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DISTRICT I

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

2018AP340-CR State of Wisconsin v. Keith Richard Bump (L.C. # 2016CF981)

Before Brennan, Brash and Dugan, 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).

Keith Richard Bump appeals a judgment of conviction and an order denying postconviction relief. He seeks a sentence modification that he claims will enable him to participate in the Wisconsin substance abuse program (WSAP). Upon our review of the briefs

and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

In Milwaukee County circuit court case No. 2016CF981, which underlies this appeal, Bump pled guilty to manufacturing tetrahydrocannabinols. At sentencing on June 16, 2016, the circuit court imposed a three-year term of imprisonment bifurcated as two years of initial confinement and one year of extended supervision.[2] The circuit court also found Bump eligible to participate in WSAP while confined. Subsequently, Bump appeared before a different circuit court for sentencing in Milwaukee County circuit court case No. 2016CF1046, in which he had been convicted of robbery. The circuit court in that matter imposed a consecutive five-year sentence and found him ineligible to participate in WSAP.[3]

Bump moved for sentence modification in case No. 2016CF1046, asking to be found eligible for WSAP. The circuit court denied the motion.

Bump next moved to modify his sentence in the instant case. He asserted that the Department of Corrections views his ineligibility for WSAP in case No. 2016CF1046 as disqualifying him for WSAP while serving both of his sentences. As proof, he submitted an interoffice memorandum prepared by a client services specialist with the Office of the Wisconsin State Public Defender. The memorandum discusses eligibility for WSAP in circumstances

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The Honorable Daniel L. Konkol presided over the sentencing in this matter.

[3] The instant appeal does not involve a challenge to the judgment of conviction or sentence in Milwaukee County circuit court case No. 2016CF1046.

where an inmate is serving consecutive sentences and has been found eligible for the program while serving only one of those sentences. According to the memorandum:

> where an individual is serving a sentence for an ineligible offense first, with an eligible offense running consecutive to it, [the inmate] can be found eligible once the initial confinement period for the ineligible sentence has been served. However, in cases where an individual is serving the sentence for the eligible offense first ... [the inmate] will not be found eligible [by the Department of Corrections] ... at any point during the period of incarceration.

Bump contended that, in light of the Department of Corrections' policy excluding a person with a sentence structure such as his from participating in WSAP, his sentence in case No. 2016CF1046 constituted a new factor warranting sentencing relief. As a remedy, he requested an order that he serve his sentence in this case—No. 2016CF981—after he completes his sentence in case No. 2016CF1046.

A successor circuit court presided over Bump's postconviction motion in the instant matter and denied relief.[4] The successor court concluded that Bump did not demonstrate the existence of a new factor, that sentence modification was unwarranted even assuming a new factor existed, and that Bump failed to present legal authority allowing the form of sentencing relief that he requested. He appeals.

A new factor for purposes of sentence modification 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." *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797

[4] The Honorable David Swanson presided over the postconviction proceedings in this case and entered the order denying relief.

N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, the defendant must satisfy a two-prong test. *See* ***id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents a question of law, which we review *de novo*. *See* ***id.***, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** If a defendant fails to satisfy one prong of the test, a court need not address the other. *See* ***id.***, ¶38.

Bump alleges that his consecutive sentence in case No. 2016CF1046 constitutes a new factor because the sentence renders him ineligible for WSAP in the instant case.[5] WSAP is a prison treatment program that, upon successful completion, permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. § 302.05(3)(c)2. Entry into WSAP is affected by several distinct events. Initially, the sentencing court must determine, as part of its sentencing discretion, whether to find the defendant eligible for WSAP while confined. *See* WIS. STAT. § 973.01(3m).[6] If the sentencing court makes such a finding, then the Department of

[5] As we have seen, an interoffice memorandum prepared by support staff at the Office of the Wisconsin State Public Defender is the authority Bump cites as proof that the Department of Corrections will not consider him for WSAP. We assume without deciding that the memorandum accurately describes the Department's position.

[6] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

Corrections, which administers WSAP, determines whether the eligible inmate may participate in the program. *See* WIS. ADMIN. CODE § DOC 302.39(3) (Oct. 2018).

At the original sentencing in this case, the circuit court found Bump eligible to participate in WSAP but advised him that the decision to admit him into the program rested solely with the Department of Corrections. Specifically, the circuit court said:

> to be absolutely clear, I'm not putting you into the program. I'm just saying that I'm allowing that you would be eligible.... When I say you are eligible that means the Department of Corrections can look into it to see if they want you to be put in the program. It's totally up to them then.

Thus, the circuit court explicitly stated at sentencing both that the Department would decide whether to place Bump in WSAP and that his placement would be "totally up to" the Department. His participation in the program was therefore not "'highly relevant'" to the sentencing decision. *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Further, because the circuit court incontrovertibly sentenced Bump with knowledge that the Department might choose to exclude him from WSAP, his inability to participate cannot be deemed a fact "not known to the trial judge at the time of original sentencing." *See* ***id.*** (citation omitted). Accordingly, Bump's inability to participate in WSAP is not a new factor within the meaning of ***Harbor***.

Moreover, were we to conclude that Bump identified a new factor—and we do not—we would nonetheless sustain the postconviction order declining to modify his sentence. Our standard of review is deferential. *See* ***id.***, ¶33. "[W]e will not disturb the exercise of the circuit court's sentencing discretion so long as it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result

which a reasonable judge could reach." ***State v. Cummings***, 2014 WI 88, ¶75, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted).

Here, the circuit court found in postconviction proceedings that sentence modification in this case would improperly constitute "an end-run around" the sentencing decision in case No. 2016CF1046. In that case, the circuit court ordered Bump to serve a five-year sentence consecutive to the sentence he received in the instant case. Granting Bump's request to reverse the order in which he serves his sentences would therefore circumvent a component of the sentence imposed in case No. 2016CF1046. A circuit court is entitled to take into account the sentencing decisions made in other cases. *See* ***State v. Sherman***, 2008 WI App 57, ¶17, 310 Wis. 2d 248, 750 N.W.2d 500. Because the circuit court considered relevant facts and did not make an error of law, the circuit court reasonably exercised its discretion in denying Bump's motion to modify his sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶63. Accordingly, we will not disturb the circuit court's decision. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.").

Before concluding, we touch on the State's contention that, assuming Bump demonstrated the existence of a new factor, and assuming the circuit court concluded sentence modification was warranted, nonetheless the circuit court lacked authority to grant Bump the relief he requested, namely "to run [his sentence in this case] consecutive to the sentence in case [No.] 2016CF1046." According to the State, Bump did not seek sentence "modification" but rather sought an order vacating the sentence in this case and then imposing a new sentence consecutive to the sentence in case No. 2016CF1046. The State goes on to explain why a circuit court's inherent authority to modify a sentence on the basis of a new factor does not include the

power to vacate a valid sentence. Because we have concluded that Bump is not entitled to any relief, we need not determine the availability of the specific relief he requested. *See* ***State v. Hughes***, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 799 N.W.2d 504 (we decide cases on the narrowest possible ground). For the foregoing reasons, we affirm.

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