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DISTRICT III

August 20, 2024

To:

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Electronic Notice

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

2022AP1218-CR State of Wisconsin v. Cullen William Mudrak
(L. C. No. 2017CF45)

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).

Cullen William Mudrak appeals a circuit court order denying his motion for postconviction relief. Mudrak argues that a legislative change that reduced the maximum sentence for his type of offense is a new factor that warrants sentence modification. 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 Mudrak's arguments and affirm.

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

On February 3, 2017, Mudrak was charged with having sexual intercourse with a child under sixteen, in violation of WIS. STAT. § 948.02(2) (2015-16). According to the criminal complaint, Mudrak had just turned eighteen, and the victim was two weeks shy from her sixteenth birthday. At the time of Mudrak's offense, a violation of § 948.02(2) (2015-16) was classified as a Class C felony, which carries a penalty of "a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both." WIS. STAT. § 939.50(3)(c).

On November 20, 2017, Mudrak and the State entered into an agreement under which Mudrak would enter a no-contest plea, and the parties would recommend that the circuit court defer entry of judgment for five years. The agreement required Mudrak to "comply with all federal, and state laws, and local alcohol, drug, and violence ordinances during the period of this agreement." The court accepted Mudrak's plea as well as the parties' recommendation for a deferred judgment.

In October of 2020, the State moved to terminate the agreement because Mudrak had failed to comply with its terms. Specifically, Mudrak had been convicted in Minnesota on a felony charge of threats of violence and a gross misdemeanor charge of driving while impaired. In addition, Mudrak had been convicted in Wisconsin on a felony charge of bail jumping. The circuit court granted the State's motion to terminate the agreement, entered a judgment of conviction on the felony sexual assault, and ordered a presentence investigation report.

On December 12, 2020, the circuit court held a sentencing hearing. In its sentencing decision, the court addressed the primary sentencing factors of the seriousness of the offense, Mudrak's character, and the need for public protection. Regarding the seriousness of the offense, the court explained that Mudrak's offense was "one of the most serious offenses we

have in the State of Wisconsin" and noted that Mudrak had been given a "gift of a deferred agreement" for "such a serious offense." The court emphasized that Mudrak's "actions impacted the victim in a severe way … psychologically and otherwise." The court determined that "it would unduly depreciate the seriousness of this offense for him to be placed on probation."

Addressing Mudrak's character, the circuit court took issue with Mudrak's attitude toward the victim, which the court described as "distorted thinking, criminal thinking, [and] justification." Likewise, the court expressed concern about Mudrak's "distorted view of the world and really this feeling … that he's been the victim of all this stuff and blames other people and minimizes his behavior." The court also stated that it was "clear that Mr. Mudrak has a problem with authority," based on various incidents between Mudrak and law enforcement, as well as the fact that Mudrak "wasn't amenable to probation right away; he had to be tracked down, they had to basically find him." In addition, the court observed that there were "red flags" in the derogatory terms that Mudrak used to describe others, such as calling authority figures "d-bags" and referring to a woman in a bar as an "older, trashy babe." The court noted that these character traits stood in contrast to Mudrak's positive character traits such as being a "productive member of the society, maintaining employment and getting almost through college and working."

Regarding the need to protect the public, the circuit court determined that "the need to protect the public is high." The court explained that probation did not make sense given Mudrak's failure to report to probation at a time when he "should be on his best behavior awaiting sentencing and awaiting what's going to happen here." The court also expressed concern about whether "somebody with Mr. Mudrak's recent track record here can be trusted in

the community to follow the rules and to be respectful and mindful of authority figures, like his probation agent."

The circuit court sentenced Mudrak to eight years' initial confinement followed by eight years' extended supervision. Mudrak filed a postconviction motion in which he made several challenges to his sentence. As relevant to this appeal, Mudrak argued that a legislative change enacted after he was charged in 2017, but before he was sentenced in 2020, was a new factor warranting sentence modification.

Specifically, on March 28, 2018, the legislature amended WIS. STAT. § 948.02(2) to create an exception for "underage sexual activity," as set forth in the newly created WIS. STAT. § 948.093 (2017-18). 2017 Wis. Act 174, §§ 7, 9. This exception applied when the victim was at least fifteen years old and the offender was not yet nineteen years old. 2017 Wis. Act 174, § 9 (creating § 948.093 (2017-18)). As of the Act's effective date of March 30, 2018, the legislature reclassified the offense for which Mudrak was convicted from a Class C felony to a Class A misdemeanor. *See* § 948.093 (2017-18); 2017 Wis. Act 174. The statutory penalty for a Class A misdemeanor is "a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both." WIS. STAT. § 939.51(3)(a). Mudrak argued that this legislative reduction in the applicable penalty was a new factor warranting modification of his sentence.

"[S]entence modification based on a new factor is a two-step inquiry." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, Mudrak "has the burden to demonstrate by clear and convincing evidence the existence of a new factor." *See* ***id.*** Second, "if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id.***, ¶37.

At the hearing on Mudrak's postconviction motion, the circuit court determined that the "change in the legislation" was not "a new factor" warranting sentence modification. The court pointed to the fact that 2017 Wis. Act 174 was not retroactive, explaining that "if the [l]egislature wanted to change Mr. Mudrak's sentence, they could have done it. In fact, they tried to do it and they didn't do it." The court further determined that under ***State v. Hegwood***, 113 Wis. 2d 544, 335 N.W.2d 399 (1983), a legislative change to decrease the maximum penalty by "changing the classification from a felony to a misdemeanor" was "not a new factor."

