COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2001 **Cir. Ct. No. 2005CF827**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY D. SISSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kimberly Sisson appeals an order denying a motion for sentence modification. We affirm.

¶2 This matter stems from sexual misbehavior involving Sisson and a fifteen-year-old female victim. At the time, Sisson was seventeen years old. Sisson had the victim watch while Sisson had sexual intercourse with a thirty-three-year-old male; and Sisson received oral sex and digital intercourse from the victim before, during, and after intercourse with the male. Sisson was charged with two counts of sexual assault of a child under sixteen; one count of child enticement; two counts of causing a child older than thirteen to view or listen to sexual activity; and one count of bail jumping.

¶3 Pursuant to a plea agreement, charges were amended and Sisson pled guilty to sexual assault of a child under the age of sixteen, and three counts of fourth-degree sexual assault. The circuit court adopted a joint sentencing recommendation consisting of a deferred judgment on the sexual assault of a child count pending Sisson's successful completion of a four-year probation term. As to the fourth-degree sexual assault counts, Sisson received a withheld sentence and was placed on concurrent probation for four years.

¶4 Subsequently, the State moved to revoke the deferred entry of judgment after Sisson's probation was revoked for a variety of rules violations, including absconding from supervision and cutting off her ankle monitor. At the sentencing after revocation hearing, the parties jointly recommended, upon findings of guilt, that sentence be withheld on the sexual assault of a child count with six years' probation. The parties also jointly recommended concurrent sentences of nine months' jail on the fourth-degree sexual assault counts.

¶5 Approximately eight months later, it was recommended Sisson's probation be revoked for a variety of rule violations, including absconding and consuming heroin, cocaine and marijuana. At the sentencing after revocation

hearing, the circuit court was informed of Sisson's history of absconding and her inability to comply with terms of supervision or probation. Among other things, Sisson's patterns of behavior included prostitution, using and dealing multiple types of hard drugs, and relationships with undesirable individuals. The court was told despite being afforded every opportunity, there "was no actual real change in her behavior." The court was also specifically advised that if Sisson "did not choose to change her behaviors around while she was incarcerated, the chances are high that these behaviors will follow her into the community."

¶6 Sisson personally informed the circuit court at this revocation hearing that she had been a victim of sexual assault several times and was deeply ashamed that she had herself become a victimizer. The court stated the following concerning Sisson's disobedience while on probation:

> You are screaming for help here. You need some sort of help. You are disobeying the rules. You are hooking up with guys that your agent doesn't want you to [associate with]; [I'm] trying to protect you.
>
> I am most concerned about the fact that you are using – you absconded to Milwaukee. You are using drugs, and they are serious drugs. You are dealing with heroin and cocaine, and there is an allegation you were engaged in prostitution while you were down there. You have serious issues relating to sex, as well as drugs, that need to be addressed, and they can only be addressed in the institutionalized setting.

¶7 Accordingly, the circuit court imposed a seven-year sentence consisting of two years and six months' initial confinement, and four years and six months' extended supervision on the sexual assault of child count. However, after Sisson completed her term of initial confinement, she was released on extended supervision and picked up a variety of new charges in Waukesha and Marathon

Counties. When faced with revocation of her extended supervision, Sisson moved to modify her sentence to time served.[1]

¶8 In her postconviction motion to modify her sentence, Sisson argued a psychosexual evaluation presented by Dr. Nick Yackovich demonstrated a new factor. According to Sisson, the sentencing court did not have an appreciation of the depth of the extensive trauma Sisson suffered, and Sisson had been viewed as the perpetrator without a true acknowledgment or understanding of how her own victimization related to her becoming the defendant.

¶9 Yackovich testified at the postconviction motion hearing. Attorney and mediator Rachel Monaco-Wilcox also testified about community treatment, and contended that Sisson could get better treatment in the community than in the correctional system. The circuit court concluded Sisson did not present a new factor that warranted sentence modification, and Sisson now appeals.

