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DISTRICT IV

May 13, 2021

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

2020AP1138-CR State of Wisconsin v. Logan M. Vollriede (L.C. # 2017CF508)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).

Logan Vollriede appeals a judgment convicting him of one count of first degree sexual assault of a child under the age of 13 and an order denying his postconviction motion for a

modification of his sentence under WIS. STAT. RULE 809.30(2)(h) (2019-20).[1] Based on 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. We agree with the State that Vollriede fails to show by clear and convincing evidence that there is a new factor justifying the modification of his sentence, as Vollriede concedes in part by failing to reply to at least one major point made by the State. Accordingly, we affirm the postconviction court.[2]

In 2017, Vollriede was charged with six counts of first degree sexual assault of a child under the age of 13 in violation of WIS. STAT. § 948.02(1)(e). The allegations were that he had sexual contact with the same victim on multiple occasions from 2010 to 2013, when the victim was approximately seven to ten years old. In 2019, Vollriede pleaded no contest to one count of first degree sexual assault of a child. The five remaining counts were dismissed and read in at sentencing.

At the sentencing hearing, the prosecutor recommended a ten-year sentence, consisting of five years of initial confinement and five years of extended supervision. The prosecutor based this recommendation in part on the severity of the criminal conduct as a whole, including the five read-in counts of sexual assault, as well as a sexual assault that Vollriede had committed against a second, four-year-old victim in 2010. The State had earlier sought and obtained the admission of evidence related to the 2010 offense as other-acts evidence, describing conduct that had been

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

[2] The Honorable William F. Hue ("the sentencing court") sentenced Vollriede and entered the judgment of conviction. The Honorable William V. Gruber ("the postconviction court") entered the order denying the motion for postconviction relief.

the subject of a juvenile court delinquency proceeding. The prosecutor argued that this history called for five years of initial confinement to protect the public.

Vollriede's counsel recommended five to seven years of probation. Counsel observed that, under the rules of probation for sex offenders, the Department of Corrections ("the department") would require that Vollriede undergo psychological evaluation and treatment. Counsel contended that Vollriede could expect to receive sex offender treatment much sooner if he were placed on probation than if he were incarcerated. Specifically, counsel contended that Vollriede could expect to begin treatment within "weeks [or] months" while on probation, as opposed to having to wait "years" if confined in prison, because "[n]ot every institution in Wisconsin offers" sex offender programming or treatment. The prosecutor responded to this last point in part by contending that there is a similar backlog for sex offender assessments and treatment between prisoners and those placed in the community. For this reason, the prosecutor argued, the sentencing court should consider that, if Vollriede were given a probationary disposition, "it's not a given that he'll be assessed tomorrow and be starting treatment within a short period of time simply because he's in the community."

The sentencing court imposed a ten-year prison sentence, consisting of three years of initial confinement followed by seven years of extended supervision, consecutive to any existing sentence. The court decided to set an initial confinement period shorter than that recommended by the State, explaining:

> I'm going to reduce the amount of confinement from five years to three years, because I'm in agreement that the five years would be a waiting around period for [the department] to give sex offender treatment.

> What I'm going to do is to say to [the department], you got three years; it should be done in confinement. Sex offender treatment in confinement is appropriate and you got three years to do it. If you fail to do it, then as they go into [extended supervision], they're going to have to do something there, but it would be highly disappointing to me to [miss] finally get[ting] a handle on this in some way if they don't successfully evaluate and at least start or commence the treatment in that period of time.
>
> ... To me it's a protection of … the public issue, and I take ownership of the system's failure here. We failed the victim. We failed him in our Juvenile Court response, and the legal system failed ….[3]
>
> So we've got a systemic failure, I think a perfect storm of failure, but I can't be satisfied that the public is protected as we go into the future unless and until there is finally some reckoning here and a breaking down and an evaluation and a treatment, a follow-through of all known facts and all known problems [and] to date we haven't been able to do that. So that's why the confinement prison sentence is appropriate.
>
> Again, I reduce the recommendation of the confinement portion, because [defense counsel is] exactly right, if the sentence was for five years or ten years or 12 years in confinement, all that would be doing would be not addressing the pivotal issue that I'm talking about, would be more punitive … as opposed to being public protective[,] with [what] one would hope [is] a therapeutic aspect, and so then that's why there's a reduction.