In addition, the circuit court determined that Mudrak had not met his burden of showing, by clear and convincing evidence, that the legislative change was relevant and unknown to the sentencing court. The court stated that when it sentenced Mudrak, it "knew that there was the change in the law" but it concluded that the change was "not relevant." Although the court did not mention the change in law during the hearing, it explained that "it's an impossible task to ask the [c]ourt to put everything down in [its] transcript."

Finally, the circuit court stated that even if the legislative change were a new factor, by "no stretch of the imagination would [the court] modify [Mudrak's] sentence." The court explained that the sentence imposed was "a fair and just sentence in light of all the circumstances," for all of "the reasons stated in the transcript of the sentencing hearing."

"Whether the fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law," which we review "independently." ***Harbor***, 333 Wis. 2d 53, ¶33. "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and we review such decisions for erroneous exercise of discretion." ***Id***.

> The court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.

State v. Jeske, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

In this appeal, Mudrak again argues that the legislative change in 2017 Wis. Act 174 is a new factor that was highly relevant to the circuit court's sentence. Mudrak contends that the court focused heavily on the legislature's treatment of Mudrak's offense when discussing the seriousness of the offense. In particular, he contends that "the court specifically referenced the legislature's decision to make [Mudrak's] conduct a '40-year felony' and labeled it 'one of the most serious offenses we have in the State of Wisconsin.'" Mudrak also points to the court's observation that the State's recommendation of eight years' initial confinement followed by seven years' extended supervision was "not even half the maximum penalty."

Mudrak further argues that the circuit court erred by concluding that ***Hegwood*** was dispositive on the issue of whether the legislature's reduction in the maximum sentence could constitute a new factor. Mudrak contends that ***Hegwood*** applies only to "legislation that was not retroactive in language or intent." Here, although 2017 Wis. Act 174 was not itself retroactive, Mudrak argues that this treatment was "an oversight" that the legislature later attempted to correct by introducing simultaneous bills in the assembly and the senate. Although the legislature was unable to pass these bills before COVID shut down its operations in March 2020, Mudrak argues that "the discussion, drafting, and introduction [of these bills] demonstrates the intent of the legislature regarding retroactive application." Mudrak therefore argues that ***Hegwood*** did not bar the court from treating this legislative change as a new factor. For these

reasons, Mudrak asks us to remand the matter so that the circuit court can exercise its discretion regarding whether to modify Mudrak's sentence based on the new factor.

The State argues that Mudrak has not satisfied his burden of demonstrating by clear and convincing evidence that a new factor exists. In the alternative, the State argues that regardless of whether a new factor exists, the circuit court properly exercised its discretion by determining that sentence modification was not justified.

We need not evaluate the parties' arguments regarding whether the legislative change is a new factor because the record plainly demonstrates that the State's alternative argument is correct. Here, the circuit court concluded that "[e]ven if … these [changes] were considered new factors—which I find they aren't—I would not, in any way, modify the sentence." The court explained that modifying the sentence based solely on the legislature's change to the seriousness of the offense would "ignore the character traits, ignore the impact on the victim, ignore the protection of the public." The court determined that the sentence imposed was "a fair and just sentence in light of all the circumstances," for all of "the reasons stated in the transcript of the sentencing hearing." Thus, under the second prong of the ***Harbor*** analysis, the court exercised its discretion to deny sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶37.

In his reply brief, Mudrak argues that the circuit court's "lack of clarity on the second prong requires remand for a proper determination." We disagree that the court's determination lacked clarity. Although the court could not say with certainty whether it had considered the legislative change during the original sentence, it stated that "considering it today has no bearing.… I wouldn't modify [Mudrak's] sentence." Thus, the court clearly determined that

even if the legislative change did constitute a new factor, that new factor would not warrant sentence modification.

Mudrak also argues that the circuit court used the wrong legal test in making its determination, based on the court's statement that Mudrak's sentence was not "unjust." Mudrak points out that the question of whether a sentence is "unjust or harsh … is governed by different law." *See* ***State v. Stenklyft***, 2005 WI 71, ¶61, 281 Wis. 2d 484, 697 N.W.2d 769 (explaining that the circuit court has "inherent power to modify a sentence based on a new factor, an unduly harsh sentence, and/or a legal error[, but] … each invocation of the court's power must be evaluated under the constraints and legal standards pertinent to the power being addressed").

We reject Mudrak's contention that the circuit court applied the wrong legal standard when it evaluated the second prong of the ***Harbor*** analysis. Instead, the court's conclusion that Mudrak's sentence was not "unjust" was a response to Mudrak's contention at oral argument that sentence modification would give the court the "opportunity to correct what, in light of a [l]egislative change … has proven to be an unjust sentence."[2] The basis for the court's discretionary decision, however, was that the legislature's change to the seriousness of the offense did not outweigh any of the other factors that the court considered at the sentencing hearing, including Mudrak's character, the impact of his offense on the victim, and the protection of the public. Mudrak does not argue that the court erroneously exercised its discretion by relying on these factors when it determined that sentence modification was not warranted.

[2] In this appeal, Mudrak states that he "does not argue that this was an unjust or harsh sentence."

We therefore conclude that the circuit court did not erroneously exercise its discretion by determining that it would not modify Mudrak's sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶63 (affirming the circuit court's discretionary decision where the court "made no error of law, and it explained its reason for concluding that the facts … presented did not justify modification of [the] sentence"). Accordingly, we affirm the court's order denying Mudrak's postconviction motion.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. 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