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

2014AP300-CR

State of Wisconsin v. Nikola Potkonjak
(L.C.'s #2001CF658 & 2001CF2217)

Before Kessler, Brennan and Brash, JJ.

Nikola Potkonjak appeals from an order of the circuit court denying his motion for sentence modification. Potkonjak argues that his postsentencing cooperation with law enforcement officers constitutes a new factor entitling him to sentence modification. He also appeals from an order of the circuit court denying his petition for eligibility into the Substance Abuse Program. We affirm.

BACKGROUND

Procedural History.

This is the second time this case has been before this court and the second time Potkonjak has attempted to seek sentence modification based on his cooperation with law enforcement.

In October 2001, Potkonjak entered guilty pleas to multiple charges relating to drug activity and drug possession in two Milwaukee County cases. At sentencing, the State requested twelve to fifteen years of incarceration, based, in part, on Potkonjak's cooperation with federal authorities by participating in controlled buys and wearing a wire. The sentencing court¹ rejected the State's recommendation, instead sentencing Potkonjak to a total of fifty-two years of imprisonment, consisting of twenty-nine years of initial confinement and twenty-three years of extended supervision. The sentencing court also determined that Potkonjak was not eligible for the Earned Release Program.²

In April 2005, Potkonjak filed a motion for sentence modification, arguing that his cooperation with federal authorities after his sentencing constituted a new factor. Potkonjak's new-factor claim was predicated upon a letter from a special agent with the U.S. Department of Justice, who stated that Potkonjak provided information about an unnamed subject who was trafficking large amounts of drugs in the Milwaukee area. The letter indicated that portions of Potkonjak's information had been corroborated. At a hearing on the motion, the postconviction

¹ Because this case has a long procedural history involving many hearings and motions, we refer to the court that entered Potkonjak's original sentence as "the sentencing court"; the court that presided over Potkonjak's first postconviction motion as "the postconviction court;" and the court that issued the orders on appeal as "the circuit court."

² As of August 3, 2011, the Earned Release Program became known as the Substance Abuse Program. *See* 2011 Wis. Act 38, §19; WIS. STAT. § 302.05.

court applauded Potkonjak's cooperation, but also called the letter from the special agent "cryptic" and noted that there was no indication that Potkonjak's information led to any arrests, prosecutions, or seizures of any assets.

The postconviction court granted the motion in part, ordering that Potkonjak's sentence for bail jumping be made concurrent with the remaining counts. The effect of the postconviction court's order reduced Potkonjak's overall sentence to twenty-four years of initial confinement and eighteen years of extended supervision.

Potkonjak appealed the postconviction court's order, arguing that his sentence was harsh and excessive. We affirmed the postconviction court in June 2007.

Motion on Appeal.

As relevant to this appeal, in August 2013, Potkonjak filed a motion to modify his sentence based on new factors. He also filed a petition for eligibility into the Substance Abuse Program.³ Potkonjak asserted the following new factors: (1) the details of his postsentencing cooperation with federal law enforcement were better known in 2013 than in 2005, when he filed his first sentence modification motion; (2) threats were made against him by other inmates due to his postsentencing cooperation with law enforcement, which was made public by this court's June 2007 decision; (3) federal sentencing guidelines, if applied to his cases, would have resulted in much shorter sentences; and (4) the financial burden to taxpayers.

³ Potkonjak filed multiple previous petitions for earned release but his then-counsel did not provide the circuit court with the necessary documentation, rendering the circuit court without jurisdiction on the matter. Potkonjak's latest petition was filed with new counsel and included the necessary documentation.

After reviewing the original sentencing transcript, the transcript of Potkonjak's first postconviction hearing, the decision from this court, and the parties' briefs, the circuit court denied Potkonjak's motion. Relying on our decision in *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, the court did not find that Potkonjak's proffered evidence of additional cooperation qualified as a new factor. The court rejected Potkonjak's other asserted new factors, stating: the possibility of Potkonjak facing threats from other inmates was previously known; the circuit court was not bound by the federal sentencing guidelines; and the cost of incarcerating defendants was not highly relevant to the length of Potkonjak's sentence. The court also issued an order denying Potkonjak's petition for the Substance Abuse Program, finding that the seriousness of Potkonjak's crimes necessitate confinement and that "[t]he criminal behavior extended beyond simply the use of controlled substances for which treatment would be appropriate."

This appeal follows. Additional facts are included as necessary to the discussion.

DISCUSSION

On appeal, Potkonjak reiterates the arguments made in his latest motion for sentence modification. He argues that four new factors entitle him to sentence modification and that the circuit court erred when it deemed him ineligible for the Substance Abuse Program.

I. New Factors.

A circuit court has discretion to modify a sentence if the defendant presents a new factor. *State v. Macemon*, 113 Wis. 2d 662, 668, 335 N.W.2d 402 (1983). 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). “Deciding a motion for sentence modification based on a new factor is a two-step inquiry.” *Id.*, ¶36. First, the defendant must “demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* Second, if a new factor is present, the circuit court must determine “whether that new factor justifies modification of the sentence.” *Id.*, ¶37.

Whether something constitutes a new factor is a question of law that we review *de novo*, without deference to the circuit court; however, whether a new factor, if there is one, warrants sentence modification is left to the circuit court’s discretion. See *State v. Torres*, 2003 WI App 199, ¶6, 267 Wis. 2d 213, 670 N.W.2d 400.

We address each of Potkonjak’s asserted new factors.

The Extent of Potkonjak’s cooperation with law enforcement.

In *Doe*, we addressed “whether post-sentencing substantial assistance to law enforcement is new factor.” See *id.*, 280 Wis. 2d 731, ¶8. We observed that there is a federal rule which “expressly authorizes a reduction in a sentence if ‘the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.’” See *id.* (citation and footnote omitted).

We adopted five factors, derived from the federal sentencing guidelines, to assist “in determining whether the post-sentencing assistance constitutes a new factor[.]” *Id.*, ¶9. The

appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

Id. (citation omitted).

Potkonjak argues that at the time of his postconviction hearing, the full scope of his cooperation with law enforcement was unknown to the postconviction court because he was unable to provide the court with details, given the nature of the federal investigation. While the extent of the postconviction court's knowledge of Potkonjak's cooperation was indeed limited to a letter from a federal agent, we agree with the circuit court that Potkonjak has not met the burden of showing a new factor warranting sentence modification.

It is undisputed that in 2002, Potkonjak provided federal authorities with information about a Milwaukee-area drug distributor engaged in wide-spread drug dispersal and that Potkonjak helped place two other informants in contact with the authorities. It is also undisputed that the drug distributor was ultimately charged and convicted of multiple drug-related counts. What is unknown, however, is the extent to which federal authorities relied on information from Potkonjak. There is nothing in the record to suggest that the drug distributor was convicted as a result of Potkonjak's information or that the additional informants contributed in any way to the

distributor's conviction. In short, Potkonjak has not demonstrated that the information he provided was "significan[t] and useful[]" in the conviction of the drug distributor. *See id.*, ¶9.

Even if Potkonjak's cooperation did qualify as a new factor, the circuit court found that Potkonjak was still not entitled to sentence modification because "[Potkonjak] was convicted of major drug dealing ... and one particularly aggravating feature at his sentencing hearing was the fact that while acting as a police informant, he was also selling drugs and providing information and assistance to other drug dealers." Accordingly, we conclude that the circuit court properly exercised its discretion because it explained its reasons for determining that, notwithstanding the fact of the defendant's assistance, modification was not warranted.

Threats made against Potkonjak in prison.

Potkonjak also argues that our decision affirming the postconviction court in Potkonjak's first appeal is a new factor. Specifically, Potkonjak contends that the circuit court "did not and could not know that this Court ... would disclose Potkonjak's cooperation by referencing that cooperation in an opinion that would be made available to inmates throughout the state." The availability of our decision, Potkonjak contends, led to threats by other inmates.

Potkonjak does not present a new factor. The postconviction court addressed the possibility that Potkonjak would face threats for his "support of law enforcement" during the hearing on Potkonjak's initial postconviction motion. The court explicitly noted that Potkonjak's cooperation came with "some personal risk."

Moreover, Potkonjak's argument ignores the fact that his cooperation was made public because Potkonjak did not file his appeal documents under seal. Potkonjak had the option of

asking this court to amend the caption to shield his identity but he did not do so. Potkonjak cannot seek sentence modification based on his own failure to follow procedures allowing for defendant anonymity in certain circumstances.

Federal Sentencing Guidelines.

