

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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Appeal No. 2005AP2639-CR

Cir. Ct. No. 2004CF1244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANE G. HEATH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 BROWN, J. Duane G. Heath appeals from a judgment of conviction and an order denying his motion for postconviction relief. The primary

issue Heath raises involves certain remarks the court made at the sentencing hearing regarding Heath's status as a single father. He claims that when the court imposed sentence, it used this status to discount his credibility and as negative evidence of his character. The court had noted that WIS. STAT. § 765.001(2) (2003-04)¹ extols marriage as the foundation of family life and expressed the view that Heath's failure to marry the mother of his children cast doubt on Heath's assertion that he was committed to his family. As we read the statute, it merely underscores the positive contribution of marriage to society; it does not attempt to privilege marriage over other intimate relationships. The legislature did not intend to suggest that a single parent cannot be as committed to his or her children and the other parent as a married parent. Nonetheless, we affirm. It is apparent that the only evidence the court heard about Heath's devotion to his family was his own testimony. The court cited several independent reasons for doubting Heath's credibility, all of which have overwhelming record support. We also reject Heath's other grounds for reversal.

Factual Background

¶2 The essential facts in this case are not in dispute. On October 4, 2004, Heath asked his parents to lend him money. He became upset when they refused, and his mother feared he would harm himself. Heath had a drug problem and had been using cocaine for roughly four months. He was also depressed. His family was willing to take him to St. Luke's Hospital for treatment

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that night, but he refused to go. Heath subsequently went to his parents' home and stole some money, alcohol, and pills.

¶3 At 2:26 a.m., police reported to the residence, responding to a call from Heath's mother, Marcia Heath. She told them she believed her son had been in her house and might still be in the area. As they spoke, a vehicle drove by, and she said, "That's him." The officers drove after Heath. At least one officer activated his lights and attempted to perform a traffic stop, but instead of stopping, Heath led the officers on a high-speed chase. Driving at roughly forty to fifty miles per hour, Heath drove off the road, through fields, and onto a bike trail before crossing a street and continuing down a gravel driveway on that street. He drove to the end of the driveway, at which point he struck a parked car, pushing it into a shed.

¶4 The officers were right behind him, but Heath refused to get out of the vehicle. It appeared to them that Heath was smoking a cigarette. As it turned out, he was attempting to get the last few hits off of a crack pipe. He was also under the influence of alcohol. Heath continued to refuse to exit his vehicle until the officers broke a window and attempted to use a TASER on him. The officers recovered the crack pipe during the search incident to arrest.

¶5 The State charged Heath with one count of fleeing and eluding an officer, one count of operating a motor vehicle with a revoked license, and one count of possessing drug paraphernalia. Heath pled guilty to the fleeing-and-eluding charge. The other charges were dismissed and read in.

¶6 The circuit court also modified Heath's bond on the date it accepted Heath's guilty plea. His sister had agreed to cosign a bond, and the court agreed to release him from custody to live with his sister. Conditions of the bond included

random drug tests and abstinence from drugs and alcohol. Also, because Heath had been the subject of a WIS. STAT. ch. 51 commitment following his arrest, the court ordered that he keep all doctor appointments and follow through with any treatment recommendations.

¶7 Less than two weeks later, Heath's sister wrote a letter to the court asking to be relieved of her bond obligations. She followed up with a second letter. This second letter related that Heath was not complying with the conditions of his release and that his sister could not meet his treatment needs. It also stated that Heath had bought beer with cash she had given him for other purposes and that Heath had admitted to twice using crack cocaine since his release. The sister further asserted in her letter that she had often been awakened by Heath at night when he needed emotional support. She stated that one particular night, Heath had become angry at her for not giving him money for drugs. He left, and she called the police and locked her doors. She had not seen him since that night.

¶8 The letter also averred that after Heath left, the sister and her husband had cleaned up their teenage son's bedroom, which Heath had been sharing, and found empty alcohol containers. These containers included beer bottles, cardboard cases that had once contained beer, and an empty two-gallon jug of Southern Comfort. According to the letter, Heath's girlfriend had provided him with the alcohol and helped him sneak it into the house. Heath's sister pleaded with the court to "get him some help" and expressed that she was depressed because she was unable to help him herself.

¶9 The circuit court held a hearing on Heath's sister's request to modify the bond requirements. At the hearing, the court learned that after she kicked him out, he had lived in his car for a couple of days before two of his friends took him

in. They offered to allow him to reside with them while out on bond. His girlfriend also offered her home as an alternative residence. The court modified Heath's bond, and Heath was taken into custody.

¶10 The court subsequently held a sentencing hearing. The State, the presentence investigation report (PSI), and the defendant all recommended probation, although the State and the PSI recommended some jail time as a condition. All parties agreed that Heath had a drug problem; Heath's counsel also emphasized, however, that Heath was living with his girlfriend and their two children when not incarcerated and trying to keep the family together, that he was actively involved in the children's lives, and that his income was needed to support the children. At the time of the sentencing hearing, he was approximately \$6000 in arrears on his child support. Heath did, however, have a history of gainful employment. Accordingly, the defense asked that any jail time include Huber privileges.

¶11 Heath further highlighted his commitment to his family at his allocution. Although he admitted to using drugs while he cared for his children, he related that he had taught his daughter to read and spell and that while unemployed due to a back injury, he had changed diapers and prepared bottles for his infant son. The following colloquy with the court ensued:

THE COURT: Who's the mother of your children?

[HEATH]: My girlfriend

....

THE COURT: Any particular reason why you're not married?

[HEATH]: Actually, we kind of had split up for a little while and I did some prison time, and then I got out of prison and me and my daughter, it was kind of like we ...

worked back into a family kind of because she didn't really know me because I was gone for three years, and I got back into her life around four years old

Heath went on to characterize his girlfriend as "the only family I really have," at which point the exchange continued as follows:

THE COURT: Which gets me back to my first question; how come you didn't marry her then?

....

THE COURT: I'm not just trying to be a prude here but I guess I would just point out to you a statute that your lawyer knows I quote from time to time.

[HEATH]: We do have plans on getting married.

THE COURT: Oh, in six years?

[HEATH]: In a year.

THE COURT: You have got a child that's six years old.

....

THE COURT: I'm just looking at [WIS. STAT. §] 765.001(2), which in part reads that marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization and of vital interest to society and the state, and I realize ... that ... a lot of people don't believe in the institution or don't get married and that's their choice and they are free to make that choice, but ... you're here telling me how committed you are to your children.

That's one of the arguments you're making to me about you and about your sentence, and I guess my question is I wonder how committed to your children you are and especially this woman when you're not willing to make the commitment of marriage, which at least the legislature recognizes is a very important institution in our society. I guess I'm wondering about your credibility. Is this hot air that I'm hearing? Is this just your effort to try to get back out on the street so you can use drugs again, or is this something that's sincere, and I guess it's not making sense to me.

¶12 The court also questioned Heath's credibility at two other points. First, it responded to Heath's statements that he had obtained the help he needed to address his drug and alcohol abuse problems at St. Luke's and at Alcoholics Anonymous meetings. The court asked Heath whether he had attended all of his counseling appointments, and Heath admitted he had not. The court also confronted Heath with his sister's letter to the court when Heath stated that he had not been using while out on bail. For the first time, Heath offered an explanation for the letter. He explained that he had expressed concern that his sister was locking her three-year-old son in his bedroom without food for several hours at a time. Essentially, he represented that the sister had written the letter in retaliation.

¶13 Following these exchanges, the court proceeded to its sentencing remarks. It observed that Heath's primary problem was drug dependency, that the PSI report revealed he had not successfully completed any drug and alcohol programming and that he appeared to be in denial that a relapse had occurred while he was out on bond. The court read the sister's letter and told Heath the court believed her and not him: "Now I believe her. I don't believe you, okay? It's that simple. You are an addict. You are still in denial. You're not doing what you need to get it fixed, and you have an enabler over here in the personage of your girlfriend." The court further noted that Heath had in the past had several opportunities to obtain help and had not done so. It read the following excerpt from the PSI report about Heath's previous correctional experience:

He failed to attend treatment regularly, tested positive for marijuana, was revoked [from probation] a second time.

In February of 1999, the defendant was released from prison for a second time and told his agent his last incarceration had been a waste of time because he had not received any treatment. He failed to report for his appointments, continued to use controlled substances

The court stated its belief that probation was not going to deal with Heath's major substance abuse problem and that correctional and rehabilitative treatment would be most effective if Heath were confined. It opined that Heath's lying was a symptom of his addiction.

¶14 In addition to Heath's need for treatment, the circuit court noted the seriousness of the offense and expressed that probation would unduly depreciate its gravity. It also stated confinement was necessary to protect the public. Elaborating, it said,

Police officers and law enforcement have a lot more to do than be chasing you around in your drug induced stupors....

You take away from the safety of others in the community when they have to deal with your shenanigans, shenanigans that could be resolved if you would just seriously deal with your drug and alcohol problem.

¶15 The court imposed a three-year sentence, the first half to be served in prison and the second on extended supervision. The court noted, however, that Heath was eligible for both the Earned Release Program and the Challenge Incarceration Program. It stated that Heath could be released to supervision early if he successfully completed either.

¶16 Heath moved for postconviction relief, citing several points of error in the circuit court's sentence. Most prominently, he asserted that the court had violated multiple constitutional provisions by taking into account his status as an unwed father when imposing sentence. Heath also contended that the court had given insufficient weight to mitigating factors at sentencing and failed to properly weigh the three primary sentencing objectives and explain its sentencing rationale in a manner consistent with *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Somewhat related to that contention was his argument that the court

did not sufficiently explain why it departed from the PSI recommendation for probation. Heath's motion further averred that the sentence punished Heath for his substance abuse and treatment needs. Finally, Heath challenged the court's basis for discounting his credibility.

¶17 The circuit court held a postconviction hearing. At the hearing, the court reiterated its rationale and explained its credibility determinations. It also emphatically denied that Heath's marital status had figured into the court's sentencing decision. According to the court, Heath had offered his dedicated relationship to his family as positive evidence of character, and the court was simply attempting to ascertain the extent of his asserted commitment and the credibility of his depiction of himself as a family man. The court also related several reasons for why it had rejected this family-man characterization. First, he had at least \$6000 dollars in child support arrears. Second, Heath had not established paternity of both children at the time of sentencing. Finally, the court had considered WIS. STAT. § 765.001(2) and concluded that the legislature recognized a higher level of commitment that Heath had not demonstrated.

¶18 As to the last point, the court's remarks included the following:

[T]he Court indicated that there was some question concerning his commitment to the children and the mother of his children by virtue of the fact that he was not married, and that's not a bias, as you conclude, of the Court. That is a position of the Wisconsin Legislature in the statute which the Court read but which you glossed over....

Apparently you scoff at the legislature, the legislative intent of our Wisconsin Legislature regarding the relationship of marriage and then go off on a tangent about privacy rights and equal protection and bias of the Court.

....

What the Court was attempting to do was to clarify exactly the level of commitment that the defendant's words were setting forth to the Court but his actions or inactions didn't seem to support, the \$6,000 arrearage in support and the fact that he is extolling ... this commitment to these people, when in fact the legislature and society has a relationship that evidences a higher level of commitment, to wit: marriage.

[T]he Court I think has every right to question a defendant when a statement is made to determine the credibility of that statement. Just as you said, actions speak louder than words, and I guess precisely, my point exactly.

The court denied Heath's motion for postconviction relief in all respects. Heath appeals.

Standard of Review

¶19 The circuit court enjoys wide latitude in its use of discretion, and we generally afford its sentencing decision a strong presumption of reasonability. *Gallion*, 270 Wis. 2d 535, ¶¶17-18. We will not substitute our judgment for the circuit court's just because we would have meted out a different sentence. *Id.*, ¶18. Discretion does not equal decision making. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The circuit court's decision must be the product of a rational consideration of the facts of record, reasonable inferences therefrom, and proper legal standards. *See id.* The court exercises its discretion erroneously when it relies on improper factors. *See id.* at 278.

¶20 Further, the circuit court must set forth its reasons for the sentence it chose. *Gallion*, 270 Wis. 2d 535, ¶22. The court must consider three primary sentencing objectives, namely, (1) protection of the public, (2) the gravity of the offense, and (3) the defendant's character. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It also may consider any other relevant factors. *See id.* at 623-24. How much weight to accord each factor falls within the court's

discretion. *State v. Jones*, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989). The court’s explanation should identify the objectives of greatest importance to its decision, the facts relevant to those objectives, the factors the court considered in arriving at the sentence, and how those factors meet the sentencing objectives. *Gallion*, 270 Wis. 2d 535, ¶¶41-43. The court should impose the minimum amount of confinement consistent with the gravity of the offense, the protection of the public, and the defendant’s rehabilitative needs. *Id.*, ¶¶23, 44. Even where the circuit court has erred in its discretion, however, we may affirm if the record supports the sentence. See *McCleary*, 49 Wis. 2d at 282.

Constitutional Challenges

¶21 On appeal, Heath primarily challenges his sentence on the basis that the court improperly “determined that as a single parent his character and [credibility] were flawed.” He asserts:

The court’s sentence was undeniably attributable to the single status of Mr. Heath because he was an unmarried parent and the court found that information highly relevant to its assessment of his character and depth of his commitment to his family. The court attached negative weight to Mr. Heath’s character and credibility because it determined he should be married....

Essentially, Heath argues that the court punished him for his status as an unwed father.

¶22 We do not entirely agree with Heath’s characterization of the court’s reasoning. The sentencing and postconviction hearing transcripts did not reveal that the court used Heath’s status as an unmarried man affirmatively as evidence of bad character. It merely rejected Heath’s positive character evidence as not credible based on its understanding of WIS. STAT. § 765.001(2).

¶23 Thus, we need only determine whether the statute was a proper basis for the court’s credibility determination. This endeavor requires us to interpret WIS. STAT. § 765.001(2), a question of law for our independent review. *See Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 978, 542 N.W.2d 148 (1996). Our interpretation of a statute attempts to ascertain the legislative intent, based on the statute’s language, scope, history, context, subject matter, and purpose. *Id.*

¶24 The court appeared to believe that, because the legislature determined that “[m]arriage is the institution that is the foundation of the family and of society” and that its “stability is basic to morality and civilization and of vital interest to society and the state,” the legislative intent was to recognize marriage of the parents as a necessary ingredient of healthy family life, an ingredient missing from Heath’s family relationship. We conclude that this interpretation of WIS. STAT. § 765.001(2) is mistaken. The statute expressly refers only to the marital relationship. It does not mention or compare marriage to any other type of familial or intimate relationship. Moreover, we look at the context of the statute and note that it appears in WIS. STAT. ch. 765, which is entitled “Marriage.” We presume that the legislature highlighted the importance of marriage to society in ch. 765 because marriage is the subject matter of that chapter. Thus, we do not read the legislature’s recognition that marriage is an important and vital societal institution worthy of preservation and protection as a policy judgment that other intimate relationships are of lesser value or legitimacy.

¶25 Although the circuit court relied on a mistaken interpretation of WIS. STAT. § 765.001(2) as a basis for questioning the credibility of Heath’s characterization of himself as a man devoted to his family, the circuit court is the ultimate arbiter of credibility. *See Johnson v. Merta*, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980). We will not disturb the court’s determination when credible

evidence supports the inference the court drew. *See id.* Here, the court also questioned Heath's credibility for several other reasons. For example, it noted that the court had ordered Heath to establish paternity and that he had at least \$6000 in child support arrears.

¶26 The record also contained ample other evidence that would lead a reasonable fact finder to question Heath's purported commitment to his family. First, despite Heath's assertions that the child support arrears were attributable to his inability to work due to a back injury, Heath did manage to scrape up enough money to buy drugs, which, by his own admission, he used while he had charge of his children. Moreover, Heath had admitted that at age four, his young daughter had barely known him, in part because he had been incarcerated, and in part because he and his girlfriend "kind of had split up for a little while."

¶27 The record is also clear that Heath did not always reside with his family. While out on bond, he lived with his sister, not his girlfriend and children. Moreover, he did not immediately move in with his girlfriend after the falling-out with his sister. Instead, he lived in his car for two to three days until two of his friends took him in. Parents raising a family together in the context of an intimate relationship generally share a residence. A reasonable finder of fact could easily conclude that Heath was committed to his family when he felt like being committed and was absent when he did not feel like it.

¶28 In addition to facts concerning Heath's relationships with his girlfriend and children, the court had other facts before it that reasonably cast a shadow on Heath's credibility. First, Heath admitted that he had not kept all of his counseling appointments. His record—the accuracy of which Heath never disputed—of past relapses and failure to follow through with treatment supported

the inference that the missed appointment was more of the same old backsliding behavior, not, as Heath stated, the result of a “misunderstanding.”