After imposing other conditions on Vollriede, the court said that Vollriede would "undergo sexual deviance or sexual offender treatment and follow-through as a condition of [extended supervision], but I'm asking the Department to do that when they take custody of him while in [a] confinement setting."

Vollriede was admitted as a new inmate in June 2019, and his release from initial confinement to extended supervision is scheduled for April 2022. There is no dispute that the

[3] The sentencing court's discussion of "systemic failure" referred to the court's view that treatment provided to Vollriede as part of the delinquency proceeding had been "done in an inaccurate context," because the juvenile court was not made aware that there were multiple victims, not just one.

department has assessed the level of Vollriede's sex offender treatment needs as falling within the "SOT-1" category. Both parties cite to the same publicly available materials issued by the department that describe SOT-1 treatment as "short-term" treatment that is "designed for persons … assessed to be a low risk to sexually reoffend." These materials also explain that the treatment consists of "at least 18 hours."[4]

In March 2020, Vollriede filed a postconviction motion for sentence modification. He alleged that he lacked access to sex offender treatment at the institution to which he had been assigned and argued that this constituted a new factor that justified the modification of his sentence. In opposing this motion, the State argued in part that the alleged unavailability of sex offender treatment was not a "new factor" because the sentencing court was aware of the possibility that Vollriede might not receive treatment before his release to extended supervision. The postconviction court denied Vollriede's motion.

On appeal, Vollriede renews his new-factor argument. He contends that the lack of available treatment means that the sentence, as he is actually serving it, "cannot, and will not, meet the [sentencing] court's expectation and desire with regard to reasons for the length of the defendant's confinement." We agree with the State that Vollriede fails to establish by clear and convincing evidence that the lack of available treatment constitutes a new factor.

We recently outlined the governing standards to address a motion for sentence modification based on a new factor:

[4] *See* DOC, OPPORTUNITIES AND OPTIONS RESOURCE GUIDE at 6 (July 2020), https://doc.wi.gov/Documents/AboutDOC/AdultInstitutions/OpportunitiesOptionsResourceGuideEnglish.pdf (last visited May 5, 2021).

> A circuit court has inherent authority to modify a defendant's criminal sentence based upon a showing by the defendant of a "new factor." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. To prevail, the defendant must show the following: (1) a "new factor" exists; and (2) the "new factor" justifies sentence modification. ***Id.***, ¶¶33, 37-38.
>
> A "new factor" 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Id.***, ¶¶40, 52 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law," which we review de novo. ***Id.***, ¶33. The determination of whether the defendant has shown that the new factor justifies sentence modification "is committed to the discretion of the circuit court, and we review such decisions for an erroneous exercise of discretion." ***Id.***, ¶34. A court need not address both aspects of the new factor inquiry if a defendant does not make a sufficient showing on either one. ***Id.***, ¶38.

State v. King, 2020 WI App 66, ¶¶77-78, 394 Wis. 2d 431, 950 N.W.2d 891, *review denied*, 2020 WI 110, 327 Wis. 2d 462, 787 N.W.2d 844. "The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence." ***State v. Samsa***, 2015 WI App 6, ¶14, 359 Wis. 2d 580, 859 N.W.2d 149.

The possibility that treatment would not be available to Vollriede during his period of initial confinement was not overlooked by the parties and was known to the sentencing court, and therefore the lack of available treatment is not a new factor. *See* ***King***, 394 Wis. 2d 431, ¶78 (citing ***Harbor***, 333 Wis. 2d 53, ¶¶40, 52). The sentencing court explained that it would be "highly disappointing" to the court if Vollriede did not receive, or at least start receiving, treatment during his period of initial confinement and multiple times the court expressed a clear preference for this, noting that the department has three years to at least start treatment during the initial confinement period. However, the court also said that it was aware of the possibility that

Vollriede might have to wait for sex offender treatment until after his period of initial confinement. Both parties acknowledged that there was a backlog of incarcerated inmates waiting to receive sex offender treatment.

Vollriede apparently attempts to distinguish between the sentencing court's general awareness of the scarcity of sex offender treatment, on the one hand, and the following more specific facts, on the other hand: that Vollriede has been assessed at the SOT-1 level, necessitating treatment that is available at a limited number of institutions, which do not include the one where he is currently assigned. But the specific fact that not every institution that Vollriede may have been assigned to would have the appropriate treatment options was squarely before the sentencing court. Vollriede's counsel told the sentencing court that "[n]ot every institution in Wisconsin offers" sex offender treatment. As for his specific categorization as SOT-1, Vollriede fails to explain why we should conclude that this is inconsistent with what the court understood to be the limited availability and possibly delayed timing of treatment.

Moreover, as the State further argues, Vollriede is not scheduled for release until April 2022 and SOT-1 treatment requires at least 18 hours of treatment, meaning that there is still time for him to begin the appropriate treatment while serving his initial confinement, as the sentencing court explained it strongly preferred. Vollriede fails to point to clear and convincing evidence supporting his argument that his sentence "cannot, and will not, meet the [sentencing] court's expectation and desire" that Vollriede begin to receive treatment while incarcerated. Vollriede makes two counterarguments on this point, which we now address.

First, Vollriede contends, and the State does not dispute, that he is currently housed at an institution that does not offer SOT-1 programming and that the department, not Vollriede,

controls whether and when he could be assigned to an institution offering SOT-1 programming. But Vollriede does not begin to address whether the department might or might not transfer him to an institution with the appropriate treatment programming in the time remaining on Vollriede's initial confinement.

Second, Vollriede notes that he drew the attention of the postconviction court to a publicly available department report reflecting that, as of June 10, 2019, there were 228 inmates on a waiting list, and he interprets the report to have shown that only one department institution was offering SOT-1 treatment as of June 2019.[5] Assuming without deciding that Vollriede accurately interprets the department report that he presented to the postconviction court, he did not sufficiently develop the point by merely pointing to a long waiting list and limited institutional availability as of the time of the postconviction court's ruling. Without more information, the postconviction court had no solid basis to determine that the length of this waiting list necessarily meant, as Vollriede asserts, that he would not receive any treatment before his release to extended supervision. This is particularly true given the short-term nature of SOT-1 treatment, which could be accomplished in a relatively short period before his release to extended supervision.

Further, the State makes several arguments in its brief to which Vollriede offers no response. He declined to file a reply brief. Notably, the State argues that "Wisconsin courts have routinely held that the unavailability of prison programs is not a new factor warranting

[5] *See* 2019 COUNCIL ON OFFENDER REENTRY ANN. REP. at 11, https://doc.wi.gov/Documents/AboutDOC/Reentry/2019%20Annual%20Report.pdf (last visited May 5, 2021);; WIS. STAT. §§ 15.145(5), 301.095(11) (Creating the council on offender reentry as part of the Department of Corrections and stating that it shall submit an annual report to the governor and legislature).

sentence modification." In support, the State cites ***State v. Krueger***, 119 Wis. 2d 327, 333-35, 351 N.W.2d 738 (Ct. App. 1984), in which we determined that the defendant's "need for specialized treatment [that] cannot be met in his current correctional setting" was not a new factor, despite the sentencing court's expressed hope that the defendant would be placed in an institution that would have appropriate treatment options. This was because the sentencing court was aware that the defendant's "correctional setting could be inadequate for his rehabilitative needs." ***Id.*** We deem Vollriede's failure to address this argument as conceding that the reasoning in ***Krueger*** applies here. *See* ***State v. Drew***, 2007 WI App 213, ¶20, 305 Wis. 2d 641, 740 N.W.2d 404.[6]

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[6] Vollriede argues that the postconviction court erred by applying an incorrect standard of review. Specifically, Vollriede contends that it was error for the court to consider whether the purported new factor of the lack of available sex offender treatment frustrated the sentencing objectives of the sentencing court. We need not address this argument because we conclude that Vollriede fails to establish the existence of a new factor. *See* ***State v. Samsa***, 2015 WI App 6, ¶14, 359 Wis. 2d 580, 859 N.W.2d 149 ("'If a court determines that the facts do not constitute a new factor as a matter of law, it need go no further in its analysis.'" (alterations omitted) (quoted source omitted)). We further note that the State argues that a postconviction court is not precluded from considering whether a new factor frustrates the purpose of a sentence. *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451 ("In determining whether to exercise its discretion to modify a sentence on the basis of a new factor, the circuit court may, but is not required to, consider whether the new factor frustrates the purpose of the original sentence." (citing ***State v. Harbor***, 2011 WI 28, ¶¶48-52, 333 Wis. 2d 53, 797 N.W.2d 828)). Vollriede concedes this point by failing to reply to it. *See* ***State v. Drew***, 2007 WI App 213, ¶20, 305 Wis. 2d 641, 740 N.W.2d 404.

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

Sheila T. Reiff
Clerk of Court of Appeals