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November 20, 2019

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

2018AP2406-CR State of Wisconsin v. Allen M. Haecker (L.C. #2017CF671)
2018AP2407-CR State of Wisconsin v. Allen M. Haecker (L.C. #2016CF508)

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).

In these consolidated appeals, Allen M. Haecker seeks sentence modification in which the sentencing court believed he was eligible for the substance abuse program (SAP), which turned out to be incorrect. Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE

809.21 (2017-18).[1] Haecker's SAP eligibility was not highly relevant to the sentences. Moreover, because the circuit court reasonably explained that Haecker's SAP eligibility was not a significant factor when the sentences were determined, the court did not erroneously exercise its discretion in concluding that a sentence modification was not justified. We affirm.

In August 2016, the State charged Haecker with substantial battery. In exchange for a no contest plea, the State recommended three years of probation with various conditions, including six months of conditional jail time. At the March 2017 sentencing hearing, the circuit court withheld sentence, placing Haecker on two years of probation (with conditions) and with sixty days of conditional jail time.

In October 2017, the State charged Haecker with possessing methamphetamine, THC, and drug paraphernalia, each as a repeater. Upon pleading no contest, per agreement, to the charges of methamphetamine and drug paraphernalia, the THC charge was dismissed and read in. Because these new charges would result in a hearing on revoking his probation for the battery conviction, the State agreed to await the result of that hearing before it recommended either three years of probation or nine months of jail.

At a March 2018 hearing, the circuit court addressed sentencing for both cases. The State pointed out Haecker's conduct in the substantial battery case: after being told by the victim to leave as he was intoxicated and loud, Haecker "punched her repeatedly in the face as well as held down her arms." Her injuries were significant. The State noted that, despite being put on probation with conditions to maintain absolute sobriety from drugs and alcohol, Haecker soon

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

committed the 2017 drug offenses, where police found in his residence "basically any type of drug or drug paraphernalia you could think of." The State also expressed concerns about Haecker's treatment of his partner, which had been described by others as abusive and involving drugs. Haecker's criminal history was noted. He had been placed on supervision numerous times. He had "been revoked four times." His probation for two of his three successful discharges had to be extended "in order to gain compliance for discharge." The State asserted Haecker blamed others or his addiction as the reasons for his inability to be successful on supervision. Even though he could legally obtain medication for his mental health issues, he used illegal drugs. In light of his continuing violations, the State considered him "a serious danger to the community."

Haecker also spoke at the hearing. He apologized to the court and all involved parties, accepted responsibility for his actions, and indicated that he "never wanted to ever hurt anybody in any way." He conceded that he used "drugs occasionally," that "it's a problem," and he "still want[ed] to seek help."

The circuit court began by noting that Haecker had some positive attributes and that "we're all rooting for you." But the court also noted that, while given opportunities to change, "you didn't do it. You just basically did not do it," pointing out that he continued to involve himself in drugs and passed on the opportunities offered by probation. As for the crime of substantial battery, the court considered it "a very serious offense," with no justification for attacking the female victim in the manner that he did.

The court rejected defense counsel's recommendation of a jail sentence, stating that it would not provide Haecker "the opportunities to get the treatment that [the court] think[s] [he]

need[s]." "[P]rison is not always the best alternative, sometimes it's a better option than what we have here in terms of providing treatment opportunities for individuals," and it hoped Haecker would "take advantage of it."

In light of "all the facts and circumstances of" Haecker's two cases, and "recognizing the opportunities on probation and the prior record," the court imposed the same sentence for the 2016 substantial battery conviction and 2017 methamphetamine possession conviction—eighteen months of initial confinement and two years of extended supervision for each. For the drug paraphernalia conviction, the court imposed one year of initial confinement and one year of extended supervision. All sentences were to run concurrently.

The court ordered Haecker, as part of his extended supervision, to complete the appropriate treatment programs, to avoid places that sold alcohol, and to not possess controlled substances or drug paraphernalia. The court determined Haecker to be ineligible for the Challenge Incarceration Program (CIP), but eligible for SAP. The court granted 215 days of credit against Haecker's revocation sentence and 140 days of credit against his drug offense sentences.

In November 2018, Haecker moved under WIS. STAT. § 809.30(2)(h) for sentence modification. Contrary to what had been believed, he was not eligible for SAP because of his battery conviction. *See* WIS. STAT. § 302.05(3)(a) (battery is a disqualifying offense). Haecker argued that his ineligibility was a "new factor" because it had been overlooked by the court and all of the parties at sentencing and was highly relevant to the sentence imposed. Because he would begin serving an SAP-eligible, three-year consecutive sentence, he asserted, in an unrelated Ozaukee County case once his Sheboygan County confinement was completed, he

wanted his concurrent sentences modified so as to move up the date he becomes eligible to participate in SAP on his consecutive sentence. Haecker requested reduction of his sentences from eighteen months' initial confinement to twelve months, so as to allow Haecker to receive treatment "a little earlier."

The circuit court denied the motion, stating,

> First of all, the Court's determination that Mr. Haecker should be eligible for the substance abuse program was not a significant factor in the Court's ultimate determination for sentencing. What was obviously a significant factor for the Court is that Mr. Haecker receive treatment for the issues that he must address.

The court reasoned that it must consider "many factors" for the imposition of a sentence, "obviously [] the nature and character of the defendant, the gravity of the offense, and the need to protect the public." The court noted that the substantial battery was a "serious offense" that led to "significant injuries" and "caused obviously the Court grave concern." While acknowledging that it had believed Haecker would be SAP-eligible, it more generally stated that it wanted Haecker in prison for a sufficient amount of time to "receive the treatment that he needed." It ultimately concluded that it "did not find [SAP eligibility] to be a significant factor in imposing the sentence that it did." Likewise with Haecker's drug crimes, it observed that these were "[s]erious in nature as well," making the court concerned about their gravity and the need to protect the public. Under all of the circumstances, Haecker's SAP eligibility was not "a significant factor in either of the terms that the Court imposed" in either case. Haecker appeals.

Whether a fact or set of facts constitutes a new factor is a question of law subject to de novo review. ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). A "new factor" in this setting means

> 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, even though it was then in existence, 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).

If a new factor exists, the circuit court decides within its discretion whether it warrants modification of the sentence. ***Id.***, ¶37. That decision is reviewed for an erroneous exercise of discretion. ***Id.***, ¶33. "A defendant bears the burden on both these inquiries by clear and convincing evidence." ***State v. Barbeau***, 2016 WI App 51, ¶15, 370 Wis. 2d 736, 883 N.W.2d 520. Both parts are required. ***Harbor***, 333 Wis. 2d 53, ¶38.

Haecker argues he is entitled to sentence modification because his statutory ineligibility for SAP was an unknowingly overlooked, but highly relevant, fact at sentencing.[2] Eligible inmates who successfully complete SAP may obtain early release from initial confinement *See* ***State v. Lynch***, 2006 WI App 231, ¶4, 297 Wis. 2d 51, 724 N.W.2d 656; *see also* WIS. STAT. § 302.05(3)(c)2. But even if a sentencing court considers an inmate eligible for SAP when selecting a sentence, the court thereafter relinquishes control of the confinement portion of the sentence and "may not order specific treatment." *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981). "Control over the care of prisoners is vested by statute in the" department of corrections (DOC). ***Id.*** The DOC determines whether and when an eligible

[2] Haecker's drug crimes did not disqualify him from SAP participation, but he asserts that, because he was sentenced for the same length of time on the charges, he effectively cannot participate in SAP for those offenses. The State suggests that, because of the sentence credit provided, Haecker would have completed the relevant portion of his battery sentence on or about February 2019, allegedly allowing Haecker to be eligible for SAP on his other sentences. There is insufficient information in this record to determine Haecker's status in this regard.

inmate will be allowed to participate in SAP. *See* WIS. ADMIN. CODE § DOC 302.39(3) (through Sept. 30, 2019) ("The department may enroll an inmate in the program" if it determines that certain criteria are met.).