¶10 A new factor is a set of facts highly relevant to the imposition of a sentence but not known to the circuit court at the time of the original sentence, either because it was not then in existence or because it was unknowingly overlooked by the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must establish a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d

[1] The postconviction motion in the circuit court also sought to vacate the conviction for sexual assault of a child, and to allow Sisson to withdraw her plea. The postconviction motion also stated, "If the court denies Ms. Sisson's motion to vacate her conviction, she moves to vacate the requirement that she register as a sex offender …." Sisson additionally moved for modification of her sentence. At the hearing on the postconviction motion, Sisson withdrew the request to withdraw her plea. The court granted the request to remove the sex offender registry requirements. The issue on appeal is limited to sentence modification, and we shall not further address the other issues.

828. Whether a fact or set of facts constitutes a new factor is a question of law we review independently. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶11 However, the existence of a new factor "does not automatically entitle the defendant to sentence modification." ***Harbor***, 333 Wis. 2d 53, ¶37. If the defendant shows a new factor by clear and convincing evidence, the circuit court has discretion to decide if sentence modification is warranted. Its decision in that regard is reviewable only for an erroneous exercise of discretion. *See* ***id.***, ¶33. If a court determines the facts do not constitute a new factor as a matter of law, it need go no further in its analysis. ***Id.***, ¶38.

¶12 Here, Sisson failed to provide clear and convincing evidence of a new factor. In the circuit court, Sisson insisted the psychosexual analysis "was not completed and therefore unknown to the court at the time of sentencing." However, the circuit court knew at the time of sentencing the basic premise for which the report was offered—that Sisson had been the victim of sexual assault and had significant treatment needs. The court stated:

> Obviously, this would be a new factor and easy decision if there had been no mention made of any prior sexual assault of the defendant. We don't have that here. The fact that she was a victim of sexual assault herself was known at the time of sentencing. It's not new.

¶13 Yackovich's report also addressed adolescent brain development, its impact on decision-making, and research purporting that trauma experienced during early developmental stages can restrict the functioning associated with psychosocial maturity. However, the circuit court correctly noted that adolescent brain development research is not a new factor under our case law. We rejected a similar argument in ***State v. McDermott***, 2012 WI App 14, 339 Wis. 2d 316, 810

N.W.2d 237. There, we recognized that even though the studies proffered may not have been in existence at the time of sentencing, the conclusions reached were already in existence and well reported. *See* ***id.***, ¶18. Similarly, although Yackovich's report was not completed at the time of sentencing, the underlying literature cited in his report existed prior to the court's sentence after revocation.

¶14 In addition, Monaco-Wilcox presented the circuit court with information concerning new treatment available in the community, but the court had concluded at sentencing that Sisson could not be treated in the community because she presented a danger to it. In considering the proper sentencing factors the court stated, "[T]he two that jump out at me [are] rehabilitation of the defendant, as well as protection of the community. I think those are the two most important ones." The court concluded Sisson's serious issues required an institutionalized setting.

¶15 Even assuming for the sake of argument that Sisson was a low risk to sexually reoffend, the circuit court was concerned with Sisson's continued criminal activity of many types. Sisson presented no evidence concerning her overall risk to re-offend, and the court had good reason to emphasize Sisson's danger to the community. Given Sisson's criminal history, her prior failure at supervision and probation, as well as her consistent resistance to treatment in the community, it would be unreasonable to conclude Sisson warranted time served and a release to voluntarily engage in community treatment.

¶16 Finally, Sisson does not explain, even in her reply brief to this court, why she could not have procured the information provided by Yachovich and Monaco-Wilcox before sentencing. Sisson contends that evaluation before the sentencing hearing "misses the point." According to Sisson, the purpose of

allowing sentence modification is to "correct unjust sentences." However, Sisson's contention merely begs the question, as a circuit court's authority to modify a sentence is defined by the "new factor" jurisprudence under ***Rosado***, which requires Sisson to present facts "not known to the trial judge at the time of original sentencing …." *See* ***Rosado***, 70 Wis. 2d at 288. Sisson's argument would eviscerate this requirement and encourage manipulation of the system, as a defendant dissatisfied with the court's sentencing discretion would have nothing to lose by undergoing a post-sentencing evaluation and presenting the court with additional evidence and arguments that were known or could have been known before sentencing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).