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**DISTRICT II**

September 25, 2019

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

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2018AP1208-CR                      State of Wisconsin v. Brandon L. Kline (L.C. #2014CF191)

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

**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).**

Brandon L. Kline appeals from a judgment of conviction entered after the revocation of his probation and from an order denying his postconviction motion for sentencing 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 (2017-18). We affirm.

When he was eighteen years old, Kline was charged with two counts of second-degree sexual assault. Count one alleged that he had sexual contact with a thirteen-year-old girl. Count two occurred about one year earlier and alleged that Kline had intercourse with another thirteen-year-old girl. Kline pled no contest to count one and the second count was dismissed and read in. The circuit court withheld sentence in favor of seven years of probation.

Less than one year after sentencing, the court amended Kline's probation to include an eight-month conditional jail term. The amendment stemmed from Kline's admitted rule violations, including possessing a smart phone and using it to access the internet, having contact with the victim's family, pursuing dating relationships without agent approval, viewing pornographic videos, and providing false information to his agent.

Kline continued to violate his rules of supervision, and his probation was revoked two years after his original sentencing. Kline's violations included texting a young girl, accessing the internet, possessing both adult and child pornography,<sup>1</sup> and lying to his agent. Kline acknowledged to his agent that "he is attracted to young girls." At his sentencing after revocation, the circuit court imposed six years of initial confinement followed by eleven years of extended supervision.

Postconviction, Kline filed a motion seeking resentencing or sentence modification. He attached an expert report authored after he was sentenced to prison. The report opined that Kline had enough symptoms to warrant an Autism Spectrum Disorder (ASD) diagnosis and stated that

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<sup>1</sup> The State initiated new criminal proceedings against Kline for possessing child pornography.

teens with developmental disorders like autism mature slower than their neurotypical peers. The circuit court denied the postconviction motion. Kline appeals.

Kline maintains that he is entitled to resentencing because at his sentencing after revocation, the circuit court erroneously exercised its discretion by “not specifically considering and articulating on the record the mitigating effect of his juvenile mind when deciding sentence.” This argument finds no support in the record facts or existing law. As to the facts, the court soundly weighed Kline’s juvenile mind, or “immaturity,” in sentencing him both before and after his revocation. *See State v. Wegner*, 2000 WI App 231, ¶¶7, 9, 239 Wis. 2d 96, 619 N.W.2d 289 (sentencing after probation revocation is reviewed “on a global basis, treating the latter sentencing as a continuum of the” original sentencing hearing; when the same judge presides at both hearings, “we will consider the original sentencing reasons to be implicitly adopted”). At his original sentencing, the court heard that Kline was “still very young, developmentally and chronologically,” and that he was socially and emotionally immature for his age. Kline’s attorney expressly referred to *Roper v. Simmons*, 543 U.S. 551 (2005), reminding the court that juveniles mature at different speeds and that Kline had not “reached full maturity yet.” Ultimately, the circuit court cited Kline’s young age as the “only reason” it was imposing probation rather than prison. After revocation, the circuit court was reminded about Kline’s delayed maturation and did not discount the possibility that Kline’s poor performance on probation “was because he was young; he didn’t have good judgment[,]” but stated that there was a “constant theme” of manipulation and dishonesty and that was “a real problem.” The court explained that it could no longer send Kline to “Homme House” or residential treatment, but that it would “take into account his age” when determining the appropriate length of the prison sentence.

With regard to the law, Kline does not identify any cases supporting his novel theory that a person's young chronological or developmental age must mitigate the severity of a sentence in every case. We agree with the State that this proposition is wholly incongruous with Wisconsin law, which affords sentencing courts wide discretion in fashioning individualized sentences. It also runs afoul of *State v. Davis*, 2005 WI App 98, ¶18, 281 Wis. 2d 118, 698 N.W.2d 823, which recognizes that a defendant's young age is a secondary factor that courts may—but are not required to—consider in fashioning sentence.

Kline next argues that his postsentencing ASD diagnosis constitutes a new factor warranting sentencing modification “because the sentencing court relied on his related adolescent immaturity to aggravate his sentence.” A circuit court may modify a sentence based on the existence of a new factor, which 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the circuit court determines whether the new factor justifies sentence modification. *Id.*, ¶37.

We conclude that Kline's ASD diagnosis is not a new factor. *Id.*, ¶36 (whether a new factor exists presents a question of law). The circuit court was aware that Kline was emotionally and socially delayed. The existence of a later diagnosis that might help account for his immaturity and poor judgment is not highly relevant to his prison sentence given that he was a poor candidate for supervision, he committed serious offenses that impacted the victims, and he presented a danger to the public.

Further, even assuming that his ASD diagnosis was a new factor, the circuit court's decision not to modify his sentence was a proper exercise of discretion. *Id.*, ¶37 (whether and to what degree a sentence should be modified is a discretionary determination for the circuit court). The expert did not suggest that the fact of a diagnosis would somehow ameliorate Kline's manipulative and dishonest behavior. As stated by the postconviction court, "perhaps now we have a different label for some of Mr. Kline's, for lack of [a] better phrase, problems, but if you insert the word immaturity, judgment, it's the same result."

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2017-18).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*