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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 11, 2016

To:

Hon. James G. Poulos
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Jacob J. Wittwer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Chad D. Espen 284780
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2015AP1123-CR

State of Wisconsin v. Chad D. Espen (L.C. # 2003CF491)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Chad Espen appeals pro se from a circuit court order denying his motion to modify his 2009 sentence after revocation of his extended supervision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

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

Espen was convicted of first-degree sexual assault of a child in 2004. In 2009, Espen's extended supervision was revoked for multiple violations of his supervision rules. Within the revocation summary compiled by the Department of Corrections was an opinion expressed by Espen's sex offender treatment facilitator, Joe Henger, that Espen "has deviant sexual arousal to children." At the June 2009 sentencing after revocation of his extended supervision, the State referred to Henger's opinion, and the defendant responded that Henger also opined that Espen posed a medium rather than a high risk to reoffend.

In sentencing Espen, the circuit court noted Espen's numerous violations of his supervision rules, that he was terminated from Henger's sex offender treatment program for numerous rule violations, and that he had a deviant sexual arousal to children, although he did not have a long history of assaultive behavior. The court observed that the sex offender treatment program facilitator perceived a significant risk to reoffend. We affirmed the sentence in *State v. Espen*, No. 2009AP2898-CRNM, unpublished op. and order (WI App Apr. 28, 2010).

In April 2015, Espen moved the circuit court pro se to modify his sentence because a social worker informed him in July 2014 that Henger's deviant sexual arousal opinion was not premised upon proper evaluation tools and protocols. Espen alleged that mental health professionals with whom he had subsequent contact criticized Henger's opinion and opined that Espen posed a lower risk to reoffend than suggested by Henger's opinion. Espen argued that the 2014 discoveries constituted a new factor warranting sentence modification. The circuit court disagreed, concluding that Espen did not meet his burden to show a new factor. Espen appeals.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant must demonstrate

by clear and convincing evidence that a new factor exists and that the new factor justifies sentence modification. *Id.*, ¶¶36, 38. 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.” *Id.*, ¶¶40, 52 (citation omitted). Though the existence of a new factor presents a question of law that we review de novo, *id.*, ¶33, whether and to what degree a sentence should be modified is a discretionary determination for the circuit court, *id.*, ¶¶36-37. We search for reasons to sustain a discretionary decision. *J.A.L. v. State*, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991).

Espen’s alleged new factor is his 2014 discovery of opinions he contends undermine Henger’s 2009 “deviant sexual arousal to children” opinion.² Other mental health professionals opined that (1) Espen had a relatively low risk to reoffend sexually (2004 evaluation report by Dr. DeYoung); and (2) Espen did not meet the criteria for long-term sex offender treatment, although he did meet the criteria for short-term sex offender treatment (2014 sexual offender assessment by Dr. Amy Karn). Espen also relies upon a note from a psychological services clinical contact recounting a discussion with Espen about how evaluators typically determine whether an individual has deviant sexual arousal to children and that a pedophilic disorder³

² Henger’s 2009 opinion that Espen “has deviant sexual arousal to children” cannot itself constitute a new factor because Henger’s opinion was discussed by the parties and the circuit court at Espen’s 2009 sentencing hearing. See *State v. Harbor*, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828.

³ There is no indication in this record that pedophilic disorder is the same as deviant sexual arousal to children.

would be made after diagnostic testing, a self-report of sexual attraction to children, or a clearer pattern of child victims (2014 note of John Patrick).

Espen bore the burden to show by clear and convincing evidence that the 2014 discoveries constituted a new factor. In light of the nature of Espen's conviction for first-degree sexual assault of a four-year-old child (penis-vagina intercourse), and the fact that Espen was terminated from sex offender treatment because of rule violations, the 2014 discoveries are not clear and convincing evidence of a new factor "highly relevant to the imposition of sentence." *Harbor*, 333 Wis. 2d 53, ¶40. DeYoung's 2004 opinion that Espen has a low risk to reoffend and Karn's 2014 determination that Espen required short-term sex offender treatment do not by clear and convincing evidence undermine Henger's 2009 opinion that Espen has "deviant sexual arousal to children." Furthermore, Espen has not shown by clear and convincing evidence that "deviant sexual arousal to children," a feature of the crime of conviction, is the same as the pedophilic disorder mentioned in the 2014 Patrick note, and that the evaluation protocols and tools are the same for both. Finally, a mental health professional's subsequent contradictory opinion is not a new factor because "mental health professionals will sometimes disagree on matters of diagnosis and treatment." *State v. Slagoski*, 2001WI App 112, ¶11, 244 Wis. 2d 49, 629 N.W.2d 50.

The record supports the circuit court's discretionary decision not to modify Espen's sentence because Espen did not establish a new factor.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals