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January 26, 2015

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

2014AP146-CR	State of Wisconsin v. Josue Trejo (L.C. # 1992CF499)
2014AP147-CR	State of Wisconsin v. Josue Trejo (L.C. # 1992CF513)
2014AP148-CR	State of Wisconsin v. Josue Trejo (L.C. # 1992CF524)

Before Lundsten, Higginbotham and Sherman, JJ.

Josue Trejo appeals an order that denied his motion for sentence modification on the grounds of a new factor in three jointly handled cases. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

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

A court has inherent authority to modify a previously imposed sentence based upon a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new sentencing 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 sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *Id.*, ¶¶40, 52, (reaffirming holding of *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant bears the burden of establishing a new factor by clear and convincing evidence. *Id.*, ¶36. Whether a particular fact or set of facts constitute a new factor is a question of law that we review *de novo*. *Id.* However, whether a new factor warrants a modification of sentence is a discretionary determination to which we will defer. *Id.*, ¶37.

Trejo was convicted in 1992 of criminal damage to property, trespass to a dwelling, battery, kidnapping with use of a weapon, two counts of first-degree sexual assault, bail jumping, and intimidation of a victim. The circuit court adopted the recommendation made in the PSI and imposed three consecutive indeterminate sentences of twenty years on the kidnapping and sexual assault counts, with the rest of the sentences to be served concurrently.

In explaining its decision, the circuit court stated:

My obligation is to look at the seriousness of this offense, your character, weigh out everything that I have learned about you in this presentence and this offense, and weigh it against the need to protect the public, and the need, as [the district attorney] calls it, of the community's punishment for such a heinous crime.

....

... But you are not before the Court because of your fine qualities but because of this—these offenses. They're serious. They are crimes of violence. They indicate to the Court that you

pose a serious risk to the community, ... perhaps unknowingly on your part, unwittingly.

There is clearly an indication of usage of drugs and alcohol which I am not certain is the basis of this very violent crime. If I could say I believed it was the crack that caused this

....

But I look at the character, your character, and I see a pattern, Mr. Trejo, of your inability to control yourself. [Defense counsel] refers to the 50 sexual partners you claim to have had as perhaps braggadocio. I look at it as perhaps a symptom of a deep seeded problem. I don't know who's right. I look at this attack on [one of the victims] and her property, and again it focuses to me [as] an attack on a woman.

... [C]ulminating with this vicious, violent attack against [another victim] There is a serious pattern of bizarre behavior by you, Mr. Trejo.

Now, I don't—I don't assume that you do that deliberately or with your mind, as [defense counsel] described your attack on [the victim]. You thought you were outside looking at this happening, thinking I can't be doing this. I believe that. But it indicates to me that you have very little ability or you have a great risk of an inability to control your behavior.

Therein comes my job to look at what can we do with you, and my obligation to protect the public. I have no right in this position to allow you to be a risk to any other human being again. No one in this community or any other should endure this type of victimization by you.... I have an overwhelming obligation today to see that no one is hurt by you again.

And the presentence leads me to conclude that you have serious needs for treatment. You are unpredictable. You have serious drug and alcohol problems, and therefore I feel that a seriously long period of incarceration is absolutely necessary. My overwhelming reliance in this area is what I feel is an unpredictableness of you at the age of 20 ½ years old.

There are indications, in my opinion, that you do not know necessarily what you do, so I'm going to follow the presentence writer's recommendation, Mr. Trejo. It doesn't mean I believe that you cannot rehabilitate yourself. I do. I think there are programs. There are things that you can do for yourself that will improve yourself. I don't believe the prison system is necessarily casting someone off of—out of society or away from us forever. I believe

that it is a necessary institution which allows our society to be secure, and today I have to make this society secure from you.

I hope that you heal. I hope that you are allowed to participate in programs and educational activities. I hope you receive the treatment which I believe you need desperately. That is the obligation of our state, and I want you to receive that.

In the sentence modification motion that is the subject of this appeal, Trejo contends that the court's comments demonstrate that the court intended for him to obtain treatment in prison, and that the DOC's policy of denying him access to AODA programs until five years before his mandatory release date constitutes a new factor that is frustrating the court's intent. We disagree.

First of all, it is not clear that the court's reference to Trejo's treatment needs was focused only, or even primarily, on AODA treatment. The court observed that it was not convinced that Trejo's substance abuse problems were "the basis" for the offense, and that his "bizarre" behavior could be the result of a "deep seeded problem" involving an inability to control his behavior. Therefore, the court may well have been referring to Trejo's need for some sort of counseling or cognitive therapy, as well as the need for substance abuse treatment.

Second, defense counsel had informed the court during his sentencing argument that it was DOC's policy at the time to place offenders with sentences longer than fifteen years in maximum security where they would have no access to programs or treatment until they had served at least half of their time until their mandatory release date; and that such offenders were typically not eligible for minimum security until about eighteen months before their mandatory release date, when the prison would begin focusing on plans to prepare them for parole. Thus, the court was already aware that Trejo would not be beginning any treatment programs until he

was well into serving his sentences, and we see nothing in the court's comments that indicates the court was concerned about *when* during Trejo's incarceration he received treatment.

Finally, the court's entire discussion makes clear that the court's primary purpose in imposing a sixty-year sentence structure was to protect the public. While the court expressed its "hope" that Trejo might receive treatment and be able to heal, it stated that it was its "obligation" to protect the public. We therefore agree with the circuit court's conclusion that the DOC's policy regarding when to provide AODA treatment to offenders was not highly relevant to the imposition of Trejo's sentences, and did not constitute a new factor warranting sentence modification.

IT IS ORDERED that the order denying Trejo's motion for sentence modification is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals