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May 5, 2021

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

2020AP329-CR

State of Wisconsin v. Cody A. Kiefert (L.C. #2017CF51)

Before Neubauer, C.J., Gundrum and Davis, 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).

Cody A. Kiefert appeals from a judgment convicting him of second-degree sexual assault of a child as a repeater and from a circuit court order denying his request for sentence modification due to new factors. 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 (2019-20).¹ We affirm because Kiefert did not show the existence of new factors.

Kiefert pled guilty to second-degree sexual assault of a fourteen-year-old child. At sentencing, the circuit court considered the following: the seriousness of the offense, which Kiefert committed while on supervision for a prior offense, the very detrimental effect on the victim, the need to protect the public and vulnerable persons, and Kiefert’s character, history of adult and juvenile offenses and multiple revocations from probation and extended supervision. Of specific concern to Kiefert postconviction was the following remark of the circuit court:

And there is a link between fire setting and sexual assaults, and people like that share some developmental risk factors. Both of those activities evidence a tendency towards violence, a disregard for social norms, as well as evidence of self-gratification over any regard for others, and that speaks of a dangerous person, someone that is dangerous in the community.

The circuit court imposed a nine-year sentence (four years of initial confinement and five years of extended supervision).

Postconviction, Kiefert argued the existence of new factors requiring sentence modification because the circuit court (1) erroneously based its sentencing rationale on its view that Kiefert was a “dangerous person” based upon an unsupported “link between fire setting and sexual assaults” and, in so doing, (2) erroneously ascribed to Kiefert a prior conviction or convictions for sexual assault² and certain characteristics typical of Antisocial Personality Disorder, with which Kiefert had not been diagnosed.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² At sentencing, the circuit court stated that Kiefert had “committed a very serious sex offense, which is not his first.”

The circuit court denied Kiefert’s sentence modification motion without a hearing. The court found that Kiefert’s characterization of the above sentencing remark ignored the bulk of the court’s sentencing remarks and the full spectrum of the sentencing rationale. After reiterating the sentencing considerations described above, the court stated that the specific remark challenged by Kiefert was a reference to Kiefert’s character and dangerousness. The court stated that it arrived at its dangerousness assessment after considering Kiefert’s prior history and his “tendency towards violence, a disregard for social norms” and “evidence of self-gratification over any regard for others.” The court stated that it did not rely upon any type of diagnosis when it fashioned the sentence. Rather, the court “simply identified characteristics which are shared by those involved in arson and those who commit sexual assault,” conduct in which Kiefert had previously engaged as discussed below. In the absence of a new factor, the court denied Kiefert’s sentence modification motion.

On appeal, Kiefert argues that he presented the circuit court with new factors. Our decision in this appeal is driven by the definition of “new factor:”

A new factor is one that was “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.” Therefore, any fact that was known to the court at the time of sentencing does not constitute a new factor.

State v. Harbor, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A new factor must be “a fact or set of facts highly relevant to the imposition of sentence.” *Id.*, ¶40. Whether a new factor exists presents a question of law we review independently. *Id.*, ¶36.

The circuit court rejected Kiefert’s new factor claim, as do we. One aspect of Kiefert’s new factor claim relates to the circuit court’s determination that Kiefert is dangerous because he

has a history of violent behavior. We do not agree that the court overlooked, misstated, or misunderstood Kiefert's history of violent behavior. The court's references to fire setting and more than one sexual assault were to incidents described in the presentence investigation report: a prior charge of being party to the crime of negligent handling of burning material and two counts of criminal damage to property for providing matches to a friend who then set a fire in a park bathroom, Kiefert's obstruction of the view of shelter staff while a fellow shelter resident sexually assaulted a ten-year-old boy, and a juvenile referral for a first-degree sexual assault of a child which resulted in a deferred prosecution agreement. From these incidents, the court could reasonably infer that Kiefert is dangerous to the community.³ *State v. Fisher*, 2005 WI App 175, ¶¶25-26, 285 Wis. 2d 433, 702 N.W.2d 56 (a defendant's prior offense history is evidence of character and the need to protect the public); *State v. Ziegler*, 2006 WI App 49, ¶21, 289 Wis. 2d 594, 712 N.W.2d 76. At sentencing, the circuit court perceived Kiefert as dangerous based on his record. Kiefert has not shown as a new factor that he was not dangerous or that his record did not reasonably permit the circuit court to make this determination. *Harbor*, 333 Wis. 2d 53, ¶57 (new factor must be a fact not known to the circuit court at the time of sentencing).

The other aspect of Kiefert's new factor claim relates to whether the circuit court either considered an undiagnosed Antisocial Personality Disorder or did not understand Kiefert's actual diagnoses of cognitive disability and a developmental disorder characterized by social immaturity and susceptibility to manipulation by others. We reject this claim as well. First, the cognitive disability diagnosis was discussed in the presentence investigation report which was

³ The circuit court was not required to accept Kiefert's characterization of the bathroom fire as a teenage prank. At sentencing, Kiefert, to whom counsel read the presentence investigation report verbatim, did not note any errors in the report's prior history section.

before the circuit court. Second, as we held above, the court's sentencing remark is appropriately understood in the context of the court's concern about Kiefert's dangerous behavior and his failure on supervision, all of which are supported by the record or reasonably inferred from the record. *Ziegler*, 289 Wis. 2d 594, ¶21.

We conclude that Kiefert did not meet his burden to show the existence of new factors justifying sentence modification. *Harbor*, 333 Wis. 2d 53, ¶36.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of 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