Haecker falls far short of proving the first part of the test—that his SAP eligibility/ineligibility was a "highly relevant" fact to the imposition of his sentence. There is nothing to suggest that the sentencing court viewed this particular treatment program, and specifically the possibility of a reduced sentence, as highly relevant to the sentence. For sure, everyone, including Haecker, recognizes he needs to address his substance abuse issues.[3] But that is far different than saying the sentencing court wanted Haecker in the SAP program so that he could achieve an early release. Indeed, while the court believed Haecker's participation in SAP was a possibility, there is no guarantee that the DOC would decide to allow it or that Haecker would succeed.

What the record further shows is the sentencing court's attention drawn to the gravity of the offense, character of the defendant, and protection of the community as overwhelmingly more relevant and important considerations in its sentencing decision. While the court wanted to afford Haecker rehabilitative opportunities, its comments reflect an intention to tie those opportunities to the need to protect the public. In short, there is absolutely no indication that, had

[3] Clearly, there are other options for treatment besides SAP. For example, at the March 2018 revocation hearing, defense counsel stated that Haecker acknowledges his drug use, that he was cooperating with the Pathways Program, which is an AODA treatment program offered in jail, and that, while out on supervision, he had sought assistance of a psychiatrist and occasionally works with the DOC on his mental health issues. At sentencing, the court ordered that, as a condition of his supervision, Haecker should follow through on all treatment programs deemed appropriate. And defense counsel advised the court that Haecker is SAP-eligible for a consecutive three-year sentence in an Ozaukee County case.

the court known Haecker was SAP-ineligible, it would have given him a reduced sentence. SAP ineligibility therefore was not a new factor.

Haecker also fails to show the second part required for sentence modification, i.e., he fails to show that, even if the SAP ineligibility were, for the sake of argument, a new factor, the circuit court erroneously exercised its discretion when it denied the motion.

During the March 2018 hearing, although the circuit court remarked on the opportunities and programs made available to Haecker, the court's theme was how Haecker ultimately failed to seize those opportunities. The court emphasized Haecker's substantial battery, considering it "a very serious offense" with "no justification." Despite Haecker talking about what he needs to do to get better, the court noted he "unfortunately [has] not done it." When imposing the sentences, the court stated it was "looking at all of the facts and circumstances of the cases," handed down the sentences, and then later commented, incorrectly, that Haecker would be eligible for SAP.

At the December 2018 postconviction hearing, the circuit court reaffirmed its thinking that, although Haecker should seek and receive treatment for his issues, his eligibility specifically to the SAP "was not a significant factor in the Court's ultimate determination for sentencing." Additional reasoning provided by the court supports this, as it again emphasized the three main sentencing factors of the "nature and character of the defendant, the gravity of the offense, and the need to protect the public." Those considerations were applicable here given the "[s]ignificant injuries" to the victim that caused the court "grave concern" and Haecker's ongoing drug-related issues.

Given the court's explanation that Haecker's SAP ineligibility had no effect on its sentencing decisions and Haecker's related failure to show his sentence would have been shorter had the court known of the SAP ineligibility, we conclude the court sufficiently considered the appropriate facts and legal principles, and its decision demonstrated a rational process leading to a reasonable conclusion. In other words, the court did not erroneously exercise its discretion when it determined that the SAP ineligibility (even assuming it was a new factor) did not warrant a sentence modification. *See* ***State v. Yanda***, No. 2018AP412-CR, unpublished slip op. ¶22 (WI App June 18, 2019) ("In the circuit court's view, Yanda's ability to participate in the CIP and the [Earned Release Program] was simply not of much significance to the length of his sentence"; because the sentence would have been no different even had the court known about program eligibility, there was no erroneous exercise of discretion in denying sentence modification.).

Upon the foregoing reasons,

IT IS ORDERED that the judgments and orders 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.

Sheila T. Reiff
Clerk of Court of Appeals