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DISTRICT III/IV

January 18, 2018

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

2017AP609-CR State of Wisconsin v. Chad Robert Danek (L.C. # 2016CF43)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Chad Robert Danek appeals a judgment of conviction and an order denying his postconviction motion seeking sentence modification. 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.

While driving his truck, Danek struck and caused damage to another moving vehicle, but did not stop. The other driver followed Danek and reported Danek's license plate number to police. Both vehicles eventually stopped and Danek exited his truck. The other driver reported that Danek was swaying, staggering and squinting as if trying to focus. Danek said "I don't have to stay here," staggered back to his truck, and drove away. When police located Danek, he smelled of alcohol, had glassy eyes, and admitted to drinking vodka. He was arrested and charged with operating while intoxicated as a ninth offense (OWI-9th), operating with a prohibited blood-alcohol concentration as a ninth offense (PAC-9th), and operating after revocation (OAR).

Danek pled no contest to OAR but proceeded to trial on the OWI and PAC charges. He was found guilty of both, though the PAC was dismissed pursuant to WIS. STAT. § 346.63(1)(c), and WIS. STAT. § 346.65(2)(am) (when both OWI and PAC are charged for the same incident, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions."). At sentencing, the court imposed five years of initial confinement followed by five years of extended supervision on the OWI, and one year of consecutive jail time on the OAR. The circuit court ordered a $2900 fine on the OWI conviction, and found Danek ineligible for both the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP) "in light of the number of convictions that he has for drunk driving, number one, and number two,

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

the fact that he has taken advantage of [early release] programs in the past with no progress being made."

At sentencing, in going through Danek's lengthy history of arrests, incarcerations and supervision for OWI-related offenses, the court remarked that Danek "was able to take advantage of the Substance Abuse Program on two separate occasions in prison to get out early." Danek filed a postconviction motion alleging that he had actually participated in the SAP only once. He argued that: (1) the fact that he had participated only once rather than twice constituted a new factor warranting modification of his sentence to include program eligibility; (2) the alcohol fine enhancer was improperly applied to increase his fine; and (3) insofar as trial counsel facilitated these errors, Danek received ineffective assistance. The circuit court denied the postconviction motion without a hearing or written explanation. Danek appeals.

Danek first argues that he is entitled to sentence modification in the form of a finding of eligibility for the CIP and the SAP based on the existence of a new factor, namely, that he was released early from prison following the successful completion of the SAP only once, not twice, as the circuit court apparently believed. A new factor is a fact or set of facts highly relevant to the imposition of a sentence but not known to the circuit court judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. ***Id***., ¶38. Whether the defendant has established a new factor presents a question of law we review de novo. ***Id.***, ¶¶36-37. If the defendant makes this threshold showing, the circuit court

may but is not required to modify the sentence; whether a new factor justifies modification is a discretionary determination for the circuit court. ***Id***.

We conclude that Danek has not established the existence of a new factor. First, Danek knew at the time of sentencing how many times he had completed the SAP. Therefore, the "fact" that he completed it only once was not overlooked by all the parties. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. Second, that only one of Danek's early release dates was attributable to his completion of the SAP is not highly relevant to the circuit court's sentence. Danek was, in fact, released early from prison a second time, though in connection with a petition for sentence adjustment rather than successful completion of the SAP. The circuit court was concerned less with the details of Danek's prison programming than with his cycle of reoffense:

> It just appears that so far in his life he has lived life on the installment plan. Works hard, drinks too much, drives, and goes back to prison. Gets out, works hard, drinks too much, gets behind the wheel, goes back to prison. This has occurred on numerous occasions, and here we are again.

To this end, the court recounted Danek's history of refusing treatment in the community:

> Let me ask you. Has there been a fair attempt here for rehabilitation, aftercare treatment, AODA assessment? Can't very well do it if the defendant refuses to cooperate with it, can you?

In imposing sentence, the circuit court emphasized the severity of the offense and the need to protect the public:

> The Court must protect the public, and the only way to keep the public protected, which would include Mr. Danek, is to keep him off the road and to keep him from drinking.
>
> The fact that he was involved in an accident and he took off without stopping, number one; number two, the fact that this is

> operating while intoxicated 9th; and number three, … .321 blood alcohol concentration, demands that I give him a maximum sentence.

In light of all of the sentencing factors considered and explained by the court, including the need for punishment, the aggravated severity of the offense and Danek's history and pattern of reoffense, the fact that he completed the SAP once, not twice, is not highly relevant to the sentence imposed as a matter of law.

Next, Danek challenges the $2900 fine ordered in connection with his OWI conviction. Danek claims that the circuit court improperly increased his fine using an inapplicable fine enhancer, WIS. STAT. § 346.65(2)(g) (2013-14), which acts as a multiplier to increase the statutorily prescribed minimum and maximum fines for certain OWI offenses based on a defendant's blood-alcohol concentration (BAC). The parties agree that § 346.65(2)(g), does not apply to a ninth-offense OWI conviction.[2] Based solely on the fact that § 346.65(2)(g), is among the statutes listed on his judgment, Danek asks this court to assume that the circuit court quadrupled the fine it would have otherwise ordered, and requests that we reduce his fine by three-fourths, to $725.

Danek's arguments are unpersuasive. The mere inclusion of the enhancer statute on the judgment does not establish that the circuit court applied it by quadrupling some unspecified

[2] By its terms, WIS. STAT. § 346.65(2)(g) (2013-14) is applicable to OWI-3rd through OWI-6th convictions. *See* § 346.65(2)(am)3.-5. (2013-14). Given his BAC of .321, had Danek been convicted of a qualifying offense, his minimum and maximum fines would have been quadrupled. *See* § 346.65(2)(g)3. (2013-14).

monetary amount.[3] Danek was convicted of OWI 9th, then a Class G felony carrying a maximum fine of $25,000. *See* WIS. STAT. § 346.65(2)(am)6 (2013-14) and WIS. STAT. § 939.50(3)(g) (2013-14). Nothing in the record suggests that the circuit court believed it was bound to apply a statutory multiplier or otherwise erroneously exercised its discretion in imposing a fine well below the $25,000 maximum.

Finally, Danek asserts that the circuit court erred in denying his postconviction motion without an evidentiary ***Machner***[4] hearing. We disagree. It appears that, in his postconviction motion, Danek asserted as an alternative ground for relief that trial counsel should have corrected the circuit court's alleged misapprehensions about the number of times Danek had completed the SAP and whether the alcohol fine enhancer applied to Danek's OWI 9th conviction. To the extent Danek argues that trial counsel provided ineffective assistance by not informing the sentencing court that Danek had completed the SAP only once, he has failed to allege facts showing prejudice. As we previously explained, the completion of the SAP once rather than twice was not highly relevant to Danek's sentence. As to the BAC fine enhancer, Danek has not shown that the circuit court applied it at sentencing, and therefore, has failed to allege facts, which if true, would establish either deficient performance or prejudice.

Upon the foregoing reasons,

[3] The OWI convictions subject to enhancement under WIS. STAT. § 346.65(2)(g), all carry a mandatory minimum fine, and some provide for a maximum unenhanced fine. For example, had Danek been convicted of an OWI 4th with a .321 BAC, his minimum fine would have been $2400, and the maximum fine, $8000. *See* WIS. STAT. §§ 346.65(2)(am)4., and (2)(g)3. (2013-14). Further, we observe that Danek's crime has since been reclassified from a Class G to a Class F felony.

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

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals