COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1131-CR **Cir. Ct. No. 2008CF1020**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEATHER LEE BENDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Heather Lee Bender moved for resentencing citing as a new factor the inability of Taycheedah Correctional Institution (TCI) to provide her with appropriate mental health treatment. We agree with Bender that

mental health treatment at TCI is undeniably inadequate; we agree with the trial court that the fact does not constitute a new factor. We also conclude that the trial court considered proper sentencing factors and that defense counsel was not ineffective. We therefore agree that resentencing is not warranted and so affirm the order denying Bender's motion.

¶2 The facts are not disputed. Bender has a documented history of serious mental illness. Her diagnosed schizophrenia and psychosis not otherwise specified manifest as delusional thinking and frequent auditory and visual hallucinations. She hears family members calling out to her when they are not there and sees strangers' faces morph into those of her family members, or of demons. Bender also has a history of drug and alcohol abuse, at times illicitly supported, which may contribute to her psychosis. The synergistic interplay of her problems pose a challenge to all involved.

¶3 In August 2008, Bender ran into an automotive shop "yelling and acting crazy" and telling the shop owner that he owed her money. In reality she never had met him. Bender threatened the shop owner, who called the police. A search of Bender yielded drug paraphernalia and marijuana. The police noted that Bender acted strangely and talked to people who were not there. They attributed her behavior to the crack cocaine she said she had used earlier that day.

¶4 Bender was charged with possession of THC as a second or subsequent offense, disorderly conduct, misdemeanor bail jumping and possession of drug paraphernalia, all as repeaters. She pled guilty to possession of THC as a second or subsequent offense and misdemeanor bail jumping. The disorderly conduct and possession of drug paraphernalia charges were dismissed and read in, as were identical charges from another case. Consistent with both parties'

recommendations, the trial court withheld sentence and placed Bender on two years' probation on each count, to be served concurrently.

¶5 Bender never reported to the probation office and picked up new charges for disorderly conduct and prostitution. As an alternative to revocation, the court withheld sentence, ordered eighteen months' probation concurrent to the probation Bender was serving and ordered her to complete a drug treatment program and aftercare at "Crossroads."

¶6 Upon her arrival at Crossroads, Bender displayed "erratic, psychiatric behavior." She immediately was hospitalized at St. Luke's in Racine. Bender stabilized on her medications and returned to Crossroads a week later. The same day, the police were called because she ran out of the facility into the street and was nearly hit by two cars. Bender was taken back to St. Luke's. She told the examining psychiatrist that she was running toward a family member she imagined she saw in the field across the street.

¶7 When Bender again stabilized, her psychiatrist refused to release her either to Crossroads, an unlocked facility, because she was an elopement risk or to the community because she posed a danger to herself and others. The county human services department did not authorize her transfer to a state hospital because of her pending criminal charges, leaving the county jail as the only option. Because of numerous probation violations, including absconding and failing to complete the Crossroads program, her probation was revoked.

¶8 Bender exhibited more bizarre behavior while awaiting revocation proceedings and was sent back to St. Luke's. She was placed on a new medication, Geodon, that more effectively addressed her hallucinations. Her doctors deemed her competent.

¶9 Against her counsel's advice, Bender insisted on not challenging the revocation proceedings because "they have her on lockdown in the jail 23 hours a day." Counsel opined that Bender would not get the help she needed in prison, however, and, like the Department of Corrections (DOC) agent, recommended a year in the county jail. The State commented that the jail recommendation was puzzling because Bender "obviously[] has needs that are not going to be met in the jail" and a prison sentence would serve her better. It recommended an equally bifurcated three-year prison sentence to afford treatment during confinement and supervision once she was out.

¶10 The trial court followed the State's recommendation, explaining:

> I have to agree with [the prosecutor] that your mental health problems are well documented and they're significant. And I'm very happy to hear that the Geodon is working finally. It sounds like you have a medication that is finally going to help you with those very serious mental health issues. It would seem to me that the jail, in essence, is just going to be warehousing you. And I agree that you need more than that.
>
> In addition to the medication you need programming. You need other things to help you.

¶11 Within ten days of her transfer to TCI, Bender was referred to Monarch Special Management Unit (MSMU), a specialized housing unit for inmates with behavioral or mental health needs, due to her "wandering"[1] and to manage her psychotic symptoms. Over the next few months, Bender began to decompensate and was transferred to Winnebago Mental Health Institute.

[1] Bender explained that she hears voices of her family members speaking to her and she runs toward the voices to try to find them.

¶12 Bender improved with changes in her medications and returned to TCI. She soon began to decompensate again, shouting out family members' names for hours, wandering and resisting staffs' efforts to make her follow rules. She received three conduct reports in one month with total dispositions ordered of 270 days in "disciplinary separation"—essentially segregation.

¶13 Bender moved for postconviction relief, requesting resentencing. She argued that the trial court impermissibly sentenced her based on her mental illness, relied on inaccurate information and improperly applied the sentencing factors ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, requires, and that she received ineffective assistance of counsel. She also claimed an additional three days of sentence credit. In addition, Bender orally amended the motion at the motion hearing to include a request for sentence modification based on two new factors: TCI's inability to treat an inmate with a mental illness as severe as hers, as evidenced by Judge Randa's opinion in ***Flynn v. Doyle***, 672 F. Supp. 2d 858 (E.D. Wis. 2009), which involved TCI and which was pending at the time of her sentencing; and the extent of her mental illness' effect on the behavior leading to her revocation. The court denied the motion in its entirety with the exception of granting the additional sentence credit. Bender appeals.

¶14 Bender first argues that information regarding TCI's inability to provide adequate mental health treatment is a new factor for purposes of sentence modification. She submits that the sentencing court could not have known about ***Flynn*** because the case still was pending and her own treatment at TCI had not yet occurred. She contends that the trial court erred by concluding otherwise.

¶15 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." ***State v. Harbor***, 2011 WI 28, ¶40, No. 2009AP1252-CR (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether what the defendant presents is a "new factor" is a question of law. ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶16 To prevail when seeking sentence modification due to a new factor, a defendant must prove both the existence of a new factor and that it justifies modifying the sentence. ***Franklin***, 148 Wis. 2d at 8. The court may address the points in either order. *See* ***Harbor***, 2011 WI 28, ¶38. It need take its analysis no further if the defendant fails to prove the one the court addresses first. *See* ***id.*** [2]

¶17 ***Flynn*** was a class-action lawsuit filed on behalf of the women prisoners at TCI. ***Flynn***, 672 F. Supp. 2d at 860. It alleged that the medical, dental and mental health care provided to prisoners at TCI violates the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, Title II of the Americans with Disabilities Act, and §504 of the Rehabilitation Act. ***Id.*** As is relevant here, the opinion details systemic deficiencies in TCI's staffing, facilities and procedures in mental health treatment. *See, e.g.*, ***id.*** at 863-64 (medication errors), 866-67 (delayed assessments; inaccurate diagnoses), 867-68

[2] Both parties also discuss whether TCI's treatment failures frustrate the purpose of the original sentence. "[F]rustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." ***State v. Harbor***, 2011 WI 28, ¶48, No. 2009AP1252-CR.

(insufficient MSMU beds, mental health staff and staff hours), 869 (authority of correctional staff "trumps" that of mental health staff).

¶18 Bender contends that the facts leading to the ***Flynn*** litigation constitute a new factor because the opinion was released over three months after her August 3, 2009 sentencing after revocation. The release date proves nothing about the court's awareness of underlying problems at TCI. The opinion may not have been released at her sentencing but the case was filed in 2006. Moreover, problems with prisoner health care at TCI had gained notoriety for some years. The State cites a 2008 *Milwaukee Journal Sentinel* article reporting that the newspaper had covered the issue since 2000. TCI also was the focus of a 2005 federal investigation, the results of which are publicly available. *See* http://www.justice.gov/crt/about/spl/documents/taycheedah_findlet_5-1-06.pdf(last visited 5-27-2011).

¶19 Pursuant to the agreement resulting from the investigation, the State agreed to remedy the identified lacks in the provision of mental health services at TCI. *See* http://www.justice.gov/crt/about/spl/documents/taycheedah_agree.pdf (last visited 5-27-2011) at Part IV and Attachments A and B. Without clear and convincing evidence that the sentencing court was not aware of the treatment issues ***Flynn*** addressed, we think it at least equally reasonable that the court was aware of past problems and was hopeful that, in keeping with the agreement, the State had begun to implement the mandated changes. Therefore, the inadequacies identified in ***Flynn*** are not "highly relevant" to Bender's sentencing. ***Flynn*** does not constitute a new factor.

¶20 Similarly, the wanting mental health treatment Bender experienced is not a new factor. True, the court could not have known she would rack up

hundreds of days of disciplinary separation. But a factor is not "new" unless it is both unknown—or under the radar—and "highly relevant." *See* ***Harbor***, 2011 WI 28, ¶40. Again we must conclude that the actual conditions are not highly relevant to her having been sentenced to prison. Recognizing Bender's well-documented mental illness, the court rejected the option of jail because jail would be "just … warehousing you" and "you need more than that. In addition to the medication you need programming. You need other things to help you."

¶21 The record establishes that, for all TCI's shortcomings in its ability to properly treat Bender's substantial mental health needs, she did get some programming, some psychiatric care and some monitoring of her medications. The court expressed being "saddened" that Bender may not have been getting the mental health treatment "that perhaps … I envisioned." It nevertheless concluded that the treatment inadequacies were not a new factor: "Certainly under all circumstances she was not going to get treatment in the Racine County Jail. There is nothing available at all in the Racine County Jail." Bender has not met her burden of showing that the treatment inadequacies at TCI, either as discussed in ***Flynn*** or that she actually experienced, amount to a new factor.[3]

[3] If Bender is suggesting that the trial court should have ascertained at sentencing whether TCI would provide mental health treatment appropriate to her needs, we disagree that such is the case. A defendant's need for specialized treatment is a factor the trial court may consider when choosing a disposition for a convicted defendant, but once a prison term is selected the court may not order specific treatment. ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981). The sentencing court has no jurisdiction to place conditions on a prison sentence. ***Id.*** Control over the care of prisoners is vested by statute in the DOC. *See* WIS. STAT. § 301.03(2); *see also* ***State v. Gibbons***, 71 Wis. 2d 94, 99, 237 N.W.2d 33 (1976). Bender is entitled to challenge the conditions of her confinement by filing a petition for a writ of habeas corpus. *See* ***Gibbons***, 71 Wis. 2d at 99.

¶22 Bender next contends the trial court failed to fully consider appropriate factors when sentencing her. Appellate review of a sentence is limited to determining if discretion was properly exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶17. Where it has, this court follows a consistent and strong policy against interfering with the trial court's sentencing discretion. ***Id.*** at ¶18. Generally, we strongly presume that a trial court's sentencing decisions are reasonable because that court is best suited to consider the relevant factors. ***Id.***

¶23 At the original sentencing and after revocation a trial court must consider the gravity of the offense, the character of the offender and the need to protect the public. ***State v. Wegner***, 2000 WI App 231, ¶7 and n.1, 239 Wis. 2d 96, 619 N.W.2d 289. Bender asserts that, instead of imposing the minimum amount of confinement necessary to further the goals of protecting the public, rehabilitating her and not depreciating the seriousness of the offense, *see* ***Gallion***, 270 Wis. 2d 535, ¶23, the trial court imposed a "near-maximum prison term based solely on her mental health issues." We emphatically disagree.

¶24 The basis for Bender's sentence was both articulated in and is inferable from the record. *See* ***Harris v. State***, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977). The trial court expressly stated that it was not solely Bender's mental illness that led to the sentence.[4] Rather, when placed on probation, "right off the bat" she "abscond[ed], fail[ed] to report for scheduled visits, consum[ed] alcohol,

[4] Postconviction, in addressing Bender's claim that she was given a longer sentence because of her mental illness, the court stated: "Nothing could be further from the truth. The Court in sentencing Ms. Bender did rely on the revocation summary, but also relied on all of the underlying information in the Court file. And certainly while I referenced Ms. Bender's mental illness, I don't think inappropriately." When we review a sentence, we may look to the entire record, including any postconviction proceedings and to the totality of the court's remarks. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

[was] in a tavern, ha[d] sex for money … le[ft] Crossroads, attempt[ed] to leave St. Luke's, [and was] unsuccessfully discharged from the Crossroads program." In addition, the court followed the State's recommendation of a bifurcated three-year prison term to allow for mental health programming while incarcerated and substantial supervision once released. It is reasonable to infer that the court also adopted the State's logic.

¶25 The "minimum amount of confinement" still must be consistent with the appropriate sentencing factors. Probation was not an option; Bender was before the court because her probation had been revoked. Her doctor opined that community placement was inappropriate. The court rejected sending her to the county jail, finding it "sad but true" that Bender's mental health needs would not be met there. With so few alternatives, the court endeavored to fashion a sentence that balanced the protection of the public, the gravity of the offense and her rehabilitative needs. We see no misuse of discretion.

¶26 Finally, Bender contends that her trial counsel was ineffective for failing to investigate and present to the sentencing court information regarding the litigation against TCI. To prevail on a claim that counsel rendered ineffective assistance, a defendant must prove both that his or her attorney's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). We need not consider one prong if the defendant fails to establish the other. ***Strickland***, 466 U.S. at 697.

¶27 Bender asserts that just "a small amount of investigation into TCI would have brought the pending litigation" to counsel's attention. She cites no evidence, however, that trial counsel did not investigate the ***Flynn*** litigation. Fatal

to her claim, though, is that she has not proved prejudice. She asserts that "had the trial court known" the state of mental health treatment for women prisoners it "may have been persuaded" to follow the defense's and DOC's recommendations for jail. Again, she offers no evidence that the court was unaware of ***Flynn***. And we disagree that the court "may have been persuaded" to sentence Bender to jail.

¶28 Bender already had waived a challenge to revocation because she was "on lockdown in the jail 23 hours a day," where, by all accounts, absolutely no mental health treatment was available. The court did not want Bender simply "warehouse[ed]," but to receive "programming." Furthermore, if trial counsel had investigated the pending litigation, her research almost certainly also would have revealed the agreement obliging the State to make numerous improvements, which the court reasonably could have believed were happening according to the agreed-upon benchmarks. Bender's ineffective assistance of counsel claim fails.

¶29 We make a final observation. The trial court called this case heart-breaking. We can think of no better word. TCI rightfully has come under criticism and resulting scrutiny for being ill-equipped to appropriately address the serious mental health needs of inmates like Bender. That said, given Bender's probation violations and the limited options available, each with drawbacks, we must agree with the trial court that TCI's shortcomings do not constitute a new factor. This may be one of those rare occasions when, to quote Charles Dickens, "the law is an ass." We reluctantly affirm.

By the Court.—Order affirmed.

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