¶29 Second, given the conflicting accounts of Heath and his sister, the court had to accept one account or the other. The court focused in large part on the tone of the sister’s letter, which it considered more desperate and despondent than vindictive. She had expressed that she loved her brother, that despite her efforts, she was unable to meet his treatment needs, and that she felt depressed, anxious, and was “a nervous wreck.” The court rationally concluded:

In my opinion, that is an extremely credible letter This is not a letter from someone in my opinion, the way it’s written, the way it’s worded of someone who’s just trying to stick it, so to speak, to her brother. This is somebody who’s just at the end of her rope. She doesn’t know how to deal with his addiction, and her efforts to help him she now sees are inadequate and ... she can’t do any more

By contrast, the court found that Heath had a strong motive to lie: he had a drug addiction and could not continue using unless he was out on the street. The fact that he had been using again four months before his arrest and that on the night of the offense, he had entered his parents’ house and stole money to buy drugs lends additional credibility to his sister’s assertion that Heath had relapsed yet again. The court further found that the record contained no evidence, other than Heath’s say-so, that the sister had ever mistreated her child. Given that Heath’s credibility was reasonably suspect on other fronts, the court’s skepticism about the family-man image he painted was well founded.

Court’s Consideration of Sentencing Factors

¶30 The court clearly considered each of the three primary sentencing factors in light of the facts of Heath’s case. First, it noted the severity of the

accident. The record supports that Heath's flight was indeed an exceptionally dangerous case of fleeing and eluding an officer. Not only did Heath drive off the road, through fields and onto a bike trail, he did so while intoxicated and so desperate to get his cocaine fix that he actually finished off the crack pipe while the officers were in pursuit and had him in full view. Moreover, Heath had lost control of his vehicle to the point that he struck a stationary vehicle parked at the end of a driveway and caused property damage. The court noted all of these facts. Indeed, Heath could easily have killed someone. We see nothing erroneous in the court's conclusion that probation would have unduly depreciated the severity of the offense.

¶31 The court also considered the protection of the public. It stated, "You take away from the safety of others in the community when they have to deal with your shenanigans" By "shenanigans" it is obvious to us that the court was referring to Heath's high-speed chase, which jeopardized not only Heath's own life but the lives of any bystanders and other drivers. Heath's actions also threatened the property of others, as underscored by the damage to another car and the shed into which it was pushed. The court noted that this threat to public safety would diminish only if Heath seriously addressed his drug and alcohol problem.

¶32 Finally, the circuit court spent a great deal of time discussing Heath's character and rehabilitative needs. Although it did not use the word "character," its sentencing remarks clearly demonstrate that the court's primary concern was the fact that Heath was a drug addict who had relapsed several times and who was in denial about the extent of his problem. Heath contends the record does not support the notion that he was in denial because he admitted he had a drug problem. We disagree. Although Heath admitted to having an addiction, he

adamantly refused to admit to having had a relapse. Instead, he accused his sister of lying and made up allegations of child abuse. The court pointed out that such lies are symptomatic of an out-of-control addiction. The court obviously considered Heath's character and concluded that he was the type of person who would not learn from his mistakes if merely given probation.

¶33 The circuit court also opined that probation would not meet Heath's rehabilitative needs. Again, the court considered Heath's many past relapses, including those that led to past revocations of probation and the most recent one that had occurred while Heath was out on bond and living with his sister. With respect to the latter, the court stated,

[D]o fourteen year olds drink beer? Absolutely. Do I think that doesn't happen? No doubt about it, it does. Am I going to believe, however, that an empty bottle of Jack Daniels, a two gallon jug of Southern Comfort, 750 milliliter bottle of Southern Comfort, cases of beer were all there from a fourteen year old or from a recovering-failing, recovering-failing, recovering-failing drug and alcohol addict? I believe that it was the addict and not the fourteen year old, and that's what I indicated when I talked about credibility.

The court further observed that Heath's girlfriend was an enabler. The record supports this conclusion. The court clearly credited his sister's statement that the girlfriend had been providing Heath with alcohol and helping him sneak it into the house. Heath's association with a girlfriend who evidently encouraged or did not take his addictions seriously obviously bore on how effectively probation would meet his need for treatment.

¶34 Moreover, contrary to Heath's representations, the sentence imposed does give Heath an opportunity to cope with his addictions in the real world where he has exposure to temptations. Half of the imposed sentence included a period of

extended supervision. Moreover, the court stated Heath could get out on supervision early if he completed certain programming while in prison. The sentence was clearly tailored to Heath's needs and progress.²

¶35 Heath further claims the court omitted to consider several mitigating factors. These factors include his commitment to his family, the fact that he was pursuing treatment on his own, and the fact that he had expressed remorse. We disagree. We have already discussed why the court was justified in discounting his positive character evidence as not credible. As to Heath's pursuit of treatment, the court expressed concern that Heath was not following through with all treatment recommendations. Moreover, given Heath's repeated backsliding, the court was entitled to give little weight to his purported remorse. Indeed, given Heath's refusal to acknowledge that he had relapsed, a reasonable judge could conclude that his show of remorse was merely a ploy to obtain leniency so he could get out on the streets sooner. The court's sentence had a rational and explainable basis, consistent with *Gallion*.

Length of Sentence

¶36 Heath's next grievance relates to the length of his sentence. He claims that the court erred in imposing a sentence approaching the maximum without explaining why a lesser sentence would not have sufficed. We disagree. We acknowledge that the court could have been more explicit about why it chose the particular length of sentence. That said, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific

² For this reason, we reject Heath's characterization of his sentence as punishment for having a drug addiction. The court's goal was rehabilitative, not punitive.

term of confinement. See *State v. Fisher*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56, *review denied*, 2005 WI 136, 285 Wis. 2d 628, 703 N.W.2d 378 (No. 2004AP1289-CR), and 285 Wis. 2d 630, 703 N.W.2d 379 (No. 2004AP2488-CR). The record amply supports the sentence imposed. Heath had a serious substance abuse problem that he had not overcome despite numerous treatment opportunities. Heath also refused to acknowledge the extent of his problems, adamantly denying his sister's account of his relapse. Given his treatment needs and poor track record, a reasonable court could conclude that a substantial amount of time was necessary to address Heath's addiction, a significant amount of which would have to occur in a confined setting.³

Denial of Postconviction Relief

¶37 Heath lastly contends that the circuit court erred in its use of discretion when it denied his motion for postconviction relief. According to Heath, a modification was warranted. Most of the grounds he raises in support of that contention we have already rejected above and will not revisit. However, Heath also implies that the court should have taken into consideration the fact that he completed a treatment program while incarcerated and should have reduced his sentence accordingly.

³ Based on the foregoing, it is apparent to us why the circuit court deviated from the recommendation in the PSI report. We therefore reject Heath's argument that in doing so the court exercised its discretion erroneously.

¶38 We again disagree.⁴ While a court may modify a sentence it previously imposed, it may not do so merely because it has second thoughts upon further reflection. *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). It must base the modification on a “new factor,” i.e., a fact or set of facts that is highly relevant to the court’s sentencing decision but that the court did not consider at the time it imposed sentence, either because the fact did not then exist or because the parties overlooked it. *Id.* Rehabilitation does not qualify as a new factor. *Id.*

Conclusion

¶39 During the course of Heath’s sentencing hearing, the circuit court made several remarks regarding his status as an unmarried father. Based in part on its understanding that WIS. STAT. § 765.001(2) revealed a legislative intent to recognize marriage as the only committed relationship at the heart of healthy family relationships, the court expressed doubt about whether Heath was indeed the family man he portrayed himself to be. Although this interpretation of the statute was incorrect, the court rejected Heath’s credibility based on many other factors, all of which have ample basis in the record. Accordingly, the court’s

⁴ We do, however, note our disagreement with the circuit court in one respect. The circuit court strongly chastised Heath’s counsel at the postconviction hearing for misrepresenting the record. In particular, it considered counsel’s representation that the court had considered Heath’s marital status as a sentencing factor to be a “vicious” misrepresentation. We deem the court’s characterization of counsel’s advocacy unfounded. Although our review of the record convinces us that the court did not use Heath’s status as an unmarried father as affirmative evidence of his character, the court obviously discussed it at length. It was not unreasonable for counsel to infer that the court’s assessment of Heath’s character was colored by the court’s incorrect statutory reading. We view counsel’s arguments to be within the proper scope of her role as a zealous advocate for her client.

mistaken construction of the statute was harmless error, and we need not reverse. We also reject Heath's other arguments for reversal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

