviction and an order denying his postconviction motion for sentence modification. LaBonte argues that the circuit court "relied upon misconceptions about [his] life expectancy and age at release" in its sentencing decision, and that LaBonte's corrections to these misconceptions are new factors that justify modifying his sentence. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

LaBonte was charged with one count of first-degree sexual assault of a child under twelve, as a repeater. The charge carried a minimum sentence of twenty-five years and a maximum sentence of sixty years. A jury found LaBonte guilty. At the time of his offense, LaBonte was on extended supervision for a prior conviction. During the sentencing hearing on the sexual assault charge, the State explained that LaBonte's extended supervision had been revoked, and that LaBonte would be incarcerated for the balance of that sentence, which was just over four years. The State recommended that the circuit court sentence LaBonte to forty years' initial confinement followed by twenty years' extended supervision, to run consecutively to his revocation. LaBonte asked that he be sentenced to the mandatory minimum of twenty-five years, to run concurrently with his revoked sentence.

The circuit court imposed a sentence of thirty-five years' initial confinement followed by fifteen years' extended supervision. In declining LaBonte's request for the mandatory minimum sentence, the court explained that more than twenty-five years was necessary "because this is really a terrible offense committed by somebody that's had a terrible record." In particular, the court noted that LaBonte had "one of the worst criminal histories I've seen out of somebody [his] age," and that "his record screams for more punishment than the mandatory minimum."

The circuit court declined to follow the State's recommendation of forty years' initial confinement followed by twenty years' extended supervision. Specifically, the court determined

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

that such a lengthy sentence was not necessary to protect the public because "[h]is life expectancy isn't going to be at a point where really that amount of time is meaningful." Instead, the court reasoned that thirty-five years of initial confinement meant that "he will be probably alive when he's released," and an additional fifteen years of extended supervision "will get him to the point where he will be on supervision one way or the other until he's probably not alive any more." The court then determined that the sentence for the sexual assault charge would run consecutively to the revocation of the prior sentence.

LaBonte filed a motion for postconviction relief, seeking sentence modification based on new factors, two of which are relevant to this appeal. First, LaBonte argued that the circuit court had "expressed its intent to have Mr. LaBonte released before his mid-70s," yet it had imposed a sentence that kept LaBonte in prison until age seventy-five. Based on this discrepancy, LaBonte argued that the court must have miscalculated his age upon release. Second, LaBonte argued that the court did not take into account "the detrimental effects of incarceration" on life expectancy when it stated that LaBonte would probably live to see the end of his prison term. Thus, LaBonte contended that "correcting the court's misconceptions regarding that likelihood qualifies as a new factor."

The circuit court denied LaBonte's postconviction motion after a hearing. The court determined that LaBonte had not established a new factor, nor had there been any misconception at sentencing. The court explained that its intent was to avoid imposing a sentence "that's so far beyond [LaBonte's] realistic life expectancy that there's no possibility that [he is] going to be alive" when released. Instead, the court's "point was that there be some reasonable prospect of him being released." Similarly, when considering the term of extended supervision, the court explained that it declined the State's request for twenty years of extended supervision "because

the chance of him being alive for that last five years was so minimal, I wasn't trying to pile on—I wasn't trying to make some point that Mr. LaBonte's corpse somehow needs to be supervised." The court concluded that LaBonte had not identified any new factors that would cause the court to reconsider the sentence imposed.

LaBonte now appeals, asking us to reverse the circuit court's determination that there were no new factors and to remand so that the "court can determine whether sentence modification is warranted." At the outset, the State notes that LaBonte's argument draws on two distinct lines of authority. Namely, cases that address sentence modification based on a new factor, *see, e.g.*, ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, and cases that address whether a defendant is entitled to resentencing based on inaccurate information, *see, e.g.*, ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491; ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656. The State points out that these two lines of cases involve "distinct concepts with different elements and different remedies." *See* ***State v. Wood***, 2007 WI App 190, ¶¶6-11, 305 Wis. 2d 133, 738 N.W.2d 81 (explaining the difference between these two types of postconviction motions).

In ***Wood***, we explained that our past decisions had "inadvertently muddled the linguistic and legal waters with our mixing of distinctly different concepts." ***Id.***, ¶9. Specifically, "[i]n resentencing, 'the court imposes a new sentence after the initial sentence has been held invalid.'" ***Id.***, ¶6 (citation omitted). In contrast, "[a] new factor analysis … relate[s] to modification of the sentence to correct specific problems, not to resentencing when it is necessary to completely re-do the invalid sentence." ***Id.***, ¶9.

In his reply brief, LaBonte reiterates that he is seeking sentence modification. Nonetheless, he argues that discussions of inaccurate information from cases involving resentencing "share a basic commonality" with cases involving sentence modification based on a new factor. In particular, LaBonte contends that both types of cases recognize "that a significant fact had changed since sentencing—casting doubt on the fairness of the original sentence." LaBonte does not argue that his original sentence is invalid, nor do we see any indication that LaBonte would be entitled to resentencing even if he were to request it. Therefore, we will assume without deciding that the proper analysis for this appeal is whether LaBonte has demonstrated a new factor that warrants sentence modification.

