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DISTRICT IV

April 13, 2016

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

2014AP2833-CR State of Wisconsin v. John J. Hady (L.C. # 2008CF388)
2014AP2834-CR State of Wisconsin v. John J. Hady (L.C. # 2012CF302)

Before Lundsten, Higginbotham and Sherman, JJ.

In these consolidated appeals, John Hady appeals both a judgment of conviction imposing sentence after the revocation of his probation, and a judgment, entered upon his guilty plea, convicting him of possession with the intent to deliver narcotics. Hady argues the circuit court erroneously exercised its sentencing discretion when it relied on "compelled" statements Hady made to his probation agent, and trial counsel was ineffective by failing to object at the sentencing hearing. Hady also argues that a new factor justifies sentence modification. Based upon our review of the briefs and record, we conclude at conference that these cases are

appropriate for summary disposition. We reject Hady's arguments, and summarily affirm the judgments. *See* WIS. STAT. RULE 809.21 (2013-14).[1]

In 2009, Hady pleaded guilty to two burglaries in Dodge County case No. 2008CF388. The circuit court withheld sentence and placed Hady on concurrent five-year probation terms. While Hady was still on probation, police suspected him in two new burglaries. On October 1, 2012, the State charged Hady in Dodge County case No. 2012CF302 with four crimes: (1) possession of oxycodone with intent to deliver; (2) possession of morphine; (3) concealing stolen property; and (4) criminal damage to property—all of which found support in the facts underlying the two burglaries. Hady's probation in case No. 2008CF388 was revoked one week later.

In exchange for his no contest plea to possession of narcotics with intent to deliver in case No. 2012CF302, the State agreed to dismiss and read in the remaining counts. The State also agreed to recommend a total twenty-year sentence on the revocation sentence in case No. 2008CF388, consisting of ten years of initial confinement and ten years of extended supervision. In case No. 2012CF302, the State agreed to recommend a concurrent fifteen-year sentence consisting of ten years of initial confinement and five years of extended supervision.

The circuit court set a combined hearing for the sentencing after revocation in case No. 2008CF388 and both the plea and sentencing in case No. 2012CF302. In advance of the combined hearing, Hady's probation agent, Amy Jo Schroeder, submitted a letter to the circuit court that included the revocation order and warrant, along with a summary of statements Hady

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

had made to Schroeder during an interview following his 2012 arrest. The summary recounted Hady's admission to Schroeder that he committed the new burglaries, engaged in criminal drug sales and criminally destroyed evidence. The circuit court ultimately imposed consecutive and concurrent sentences totaling eighteen years, consisting of nine years of initial confinement and nine years of extended supervision.[2] The court also determined Hady was eligible for both the Substance Abuse Program (SAP) and the Challenge Incarceration Program (CIP). Hady's postconviction motions for resentencing or sentence modification were denied after a ***Machner***[3] hearing. This appeal follows.

Hady argues he is entitled to resentencing because the circuit court relied on "compelled" and "protected" statements Hady made to Schroeder. Citing ***State v. Alexander***, 2015 WI 6, ¶24, 360 Wis. 2d 292, 858 N.W.2d 662, Hady argues that a probationer's compelled statements to a probation agent are improper information at sentencing. Hady contends that the following statements by the sentencing court establish its reliance on Hady's compelled statements:

> The gravity and nature of the offenses in this case, to look at what's gone on in my courtroom today, there could be no bigger, no bigger exclamation point on the gravity of this offense, these offenses, your involvement with addiction, your involvement with burglary….
>
> ….
>
> And what you have done is burglarize. That's one aspect of this. But what you've done is take controlled substance. What

[2] Specifically, the court imposed consecutive nine year terms consisting of four and one-half years of initial confinement followed by four and one-half years of extended supervision for the burglaries in 2008CF388. With respect to the possession with intent to deliver narcotics conviction in 2012CF302, the court imposed a concurrent thirteen-year sentence, consisting of nine years of initial confinement and four and one-half years of extended supervision.

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> you've done is put more—put some of that controlled substance—and this is all from your statement—into the community, into the stream. And what you've done is potentially create the same pain, same anguish, same agony that your family is feeling, for another family. And it just keeps going.
>
> ….
>
> So fast forward. Smart kid realizes that he's on probation for offenses that have maximum penalties of 12 years and 6 months or $25,000. Smart kid knows that … if he messes up probation that he's coming back to the Court and that he could potentially go to prison.
>
> But what does smart kid do? Smart kid because of serious addiction issues involves himself in more criminal activity.
>
> ….
>
> But ultimately the Court does agree at least in part with the District Attorney and that there needs to be a significant period of incarceration so that you really do have the ability to involve yourself in treatment, but you really do have the ability to change so that when you do get out that you can do all those ... positive things that you told me about. And you can. It's just—it's going to take a lot of hard work.

Because trial counsel did not object when the sentencing court mentioned Hady's statement to Schroeder, Hady's argument is reviewed under the rubric of ineffective assistance of counsel. In order to prevail on an ineffective assistance claim, Hady must establish both that trial counsel's performance was deficient and that the deficient performance prejudiced Hady—in other words, that counsel's error undermines the court's confidence in the result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

We assume without deciding that Hady's statement to Schroeder was compelled and trial counsel, therefore, was deficient by failing to object when the court referenced the statement. We conclude, however, that Hady was not prejudiced by the claimed deficiency. Although the ***Alexander*** court held that "a circuit court employs an improper factor in sentencing if it actually relies on compelled statements made to a probation agent," it recognized that mere reference to a

compelled statement does not automatically constitute actual reliance. ***Alexander***, 360 Wis. 2d 292, ¶¶24, 26. This court, therefore, reviews "the circuit court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave explicit attention to an improper factor, and whether the improper factor formed part of the basis for the sentence." ***Id.***, ¶25 (internal quotations omitted).

Here, the court discussed the proper sentencing factors, including the seriousness of the offenses; Hady's character and criminal history; the need to protect the public; and the mitigating factors Hady raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. When viewing the larger context of the sentencing court's comments, we are confident that the court's passing reference to Hady's statement did not affect the sentence ultimately imposed. Hady, therefore, has failed to establish that he was prejudiced by counsel's failure to object at the sentencing hearing.

Hady alternatively argues that his sentence structure's impact on his ability to participate in either the SAP or CIP constitutes a new factor justifying sentence modification. A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶36-37.

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 ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (quoted

source omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

Hady notes that the sentencing court recognized the need for institution-based treatment to address Hady's addiction issues. As noted above, the court determined there needed to be "a significant period of incarceration" so that Hady would "have the ability to involve [himself] in treatment." The court found Hady eligible for both the SAP and CIP, acknowledging those programs would give Hady the opportunity to get out of prison "substantially earlier." After arriving at prison, however, Hady was informed he would not be allowed to participate in either program until 2017 at the earliest, as inmates considered for enrollment in the programs must be "classified as minimum or community custody and be within 3 years of their adjusted release date."

Hady contends the circuit court was unaware that the sentence imposed would foreclose his participation in SAP or CIP until after he had served six years of his nine-year term of initial confinement. Hady thus contends that the circuit court's lack of knowledge regarding the impact of Hady's sentence on his ability to participate in SAP or CIP constitutes a new factor that is highly relevant to the sentence imposed. We are not persuaded.

Although the circuit court emphasized the importance of institution-based treatment, and made him eligible for SAP and CIP, the court acknowledged that the programs may not be available. The court added: "And as a result, if he's unable to get into those programs it would not be considered a new factor for the purpose of sentencing or the reconsideration of the sentence as handed down by the Court." Hady, therefore, has failed to demonstrate that his

precise eligibility date for SAP or CIP constitute "facts highly relevant to the imposition of sentence." ***Id.***, ¶40.

Upon the foregoing,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals