

allowed him to stay with her because he “was at my house with all of his stuff” and it “was apparent that he needed somewhere to stay at the time.” Prior to the attack, Smith “went out” and did not return until “the middle of the night after bar close at some point.” The mother woke up to find Smith lying on top of her yelling loudly and choking her to the point where she could not breathe. She tried to call 911, but Smith took the phone and shattered it against the wall. Smith ripped the cover off an air conditioner, threatened to drop the air conditioner on her head, and punched a hole in the wall, all while the child was sleeping in the living room. Smith attempted to choke her a second time. When the mother eventually went into the living room, Smith physically attacked her again. Smith threatened to “smash the TV over [her] head,” and began choking her again. The child jumped on Smith’s back and began hitting Smith to protect his mother, crying “don’t hurt my mom.” Smith picked up the child and threw him “a pretty far distance” across the room into the back wall.

Smith fled before police arrived because he was “on probation” and afraid of police contact. A warrant was issued for his arrest, and Smith was arrested five months later following a traffic stop. Smith was a passenger in the vehicle, he had a hood over his head, and he tried to prevent the police officer from getting a look at him. Smith provided a false name but was ultimately identified when the driver said Smith’s name.

Following a jury trial, Smith was convicted of physical abuse of a child, criminal damage to property, and disorderly conduct, all as repeaters. The jury failed to reach a verdict on a strangulation and suffocation charge, and Smith was found not guilty of intimidation of a victim.

Prior to sentencing, the State submitted a recent probation revocation summary in lieu of a presentence investigation. The nine-page revocation summary included the Wisconsin

Department of Corrections (DOC) agent’s assessment of Smith’s “numerous” rehabilitative needs. At sentencing, the defense attorney informed the circuit court that he had met with Smith “yesterday, but that [meeting] was prior to receiving the Revocation Summary from the agent,” so the court granted a recess to permit Smith and his counsel an opportunity to review the revocation summary together. After reconvening, the court discussed the revocation summary, Smith’s long and violent criminal history involving domestic issues—which now included injuring and traumatizing a young child—and sentenced Smith on the child abuse charge to seven years’ initial confinement and three years’ extended supervision. On the criminal damage to property and disorderly conduct charges, the court imposed eighteen months’ initial confinement and six months’ extended supervision on each, with all charges running concurrent to each other and to any other sentences Smith was serving.

Smith later filed a motion for reconsideration, arguing that his sentence on the child abuse charge should be modified based on a new factor because the circuit court purportedly overlooked Smith’s rehabilitative needs at sentencing. The court denied the motion, stating that it was “profoundly aware of [Smith’s] rehabilitative needs” and that Smith had therefore not established a new factor.

We conclude Smith has failed in his burden to prove by clear and convincing evidence the existence of a new factor because the circuit court was aware of Smith’s rehabilitative needs at the time it sentenced him. *See State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A set of facts cannot be considered a new factor providing a basis for sentence modification unless it was not known to the trial judge or was unknowingly overlooked at the time of the original sentencing. *State v. Grindemann*, 2002 WI App 106, ¶22, 255 Wis. 2d 632, 648 N.W.2d 507.

Our review of the sentencing transcript demonstrates that the circuit court thoroughly read and understood the revocation summary, which included background information on Smith, as well as the DOC agent's assessment of Smith's rehabilitative needs. The agent's assessment stated:

Mr. Smith has shown time and time again that he is unwilling to follow the rules set forth by the Department of Corrections and the law He has continuously demonstrated his unwillingness and inability to comply with community supervision. ... The Department of Corrections does not deny that Mr. Smith is in need of AODA, Cognitive based, and Domestic Violence programming to address his identified needs of Substance Abuse and Criminal Thinking. Mr. Smith was referred for community treatment and failed to follow with this in addition to above violations. Therefore, treatment in the community is no longer an option and treatment in a confined setting is appropriate. ... Allowing Mr. Smith to continue to live in the community presents a serious danger to his victims, as well as other individuals.

The DOC agent further stated that Smith's "adjustment to supervision has been extremely poor." The revocation summary outlined numerous violations of Smith's rules of supervision. These included the acts involving the child victim and his mother in the present case; consumption and possession of cocaine; providing false information to law enforcement; and unknown whereabouts and activities. The revocation summary detailed that Smith "actively used illegal drugs on a regular basis and admitted he would not stop using." Smith also admitted to the agent that he used "THC on a daily basis." The revocation summary further noted:

Mr. Smith has numerous criminogenic needs that do impact his decision making [S]ocialization, criminal thinking, and vocational/educational as highly probable areas, and financial, social adjustment, criminal associates/peers, anger, residential instability, cognitive behavioral, and substance abuse, as probable areas of his criminogenic needs. The driver that was selected to work on while on supervision was criminal thinking and substance abuse however, with his current violation, [it] does not appear he has internalized or applied what he has learned.

The revocation summary also detailed Smith's prior revocations. Among numerous other things, the agent had been advised of Smith making telephone calls while institutionalized threatening to hurt or kill a woman "with who[m] he has children in common"; threatening another woman by stating he was going to break her neck; threatening jail officials; and striking another woman as many as twenty times in the face and choking her with what appeared to be a shoe lace. In addition, the revocation summary listed Smith's prior arrests and convictions.

The circuit court began the sentencing hearing by referencing the revocation summary. The court ensured that Smith and his defense counsel had the opportunity to review it together and provide "all of the corrections or additions" they believed appropriate. After providing the adjournment, the court reviewed the revocation summary with the parties, clarifying information and crossing out information Smith disputed. At one point, Smith's defense counsel told the court that Smith took issue with allegations in the summary regarding a different incident than the present case, and the court interjected to say, "I did not highlight any of that anyway." The court then referenced several pieces of information from the revocation summary in its sentencing decision.

Smith does not claim that the circuit court "failed to read the [revocation summary] at all, for it is clear the court reviewed the document." Nevertheless, Smith argues that despite having reviewed the revocation summary, the court "overlooked the information it provided about Smith's rehabilitative needs." Smith's argument, however, primarily depends upon the following passage from the sentencing transcript:

I'm not completely sure what the rehabilitative needs of Mr. Smith are. The—I'm not sure if he uses illegal drugs. He has been involved in the past. But I don't—It doesn't strike me as this was really a drug-related issue. I don't think he gets it with regard to

domestic relations. I don't think he gets it with regard to following general rules such as bond jumping or—or walk away from situations that are violent, keep them from escalating. I don't think he gets that. I'm not sure if anybody offers a rehabilitation program for that.

Smith's analysis of a single paragraph of the sentence transcript in isolation is unconvincing. Contrary to Smith's perception, the above passage does not demonstrate the circuit court's ignorance of Smith's rehabilitative needs. Rather, the court was expressing its belief based upon the information contained in the revocation summary that Smith had severe rehabilitative needs that the correctional system had not been able to adequately address.

The circuit court's comments immediately before and after the above passage bolster the conclusion that the court was emphasizing the extent of Smith's deep-seated behavioral issues and rehabilitative needs. Immediately preceding the passage cited by Smith, the court discussed Smith's numerous convictions and probation revocations, his "arrogant" character, his long history of escalating domestic violence, and the trauma inflicted in the present case. The court then immediately followed the above passage by stating: "There is a need to protect the community from this type of behavior and escalation and the perpetual—the—the multiple, multiple, multiple convictions, criminal record of Mr. Smith. He needs a break. We need a break from him." This context shows the court was "not completely sure" what type of rehabilitation Smith needed—not because it overlooked the information about Smith's rehabilitative needs—but because the court was emphasizing the difficulty of rehabilitating Smith, and that the community needed to be protected from his escalating violent behavior.

We find further support in the circuit court's statement, "I'm not sure if anybody offers a rehabilitation program for [Smith's issues]," which also illuminates the court's doubt in Smith's prospects of rehabilitation. Having read in the revocation summary that Smith had been revoked

multiple times from probation and involved in numerous crimes and instances of domestic violence, the court apparently did not believe that any programming could successfully rehabilitate Smith. This opinion is buttressed by the DOC agent’s discussion of Smith’s rehabilitative needs, wherein the agent noted that previous substance abuse and criminal thinking programming had been unsuccessful in changing Smith’s criminal behavior.

The fact that the circuit court was “not completely sure” of Smith’s rehabilitative needs is unsurprising. The DOC itself was plainly unsure how to rehabilitate Smith, given his numerous revocations and multiple acts of violence despite participating in programming. The full context of the sentencing transcript reveals the court was aware of the DOC assessment of Smith’s rehabilitative needs. Because we conclude Smith has failed to prove the existence of a new factor by clear and convincing evidence, we need go no further in our analysis to address whether the information allegedly overlooked was highly relevant to the court’s sentencing decision. See *Harbor*, 333 Wis. 2d 53, ¶38.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. See WIS. STAT. RULE 809.21 (2019-20).

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

Sheila T. Reiff
Clerk of Court of Appeals