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.

Harbor, 333 Wis. 2d 53, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. If the defendant demonstrates a new factor, the circuit court then exercises its discretion to determine "whether that new factor justifies modification of the sentence." ***Id.***, ¶37. "[I]f a court determines that the facts do not constitute a new factor as a matter of law, it need go no further in its analysis to decide the defendant's motion." ***Id.***, ¶38 (citation omitted).

Here, the circuit court determined that there were no new factors. "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law," which we review independently of the circuit court. ***Id.***, ¶33.

Our independent review of the record shows that LaBonte has not satisfied his burden of demonstrating that his age is a new factor. At the sentencing hearing, defense counsel expressly stated that LaBonte was thirty-seven years old. The circuit court addressed LaBonte's age when sentencing him on the sexual assault charge, correctly calculating that the State's recommendation of forty years' initial confinement would mean that LaBonte would be in his "mid- to high-70s" by the time the State's recommendation of twenty years of extended supervision began. Therefore, LaBonte cannot establish that his age was a fact that all of the parties unknowingly overlooked at the time of sentencing. *See* ***id.***, ¶40 (a new factor is a fact "highly relevant to the imposition of sentence" that was nonetheless "unknowingly overlooked by all of the parties.") (citation omitted)). "[A]ny fact that was known to the court at the time of sentencing does not constitute a new factor." ***Id.***, ¶57. Thus, LaBonte's age is not a new factor.

LaBonte nonetheless argues that the circuit court must have "miscalculated how old LaBonte would be after serving the sentence imposed." To support this argument, he points to the fact that the sentence for the sexual assault charge runs consecutively to the revocation sentence, which means that LaBonte will not be released from confinement until he is seventy-five years old. LaBonte contends that there is a "disconnect between the court's stated rationale for rejecting the State's recommendation and the practical effect of the sentence it imposed," and he further argues that this outcome is contrary to the court's "goal of ensuring Mr. LaBonte's release before his mid-70s" as demonstrated by the court's "(repeated) reference to his life expectancy."

We reject the premise of this argument. The circuit court's general references to LaBonte's age do not strike us as an attempt to precisely calculate a particular outcome for LaBonte. Rather, they were part of the court's consideration of whether the maximum sentence recommended by the State was necessary to protect the public. Indeed, the court's discussion of LaBonte's age began with the general observation that regardless of whether the court imposed the mandatory minimum sentence of twenty-five years or the State's recommendation of forty

years, LaBonte "is going to be quite old, even with either number by the time he gets the ability to be released from prison." While the court noted that there was "some legitimacy to the maximum penalty," it acknowledged that LaBonte's "life expectancy isn't going to be at a point where really that amount of time is meaningful." Based on that general assumption, the court crafted a lesser sentence that would still be sufficient to "get him to the point where he will be on supervision one way or the other until he's probably not alive any more."

The circuit court's comment that LaBonte would "be probably alive when he's released" from his initial period of confinement is consistent with its overall sentencing scheme insomuch as the court was assessing how much extended supervision would be necessary to keep LaBonte on some form of supervision for the rest of his life. This objective, in turn, is consistent with the requirement that the sentencing court consider the need to protect the public. *See* WIS. STAT. § 973.107(2); ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring sentencing courts to consider "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others"). We do not, however, construe this comment to reflect the court's intention that LaBonte survive his period of initial confinement.

We also reject LaBonte's argument that there was any miscalculation. The prosecutor informed the circuit court during the sentencing hearing that LaBonte would be serving just over four years of his revoked sentence. In choosing to impose the new sentence consecutively to the revoked sentence, the court explained that "a consecutive sentence is appropriate" because this was "a separate criminal offense and a serious criminal offense" and there was no reason "why he should get concurrent time to something he's already committed and he's been revoked on." We see no disconnect in the court's decision to order the sentence for the sexual assault charge consecutively to the revocation sentence. To the contrary, the court expressly connected the two aspects of its sentencing decision when it described its decision to impose a consecutive sentence as "the flipside" to imposing less than the maximum sentence on the sexual assault charge.

Finally, because we have rejected LaBonte's argument that the circuit court intended that LaBonte would survive his initial period of confinement, we can easily reject his argument that the diminished life expectancy of incarcerated persons constitutes a new factor. A new factor must be "highly relevant to the imposition of sentence." ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Here, the court explained at the postconviction hearing that its discussion of LaBonte's life expectancy reflected nothing more than the general principle that "the older you get, the less likely you will be to be alive." Because LaBonte's actual life expectancy had no bearing on the sentence imposed, additional facts that bear on his actual life expectancy are not new factors warranting sentence modification.

Upon the foregoing,

IT IS ORDERED that the judgment and order 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