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**DISTRICT II**

May 7, 2014

*To*:

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

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2013AP1665-CR State of Wisconsin v. Floyd E. Whipple (L.C. #2010CF30)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Floyd E. Whipple appeals from a judgment convicting him of second-degree sexual assault of a child and from an order denying his postconviction motion for sentence modification. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the judgment and order.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Whipple negotiated a plea whereby, if he pled no contest, a charge of sexual assault of a child under sixteen would be reduced to second-degree sexual assault. The court accepted his plea and sentenced him to six years' initial confinement plus twelve years' extended supervision.

After entering his plea but before sentencing, Whipple testified for the State at the trial of Thomas Glass, his former cellmate, leading to Glass's conviction for second-degree sexual assault by use of force. About the same time, Whipple sought to dismiss his counsel, apparently due to her inability to obtain a promise of consideration from the prosecutor. Newly appointed counsel was unaware of Whipple's cooperation in the other criminal matter and did not raise it at Whipple's sentencing.

Whipple moved for sentence modification, arguing that his assistance to the State was a new factor that reflected positively on his character because he continued to cooperate even after learning he would be offered no consideration. The circuit court acknowledged that Whipple had referenced his cooperation in one of several letters to the court on other matters, but it could not "say that [it] had that knowledge in mind at the time of the sentencing." The court therefore found that Whipple's cooperation constituted a new factor but also concluded that it was insufficient to warrant sentence modification. Whipple appeals.

Circuit courts have inherent authority to modify criminal sentences when a defendant establishes by clear and convincing evidence the existence of a "new factor" and that the new factor justifies modifying the sentence. ***State v. Harbor***, 2011 WI 28, ¶¶35-36, 38, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" is a fact or set of facts that is highly relevant to the imposition of sentence, but was not known to the trial judge at the time of sentencing, either because it did not exist or it was unknowingly overlooked by all of the parties. ***Rosado v. State***,

70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a new factor exists presents a question of law. ***Harbor***, 333 Wis. 2d 53, ¶36.

We question whether Whipple's cooperation with the State amounts to a new factor. We accept that the court's lack of recall caused it to "unknowingly overlook" that fact at sentencing. It is undisputed, though, that Whipple was aware his testimony helped secure Glass's conviction and that he referenced his cooperation in letters to the court and to the prosecutor. Whipple's failure to tell his new counsel or to raise it himself at sentencing strikes us as a choice, not something unknowingly overlooked by *all* of the parties. *See* ***Rosado***, 70 Wis. 2d at 288-89.

Even if we accept for argument's sake that Whipple sufficiently established a new factor, he still must clear the hurdle of showing that it justifies sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶38. We review the circuit court's determination in that regard for a proper exercise of discretion. ***Id.*** , ¶37. "We will sustain a discretionary determination if it is the product of a rational mental process and is 'demonstrably … made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.'" ***State v. Verstoppen***, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994).

At Glass's trial, Whipple testified that when they were cellmates, Glass admitted raping his ex-wife after showing her a gun. Whipple contends that his willingness to testify was highly relevant to a full consideration of his character in several respects. He argues that his testimony was a significant and valuable aid to the State in securing Glass's conviction and showed an evolution in his thinking in regard to sexual assault. With that newfound recognition, he asserts, he is less likely to reoffend.

The court acknowledged that Whipple's aid to the prosecution was timely, helpful, and voluntary. Nonetheless, it rejected the suggestion that he was motivated by a desire to do the right thing. The court found that testifying against Glass "was all about Mr. Whipple doing something for Mr. Whipple," not "an evolution in his thinking." It referred to letters Whipple had sent to the District Attorney's office that were copied to the court in which Whipple stated, "Before I talk too much about this [Glass's] case, you might be asking yourself if I am doing this to get help with my case. Yes, I am," and "I have helped you with another case but I have received nothing in return. I actually helped you convict that person." The court explained that it purposefully fashioned the sentence it did: six years' confinement would keep the forty-five-year-old Whipple out of the fifteen-year-old victim's life "until she matured sufficiently" and twelve years' supervision would "ke[ep] an eye on him" to prevent future occurrences. The court stated that it "simply [could not] fathom that this factor would justify a modification … to this sentence." This ruling represents a proper exercise of discretion. We must sustain it.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*