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DISTRICT IV

May 8, 2017

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

2016AP706-CR

State of Wisconsin v. Tyler D. Nicholas (L.C. # 2011CF49)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Tyler Nicholas appeals a judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 2011, Nicholas was convicted of one count of injury by intoxicated use of a vehicle and two counts of operating while intoxicated causing injury. The circuit court withheld sentence and placed him on probation. His probation was later revoked and he was returned to court for sentencing. The court imposed consecutive sentences totaling eight years of initial confinement and three years of extended supervision. Nicholas then filed a postconviction motion seeking sentence modification due to a new factor and alleging that his sentencing counsel was ineffective. The court denied the motion without an evidentiary hearing.

We first address the sentence modification issue. The legal standards for sentence modification based on a new factor are well established, and we do not repeat them here. *See, e.g., State v. Harbor*, 2011 WI 28, ¶¶35-52, 333 Wis. 2d 53, 797 N.W.2d 828.

Nicholas's argument proceeds in the following steps: when the circuit court sentenced Nicholas after revocation it relied in part on his conduct while on probation to conclude that he had a "low or poor" character; the conduct was partly caused by a traumatic brain injury that he suffered in the original car accident crime; when the court sentenced Nicholas after revocation the brain injury diagnosis had not yet been made; the brain injury diagnosis undercuts the court's conclusion that his acts while on probation show low character; and, because the brain injury is treatable, this new information should lead a sentencing court to place more emphasis on rehabilitation than the court originally did, and to impose less of a prison sentence.

We focus on whether Nicholas made a sufficient showing of the existence of a new factor to warrant an evidentiary hearing. Although Nicholas does not substantially discuss the treatability of his condition in his brief, his argument impliedly places heavy reliance on the idea that his condition is treatable. That is so because, at sentencing, a defendant's character is

relevant mainly to the factor of protection of the public. If a defendant is seen as having a low or poor character, that implies that the defendant's conduct is less likely to improve in the future, as compared to a person with better character. In other words, it implies that rehabilitation and deterrence are less likely to be effective, and instead protection of the public will require removal of the defendant from society.

Nicholas attempts to break that link by arguing that his conduct on probation was not due to his character, but was instead due to a brain injury. However, changing the *cause* of the conduct does not, by itself, break the link for sentencing purposes. It does not because the defendant remains dangerous to the public regardless of the cause of his conduct. Instead, the defendant must show that the newly identified cause of his behavior is one that is more likely to allow for rehabilitation than would low or poor character. It is the treatability of the conduct, not merely the cause, that could be a fact highly relevant to sentencing.

With that focus in mind, we now turn to the information Nicholas provided about the treatability of his brain injury and the prospects for it changing his behavior. The expert's report that Nicholas attached to his postconviction motion says relatively little on this topic. Treatability is addressed in one long paragraph.

The paragraph begins with a sentence stating that Nicholas's mental condition "can be treated effectively." It then states that such treatment has advanced in recent years, and involves specialists from several fields. It states, "[t]hese efforts have been supported as efficient and effective," and then cites two outside sources. The report notes that such treatment is usually not available through departments of correction. The expert describes certain aspects of the treatment further, and states that substance abuse treatment is often included.

To convincingly argue for a shorter sentence that allows for treatment not available in prison, a defendant must be able to show that there is a meaningful likelihood that the treatment will be effective to address the danger to the public that incarceration was intended to prevent. The report submitted by Nicholas does not meet that goal.

As to potential outcomes, the expert said nothing more than that treatment “can be” effective. That is ambiguous, at best. Without further details, this cannot be assumed to mean that treatment is likely to be effective in the sense that it would address dangerousness. The report does not offer any prognosis for treatment success by saying, for example, that Nicholas’s prospects are good, or that treatment is likely to be successful. Nor does it attempt to identify any factors specific to Nicholas that might make it likely that treatment will be effective to address his dangerousness.

Furthermore, the report does not state what qualifies as “effective” treatment. Does that mean return to full pre-injury psychological function? Or does it mean merely reduce, but not eliminate, the outward behaviors? If it means reduce, by how much? This is an important point in establishing that the imposed sentence is longer than necessary to protect the public.

In sum, the expert’s report is not sufficient to establish that Nicholas’s condition is treatable to an extent that makes the diagnosis of brain injury a fact highly relevant to the imposition of sentence. Accordingly, we conclude that the sentence modification part of Nicholas’s postconviction motion was properly denied.

Nicholas also argues that his sentencing counsel was ineffective by not sufficiently investigating information relating to Nicholas’s brain injury and not presenting that information at sentencing. As above, we conclude that Nicholas was not entitled to an evidentiary hearing

because his motion did not sufficiently allege prejudice. The cursory allegations about treatability of the injury are not sufficient to undermine confidence in the outcome of sentencing.

IT IS ORDERED that the judgment and order are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals