

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP431-CR

Cir. Ct. No. 2006CF912

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMY M. HINTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Amy M. Hintz, *pro se*, appeals from a circuit court order denying her request to be declared eligible for the Earned Release Program

(ERP).¹ She argues that she is a good candidate for the ERP because she has done well in prison and is motivated to make positive changes in her life, but she does not present specific argument concerning the circuit court's exercise of discretion.² We affirm the order.

BACKGROUND

¶2 In 2006, Hintz was charged with two crimes in connection with the theft of over \$11,000 from a Parent Teacher Organization (PTO) bank account. The criminal complaint alleged that Hintz, a former president of the PTO, wrote numerous checks for her own benefit over a nine-month period. She pled guilty to one count of theft and one count of forgery, both as a party to a crime, contrary to WIS. STAT. §§ 943.20(1)(b), 943.38(1)(a), and 939.05 (2003-04 and 2005-06).³ The circuit court sentenced her to three years of initial confinement and three years of extended supervision for the theft and imposed a consecutive sentence of

¹ Hintz's February 24, 2011 notice of appeal stated that she was appealing from the sentencing court's initial decision to deny her eligibility for the Earned Release Program and the Challenge Incarceration Program. Because Hintz was originally sentenced in August 2007, such an appeal is untimely. We agree with the State, however, that Hintz's intent is to appeal the circuit court's January 10, 2011 decision denying her request to be declared eligible for those programs. Therefore, we construe this case to be an appeal of the January 10, 2011 circuit court order.

On appeal, Hintz does not argue that the circuit court erred by not granting her request to be declared eligible for the Challenge Incarceration Program. Therefore, any challenge to the circuit court's decision on that program is waived. See *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not argued on appeal are deemed abandoned).

² Hintz also asserts that she was provided ineffective assistance before sentencing and that she should have been offered alternatives to probation revocation. We do not consider those issues because they are not related to the order from which she appeals.

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

one year of initial confinement and two years of extended supervision for the forgery.⁴ Both sentences were imposed and stayed and Hintz was placed on probation for a total of eight years. The circuit court found that Hintz was not eligible for the ERP or the Challenge Incarceration Program (CIP). Hintz did not appeal.

¶3 As a condition of probation, Hintz was ordered to serve twelve months of jail time, with Huber release privileges to attend college and care for her children. Five months later, Hintz's Huber privileges were revoked because she had failed to report to jail, was arrested for driving under the influence, wrote four checks from a closed checking account, failed to keep a scheduled appointment with her probation agent, and was not in contact with her probation agent for two months. The circuit court revoked Hintz's Huber release privileges and ordered that Hintz serve twelve months as straight jail time.

¶4 Hintz subsequently filed numerous *pro se* motions seeking reinstatement of her Huber release privileges and modification of her sentence, all of which the circuit court denied. After she had served eight months of straight time, a manager of inmate programs at the Milwaukee County House of Correction asked the circuit court to reinstate Hintz's Huber privileges for employment. In August 2007, the circuit court reinstated them.⁵

⁴ The Honorable Timothy G. Dugan sentenced Hintz and denied numerous *pro se* motions that Hintz filed over the next year.

⁵ The order was entered by the Honorable Jeffrey A. Kremers, who was assigned the case due to judicial rotation.

¶5 In December 2010, Hintz’s probation was revoked. The record does not contain any paperwork explaining the reasons for the probation revocation, although Hintz asserts in her brief that she was revoked “on allegations of issuance of worthless checks.” One month later, Hintz asked the circuit court to find her eligible for the ERP so that she could participate in that program in prison.⁶ The circuit court denied her request in a written order. It recognized that the sentencing court found Hintz ineligible for the ERP and CIP and that Hintz’s probation had been revoked. It stated that Hintz “will not be rewarded with an early release program for her failure to conform her conduct on supervision.” This appeal follows.⁷

DISCUSSION

¶6 On appeal, Hintz asks this court to grant her request to participate in the ERP. She notes that at the time she was sentenced, the ERP was available only for inmates who demonstrated a need for AODA treatment. She contends that changes made to the program in 2009 would now make her a good candidate for it.

¶7 In response, the State notes that Hintz has not cited legal authority or presented any argument concerning the circuit court’s exercise of discretion. It asserts, correctly, that this court does not have the authority to grant Hintz’s request for participation in the ERP simply because she asks us to do so. The issue before this court is whether the circuit court erroneously exercised its

⁶ Hintz’s request was assigned to the Honorable David A. Hansher, due to judicial rotation.

⁷ After filing the notice of appeal, Hintz filed several additional letters asking the circuit court to reconsider its decision. Those requests were all denied.

discretion when it denied Hintz’s request. We conclude that it did not and, therefore, we affirm the order.

¶8 We interpret Hintz’s January 2011 request to be allowed to participate in the ERP to be a motion for sentence modification. “A court cannot base a sentence modification on reflection and second thoughts alone,” but “it may base a sentence modification upon the defendant’s showing of a ‘new factor.’” *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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.”

Id., ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

¶9 *Harbor* explained that “[d]eciding a motion for sentence modification based on a new factor is a two-step inquiry.” *Id.*, 333 Wis. 2d 53, ¶36. First, the defendant must demonstrate the existence of a new factor by clear and convincing evidence. *Id.* “Whether the fact or set of facts put forth by the defendant constitutes a ‘new factor’ is a question of law.” *Id.* Second, “if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.*, ¶37. “In making that determination, the circuit court exercises its discretion.” *Id.*

¶10 In this case, Hintz highlights several facts that she implies constitute a new factor: her willingness to change; her success with various programs while on probation and in prison; and changes to the ERP that may make her a better candidate for the program than she was at sentencing. However, Hintz has not

provided any legal argument or references to legal authority to guide this court's analysis of whether a new factor exists as a matter of law. This alone provides a basis to reject her arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court "cannot serve as both advocate and judge" and therefore may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to record authority).

¶11 Even if we assume that a new factor exists, we nonetheless affirm the circuit court because it reasonably decided that it should not reward Hintz with ERP eligibility one month after her probation was revoked. A defendant's character, remorse, repentance, cooperativeness, and need for rehabilitation are all valid sentencing considerations. *See State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The circuit court's decision to deny Hintz's request in light of her failure to follow the rules of probation was reasonable. Moreover, Hintz has not presented any legal argument asserting that the circuit court erroneously exercised its discretion, and we decline to develop that argument for her. *See Pettit*, 171 Wis. 2d at 646-47.

By the Court.—Order affirmed.

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