Potkonjak contends that “[t]he fact that [his] sentence is far out of line with those for comparable offenses, as reflected in that called for under the Federal Sentencing Guidelines, is a new factor.” He contends that the sentencing guideline’s recommended sentence for his offenses is substantially lower than the sentence he actually received, thus “directly rebut[ting] the sentencing court’s view of the seriousness of the charges.”

The circuit court, in reviewing the transcript of the sentencing court, rejected Potkonjak’s argument, noting that “the federal sentencing guidelines are merely advisory in the federal courts and are not binding in state courts.” We agree.

An argument similar to Potkonjak’s was raised in *State v. Smet*, 186 Wis. 2d 24, 34, 519 N.W.2d 697 (Ct. App. 1994), where the defendant claimed that a scoring error made in connection with the sentencing court’s application of the sentencing guidelines constituted a “new factor.” We concluded that whether the error constituted a new factor “depend[ed] upon whether the recommended guidelines sentence range was ‘highly relevant to the imposition of sentence....’” *See id.* (citation omitted). Noting that the sentencing court in *Smet* “placed little weight upon the guidelines,” we acknowledged that the guidelines were advisory and that the sentencing court had wide discretion in considering the multiple relevant sentencing factors. *See id.* at 33-34; *see also State v. Speer*, 176 Wis. 2d 1101, 1125, 501 N.W.2d 429 (1993) (“The [sentencing] court must be aware of the guidelines and consider them when imposing [a]

sentence. It does not mean that the sentence imposed must fall within the guidelines. That is within the sound discretion of the sentencing court.”).

Here, the record establishes that the sentencing guidelines were not “highly relevant to the imposition of [Potkonjak’s] sentence.” See *Smet*, 186 Wis. 2d at 34 (citation omitted). As the circuit court acknowledged, Potkonjak continued to deal drugs while cooperating with law enforcement to apprehend another drug distributor. The sentencing transcript shows that the sentencing court considered Potkonjak’s criminal history, the hypocrisy of Potkonjak’s continued drug dealing, the amount of drugs he was selling, and the impact his activities had on the community, among other factors. The circuit court did not erroneously exercise its discretion in refusing to modify Potkonjak’s sentence based on the federal sentencing guidelines.

Cost to Taxpayers.

Lastly, Potkonjak argues that the cost taxpayers will incur as a result of his lengthy sentence is a new factor. As stated, a new factor is “a fact or set of facts highly relevant to the imposition of sentence.” *Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). Nothing in the record indicates that the cost to taxpayers was highly relevant to the imposition of Potkonjak’s sentence.

II. Substance Abuse Program.

Potkonjak contends that the circuit court erroneously exercised its discretion when it denied him eligibility into the Substance Abuse Program. Potkonjak contends that he satisfied the requirements for program eligibility and would have been successful in the program.

Sentencing decisions are discretionary; we review only whether the circuit court erroneously exercised its discretion. See *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375

(1999). A discretionary decision will be affirmed if it is made and based upon the facts of record and in reliance on the appropriate law. *Id.* There is a strong public policy against interfering with the circuit court's sentencing discretion, and we presume the circuit court acted reasonably. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

Successful completion of the Substance Abuse Program allows for an inmate's near immediate release from prison. *See* WIS. STAT. § 302.05(3)(c)2.a. Here, the circuit court denied Potkonjak's petition, finding that the seriousness of Potkonjak's crimes necessitate confinement and that "[t]he criminal behavior extended beyond simply the use of controlled substances for which treatment would be appropriate." At sentencing, the sentencing court noted that while Potkonjak's conduct wasn't "replete with ... armed robberies or burglaries, ... [it] is a source of that type of conduct in the community that can't be left alone." The sentencing court called Potkonjak's conduct of "spewing" large amounts of drugs into the community "the root of some of the evil in the community." The sentencing court commended Potkonjak's cooperation with law enforcement, but noted that "[Potkonjak] blew that big time when he decided to get [himself] back into business." The record supports the circuit court's decision.

The circuit court, in reviewing the sentencing court's decision, appropriately decided that Potkonjak's behavior warranted continued confinement and that substance abuse treatment would not sufficiently address the severity of Potkonjak's conduct. Accordingly, the circuit court did not erroneously exercise its discretion.

IT IS ORDERED that the orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

*Diane M. Fremgen
Clerk of Court of Appeals*