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December 12, 2023

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

2020AP723 Jennifer Strezelecki v. John J. Sadler (L. C. No. 2002PA34PJ)

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).

John Sadler, pro se, appeals an order denying his motion to modify child support. He contends that the circuit court erred by "considering factors not related to the determination of modifying a child support order" and by failing to apply "well[-]established guidelines for

determining the amount of support ordered." He also argues that the court's order subjected him to double jeopardy and that the court erred by "ignor[ing] the age of the child."

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 (2021-22).[1] We reject Sadler's arguments that the circuit court failed to consider the appropriate factors and subjected him to double jeopardy. The State[2] concedes, however, that due to the child's age, the child support order "should have ended [on] November 30, 2019." We therefore summarily affirm in part and reverse in part. We remand for the circuit court to: (1) modify its order to state that Sadler's obligation to pay monthly child support terminated on November 30, 2019; (2) determine the amount of child support, if any, that Sadler paid after November 30, 2019; and (3) order that any child support paid after November 30, 2019, be applied to any child support arrears that Sadler owes.

"Nancy"[3] was born in November 2001, and Sadler was adjudicated to be her father on November 13, 2002. At that time, Sadler was ordered to pay $184 per month in child support, plus $25 per month in arrears. On March 10, 2015, Sadler's child support obligation was modified to $289 per month. The March 2015 order did not order Sadler to pay any amount toward an arrearage.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] The respondents in this appeal are the State of Wisconsin and the child's mother, Jennifer Strezelecki. Strezelecki has not filed a respondent's brief.

[3] For ease of reading, we refer to Sadler's daughter using a pseudonym, rather than her initials.

In 2016, Sadler was convicted of sexually assaulting Nancy. He was sentenced to thirty nine years' initial confinement followed by twenty years' extended supervision.

In October 2019, Sadler moved to modify his child support obligation, seeking to hold open his payment of monthly child support and arrears during his incarceration. The circuit court held a hearing on Sadler's motion on December 23, 2019. During the hearing, Sadler informed the court that: (1) he was incarcerated for sexually assaulting Nancy; (2) he could possibly work if he were not incarcerated, but he would "probably end up getting disability" due to two back injuries; (3) he was able to work prior to his incarceration; and (4) he was able to work while incarcerated, making $30 to $40 per month, but the Department of Corrections took half of his wages.

In support of his motion to modify child support, Sadler argued that "charging child support to someone who makes literally pennies per hour does not seem to make sense" and that "adding the burden of the huge debt to … an ex-offender upon his release seems counter-productive to a successful re-entry." The State asked the circuit court to deny Sadler's motion, based on Sadler's ability to work and "the nature of the offense"—specifically, that it was an "intentional act" that "was visited on a child."

The circuit court denied Sadler's motion to modify child support. The court stated that it is "common" for child support to continue when the payer is incarcerated, "especially when [the payer has] done an act that was an intentional act, especially when it's to the child" for whom the support is owed. The court also stated that Sadler would not be held in contempt for his failure to make his child support payments while incarcerated, but the amounts due would "occur as an arrearage."

Sadler then informed the circuit court that Nancy had turned eighteen the prior month, "so this is actually only about the arrears." In response, the State asserted that Nancy was still in high school. The court told Sadler that child support "will be maintained … if the person turns 18 and they are currently in high school or the equivalent." The court subsequently entered a written order denying Sadler's motion to modify child support, and Sadler now appeals.

Sadler first argues that the circuit court erred by "considering factors not related to the determination of modifying a child support order" and "ignor[ing]" the factors set forth in WIS. STAT. § 767.511(1m).[4] The court was not required to consider those factors, however, because § 767.511 applies to an *initial* determination of child support. *See* § 767.511(1). When setting child support as an initial matter, the court "shall determine child support payments by using the percentage standard established … under [WIS. STAT. §] 49.22(9)," *see* § 767.511(1j), but the court may then deviate from the percentage standard after considering the factors listed in § 767.511(1m), *see* § 767.511(1m).

This appeal does not involve an initial determination of child support under WIS. STAT. § 767.511. Instead, Sadler asserts that the circuit court erred by denying his motion to *modify* child support. The factors set forth in § 767.511(1m) are therefore inapplicable, and the court did not err by failing to consider them.

A motion to modify child support falls under WIS. STAT. § 767.59. Under that statute, a circuit court may modify a child support order if it determines that there has been a substantial

[4] Sadler actually states that the circuit court failed to consider the factors in WIS. STAT. § 767.511(1n). This appears to be a typographical error, as § 767.511(1m) contains a list of factors, but § 767.511(1n) does not.

change in circumstances. *See* WIS. STAT. § 767.59(1f)(a). The decision whether to modify child support is committed to the circuit court's discretion. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525. We will affirm a discretionary decision if the court "examined the evidence before it, applied the proper legal standards and reached a reasoned conclusion." ***Voecks v. Voecks***, 171 Wis. 2d 184, 189, 491 N.W.2d 107 (Ct. App. 1992).

Although Sadler does not use the phrase "substantial change in circumstances," he essentially argues that his incarceration and resultant lack of income constituted a substantial change in circumstances warranting the modification of his child support obligation. A payer's "incarceration is a factor that the court may consider when determining whether it should exercise its discretion to modify child support." ***Id.*** at 188. However, "child support need not automatically terminate during incarceration," and the decision whether to terminate support under these circumstances is left to the circuit court's discretion. ***Parker v. Parker***, 152 Wis. 2d 1, 6, 447 N.W.2d 64 (Ct. App. 1989).

Stated differently, "[i]ncarceration is a change in circumstance sufficient to give a court competence to review a child support order," but "incarceration is only one factor to be considered by a court as it determines whether or not it *should* exercise its power to modify an award." ***Rottscheit***, 262 Wis. 2d 292, ¶42. When deciding whether to modify child support based on a payer's incarceration,

> a court should examine factors including: the length of incarceration, the nature of the offense and the relevant course of conduct leading to incarceration, the payer's assets, the payer's employability and the likelihood of future income upon release, the possibility of work release during incarceration, the amount of arrearages that will accumulate during the incarceration, and the needs of the children.

Id., ¶41.

In this case, the circuit court did not erroneously exercise its discretion by determining that Sadler's incarceration did not warrant modifying child support. Sadler told the court that he would be incarcerated for a substantial period of time and that, although he was working while incarcerated, he had very little income. Sadler did not provide the court with any information regarding his assets, however, nor did he present any evidence showing that Nancy's needs had changed. In denying Sadler's motion, the court emphasized that Sadler's incarceration was the result of an "intentional act" committed against the same child for whom he had been ordered to pay support. As noted in ***Rottscheit***, "consideration of the nature of the criminal conduct is appropriate … for an overall evaluation of the parent's behavior as it relates to [the parent's] ability and attitude toward paying child support." ***Id.***, ¶42. Here, it appears the court determined that the nature of Sadler's criminal conduct outweighed any other factors that may have supported modifying child support. We cannot conclude that the court erroneously exercised its discretion in that regard.

Sadler also argues that the circuit court's refusal to modify child support subjected him to double jeopardy because the court "use[d] chil[d] support as an additional punishment for a previous criminal case already adjudicated." The Double Jeopardy Clause protects against "the imposition of multiple *criminal* punishments for the same offense." ***Hudson v. United States***, 522 U.S. 93, 99 (1997). It does not, however, prohibit the imposition of additional penalties that are not criminal in nature. ***Id.*** at 98-99. To determine whether a particular penalty is civil or criminal, we must first ask whether the legislature "indicated either expressly or impliedly a preference for one label or the other." ***Id.*** at 99 (citation omitted). We must then ask whether the statutory scheme is so punitive in either purpose or effect as to transform "what was clearly

intended as a civil remedy into a criminal penalty." ***Id.*** (citation omitted). "Only with 'the clearest proof' will we find that what has been denominated a civil remedy is, in actuality, a criminal penalty." ***State v. Rachel***, 2002 WI 81, ¶42, 254 Wis. 2d 215, 647 N.W.2d 762 (citation omitted).

Here, there is no indication that the legislature intended WIS. STAT. § 767.59—the statute governing the modification of child support—to impose a criminal penalty. In addition, the State notes that the remedies a family court may impose for failure to pay child support are civil in nature, *see* WIS. STAT. § 767.77(3)(a), and that the civil procedure statutes generally apply to actions affecting the family under WIS. STAT. ch. 767, *see* WIS. STAT. § 767.201. Furthermore, the State asserts that there is "little evidence—much less the 'clearest proof'—that [ch. 767] is so punitive either in form [or] effect as to render the enforcement of [a] child support order criminal."

We agree with the State that Sadler's obligation to continue paying child support following his incarceration is not sufficiently punitive as to render the enforcement of the child support order a criminal penalty. In addition to the points raised in the State's brief, we note that the original order requiring Sadler to pay child support far predates the criminal action, and the most recent order setting child support at $289 per month was entered the year before Sadler's conviction. The order denying Sadler's motion to modify child support was a civil matter. While the circuit court determined that Sadler's incarceration did not warrant modifying child support because Sadler's crime was against the child for whom he was paying support, the order denying modification was not issued as a punishment for Sadler's crime, but to enforce a preexisting obligation. Furthermore, we note that Sadler has not filed a reply brief in this appeal, and he has therefore conceded the State's argument that any additional penalty imposed in this

case was civil in nature, rather than criminal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments may be deemed conceded).

Finally, Sadler asserts that the circuit court erred by "ignor[ing]" the fact that Nancy had turned eighteen prior to the hearing on his motion to modify child support. Sadler further asserts that, at the time he filed his brief in this appeal, he was "still be[ing] charged" child support based on the court's order. In response, the State concedes that Sadler's obligation to pay child support "should have ended [on] November 30, 2019."

Under these circumstances, although we affirm the circuit court's exercise of discretion in denying Sadler's motion to modify child support based on his incarceration, we also reverse in part, to the extent the court's order required Sadler to continue paying child support after November 30, 2019. We remand for the court to: (1) modify its order to state that Sadler's obligation to pay monthly child support terminated on November 30, 2019; (2) determine the amount of child support, if any, that Sadler paid after November 30, 2019; and (3) order that any child support paid after November 30, 2019, be applied to any child support arrears that Sadler owes.

Therefore,

IT IS ORDERED that the order is summarily affirmed in part and reversed in part, and the cause is remanded with directions, as set forth in this summary disposition order. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals