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DISTRICT IV

June 12, 2018

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

2017AP1911-CR State of Wisconsin v. Tyler J. Groeller (L.C. # 2014CF2298)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).

Tyler Groeller appeals a judgment of conviction for delivery of heroin and an order denying his postconviction motion for sentence modification. Groeller contends that he presented a new factor in his motion for sentence modification by showing that he would not be able to participate in the Substance Abuse Program (SAP) until he is within three years of release. 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 summarily reverse.

Pursuant to a plea agreement, Groeller pled guilty to one count of delivery of heroin in this case and one count of retail theft in a separate case, and the remaining counts in the two cases were dismissed and read-in for sentencing. The parties jointly recommended a sentence of five years of initial confinement and five years of extended supervision on the heroin count, and a concurrent sentence of three years of initial confinement and three years of extended supervision on the theft count. The circuit court followed the recommendation as to the theft count, but imposed a sentence of eight years of initial confinement and five years of extended supervision on the heroin count. The court explained that it was finding Groeller eligible for SAP, and that if Groeller completed the program he would be released earlier. The court explained that it imposed three years of initial confinement beyond the joint recommendation because the court wanted to encourage Groeller to complete SAP. The court stated that if Groeller successfully completed SAP it would reduce the amount of time he spent in custody. The court also stated that Groeller would have the right to seek a sentence reduction once he served seventy-five percent of his sentence. The court stated that, at that point, the court would grant Groeller release if he had completed SAP and had no rule violations within the institution.

Groeller moved for sentence modification, citing a Department of Corrections (DOC) policy that prevents Groeller from participating in SAP until he is within three years of release. Groeller argued that the DOC policy was a new factor because it was highly relevant to his

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

sentence and it was unknowingly overlooked by the court. The circuit court denied postconviction relief, finding that Groeller had not shown a new factor because the court understood at sentencing that it had no control over whether DOC would allow Groeller to participate in SAP. The court explained that it had not intended its sentence to be eight years, but also that the court was not bound by the parties' joint recommendation.

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence, but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant establishes the existence of a new factor, the circuit court must then determine whether the new factor justifies sentence modification. ***Harbor***, 333 Wis. 2d 53, ¶37. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. ***Id.***, ¶33.

Groeller contends that he demonstrated a new factor warranting sentence modification. He contends that his inability to participate in SAP until he is within three years of release is highly relevant to the court's sentencing, and that the circuit court unknowingly overlooked that fact. Groeller contends that the court's sentencing comments indicate that the court's reason for imposing an additional three years of initial confinement beyond the parties' joint recommendation was to motivate Groeller to successfully complete SAP, but that the DOC policy preventing Groeller's participation until he is within three years of release renders that rationale meaningless. Groeller contends that, contrary to the court's stated sentencing intent, the additional three years of confinement time will not provide any additional motivation for

Groeller to complete SAP because, no matter the amount of initial confinement, Groeller will only be able to reduce his confinement time by the amount left when he completes SAP in the three-year window before his scheduled release. Thus, Groeller, contends, the court must have unknowingly overlooked the DOC policy when it imposed an additional three years of initial confinement for the purpose of motivating Groeller to successfully complete SAP.

The State responds that the fact that Groeller will not be able to participate in SAP until he is within three years of release is not a new factor.[2] It argues that the circuit court was aware, at the time of sentencing, that the DOC would determine if and when Groeller would participate in SAP. It contends that the fact that Groeller will not be able to participate in SAP until he is within three years of release does not frustrate the court's sentencing purpose of encouraging Groeller to successfully complete the program, because the longer initial confinement portion of the sentence provides an incentive for Groeller to complete SAP to reduce his confinement time.

The State also contends that the circuit court's sentencing remarks indicated that the court anticipated that Groeller would serve at least six years of initial confinement even if he completed SAP. It points to the court's statement indicating that Groeller would have the right

[2] The State also argues that there is an exception in the DOC policy that could allow Groeller to participate in SAP earlier than three years prior to his release. However, the State does not develop an argument as to whether the exception could apply to Groeller. Accordingly, we do not consider the State's argument based on the possibility of an exception in the DOC policy. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

to seek sentence reduction after completing seventy-five percent of his sentence, and that the court would grant the request if Groeller had completed SAP at that point. The State asserts that the court was indicating that Groeller could seek sentence adjustment under WIS. STAT. § 973.195 after serving seventy-five percent of the eight years of initial confinement. It asserts that, because seventy-five percent of Groeller's initial confinement would be six years, the court must have anticipated that Groeller would serve six years prior to completing SAP.

We conclude that the fact that Groeller will not be able to participate in SAP until he is within three years of release is a new factor because it is highly relevant to sentencing and was unknowingly overlooked by the circuit court. The only logical reading of the court's sentencing comments is that the court expected that Groeller's participation in SAP would reduce Groeller's initial confinement time by the additional amount of confinement that the court ordered. That is, the court would not have stated its intent that the additional confinement time would serve to encourage Groeller to complete SAP if it had been aware the DOC policy would not allow Groeller a reduction in his total confinement time no matter how much initial confinement, beyond three years, was imposed. We conclude that the circuit court must have overlooked the DOC policy because it is inconsistent with the court's intention that additional initial incarceration imposed would encourage Groeller to successfully complete SAP.

The State is correct that we have held, generally, that the unavailability of prison programming is not a new factor for sentence modification purposes. *See* ***State v. Krueger***, 119 Wis. 2d 327, 333-34, 351 N.W.2d 738 (Ct. App. 1984) (unavailability of treatment in institution was not a new factor for sentence modification purposes, where circuit court stated it hoped that the defendant would be able to continue treatment in prison but court was aware treatment might not be available). However, that general proposition is not determinative here. The cases cited

by the State establish that prison programming is left to DOC, not the circuit court, *see* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981), and that DOC's denying programming, even when based on new DOC policies, is not a new factor when the circuit court is aware that the defendant may not be allowed to participate in the programming, *see* ***State v. Schladweiler***, 2009 WI App 177, ¶5 & n.4, ¶¶6, 8-14, 322 Wis. 2d 642, 777 N.W.2d 114 (*abrogated on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶47 n.11). However, nothing in the cases cited by the State establishes that an *existing* DOC policy is not a new factor when, as here, the circuit court makes a sentencing determination based explicitly on an expectation that is contrary to that policy.

We also reject the State's argument that the circuit court's sentencing comments regarding Groeller's right to seek a sentence reduction indicated that the court was aware that Groeller would not be able to participate in SAP until he was within three years of release. It is unclear how the court believed that a petition for sentence adjustment would follow Groeller's automatic release from confinement upon completing SAP. *See* WIS. STAT. §§ 302.05(3)(c)2.a. and b. (upon completing SAP, remaining confinement portion of sentence is automatically converted to extended supervision); 973.195(1g) and (1r) (circuit court has discretion to grant a petition for sentence adjustment filed after defendant has served seventy-percent of initial confinement portion of sentence, unless the district attorney objects, in which case the court must deny the petition). Moreover, the court's reference to a petition for sentence adjustment did not clarify how the additional confinement time would encourage Groeller to participate in SAP when it would not correlate to any additional amount of confinement time being available for conversion to extended supervision. Because Groeller established a new factor, we remand to the circuit court for a determination of whether the new factor warrants sentence modification.

Therefore,

IT IS ORDERED that the order denying sentence modification is summarily reversed and the matter is remanded for a hearing on the motion pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals