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DISTRICT IV

April 27, 2023

To:

Hon. Chris Taylor
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Hector Salim Al-Homsi
Electronic Notice

Jeremy Newman
Electronic Notice

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

2022AP682-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2019CM972)
2022AP683-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2019CM1040)
2022AP684-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2019CM1070)
2022AP685-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2019CM1084)
2022AP686-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2020CM47)
2022AP687-CR	State of Wisconsin v. Kelly L. Dugan (L.C. # 2020CM2198)

Before Nashold, J.[1]

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).

Kelly Dugan appeals amended judgments of conviction and a circuit court order denying her postconviction motion. She argues that the circuit court erred in denying her motion for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted. These appeals were consolidated for briefing and disposition by a June 20, 2022 order, pursuant to WIS. STAT. RULE 809.10(3).

sentence modification based on a new factor. Upon review of the briefs and record, I conclude that this case is appropriate for summary disposition. I affirm.

Dugan was convicted of five misdemeanor bail-jumping counts in five separate cases and one count of disorderly conduct with domestic abuse assessments in a sixth case. In the bail-jumping cases, Dugan violated the terms of her bond by consuming alcohol, committing a crime, and contacting her former roommate, A.B.[2] In one of the bail-jumping cases, Dugan drove through a stop sign and, according to the criminal complaint, had an "open case of beer" behind the driver's seat and a prohibited alcohol concentration of more than .02. In the disorderly conduct case, Dugan, after drinking excessively, slapped A.B. and grabbed his genitals.

At the sentencing hearing, as a global resolution of all six cases, the State recommended withholding adjudication and placing Dugan on eighteen months of probation. If Dugan rejected probation, the State alternatively recommended one month of jail on each count, to run consecutively, for a total of six months in jail. Dugan rejected probation, arguing for time served and a $100 fine. In the alternative, if the circuit court determined that additional jail time was warranted, Dugan asked that it be served through the community service program rather than jail. In support of this recommendation, counsel relied on Dugan's voluntary mental health and Alcohol and Other Drug Abuse (AODA) treatment, which had begun approximately four months prior to sentencing, and the nature of her offenses.

[2] To protect the identity of the victim, we refer to him as "A.B." *See* WIS. STAT. RULE 809.86.

The circuit court sentenced Dugan to a cumulative total of ninety days in jail with Huber privileges. The court stated that had Dugan not rejected probation, the court would have ordered it because Dugan's sobriety had "not been that long" and that Dugan was "in the early stages of sobriety." The court explained that with probation off the table, confinement was "the second best option" "because at least I know when you are in jail, you are not drinking. You have a longer period of sobriety there." The court also stated it was going to impose jail time because Dugan's "conduct was serious" and that the sentence Dugan requested would "depreciate what [Dugan had] done." The court disagreed with defense counsel's statement that Dugan did not pose a danger to the community, stating that some of her conduct was "alarming" and "absolutely" dangerous to the public. The court stated:

> You have multiple cases, certainly driven by your -- by alcoholism, by addiction -- no doubt about that. But I think you need more. I think there needs to be a bigger penalty than just a fine to underscore for you how serious this conduct is. I take it very seriously -- running through a stop sign. I think you could have really hurt somebody. You could have killed somebody doing that.

Following sentencing, the circuit court granted Dugan's motion to release her on a signature bond and stay her sentences pending postconviction proceedings. During the pendency of postconviction proceedings, Dugan underwent treatment for substance abuse and mental health issues. She also filed a postconviction motion requesting sentence modification based on a "new factor," namely, her post-sentencing sobriety and treatment. In support of her motion, Dugan filed four letters: two from treatment providers at two separate mental health and substance abuse programs, one from her adult son, and another from her pretrial services social worker. The State opposed the motion.

The circuit court issued a written order denying Dugan's motion. The court set forth three reasons for its denial. First, the court disagreed with Dugan's "suggest[ion]" that the court "only imposed the sentence [it] did to guarantee Ms. Dugan's sobriety." The court explained that it considered the three main sentencing factors: the defendant's character and rehabilitation, the severity of the crime, and the need to protect the public. The court further stated:

> I rejected [Dugan's] sentencing recommendation because I believed that given the serious and repeated nature of her crimes, which factually included running through a stop sign while consuming alcohol in violation of bond conditions, grabbing her roommate's groin, resisting police officers, behaving aggressively and belligerently, and repeatedly and excessively consuming alcohol, necessitated a more severe penalty. I specifically found that … Dugan's alcohol consumption and criminal behavior were concerning and a threat to the public.

(Citations to the record omitted.)

Second, the circuit court concluded that Dugan's continued success with sobriety and treatment did not meet the definition of a new factor, which, as noted by the court, is information "highly relevant to the imposition of sentence, but not known to the [circuit court] 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." *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The court stated that it was aware at sentencing that Dugan "was attempting to be sober and voluntarily pursuing counseling, as she and her counsel set forth in detail at sentencing." The court stated, "The mere passage of time since her sentence and the continuation of her efforts, though commendable, does not constitute a new factor."

Third, the circuit court, citing ***State v. McDermott***, 2012 WI App 14, ¶15, 339 Wis. 2d 316, 810 N.W.2d 237, stated that Wisconsin courts do not consider a defendant's post-sentencing rehabilitation efforts to be a new factor for purposes of sentence modification.

Because I conclude that the circuit court's third ground is dispositive and supports the court's decision, I do not address the court's other grounds for denying Dugan's postconviction motion and I address Dugan's arguments only with respect to this third ground. *See* ***Barrows v. American Fam. Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

As stated, in support of its conclusion, the circuit court relied on ***McDermott***. In ***McDermott***, this court rejected the defendant's argument that his post-sentencing rehabilitation while incarcerated is a new factor warranting sentence modification. ***McDermott***, 339 Wis. 2d 316, ¶15. We noted that it is "established law in Wisconsin that 'an inmate's progress or rehabilitation while incarcerated' is not a "new factor.'" ***Id.*** (citing ***State v. Crochiere***, 2004 WI 78, ¶15, 273 Wis. 2d 57, 681 N.W.2d 524).

Dugan argues that ***McDermott*** and ***Crochiere*** are distinguishable because, unlike this case, they involved the defendants' rehabilitative efforts while *incarcerated*. I reject this argument because, as the State points out, our precedent makes clear that the same conclusion applies to situations in which the defendant is *not* incarcerated. *See* ***State v. Kluck***, 210 Wis. 2d 1, 563 N.W.2d 468 (1997); ***State v. Kaster***, 148 Wis. 2d 789, 436 N.W.2d 891 (Ct. App. 1989).

In ***Kluck***, the defendant, like Dugan, was granted bail pending appeal of his county jail sentence. ***Kluck***, 210 Wis. 2d at 3, 5. The defendant argued that he had established a new factor because he began full-time work, attended court, and stopped drinking alcohol. ***Id.*** at 6. Our supreme court framed the issue on appeal in a manner that is nearly identical to the issue in this case: "whether a defendant's four[-]month period of sobriety while out on bail pending appeal of a misdemeanor conviction is a 'new factor' authorizing the circuit court to modify the defendant's county jail sentence." ***Id.*** at 3, *see also* ***id.*** at 6, 11. Our supreme court rejected the defendant's argument that his purported rehabilitation in the community is a new factor, explaining: "While encouraging rehabilitation is laudable, it is not the purpose of sentence modification. The purpose of sentence modification is to correct 'unjust sentences.'" ***Id.*** at 8 (citation omitted); *see also* ***id.*** at 3.

In ***Kaster***, the defendant, like Dugan, was released on bail pending appeal. ***Kaster***, 148 Wis. 2d at 802. And like Dugan, the defendant in ***Kaster*** argued that his postconviction conduct while out in the community established a new factor. ***Id.*** at 802-03. This court rejected the defendant's argument, unequivocally stating that "[p]ost-sentence conduct is not a new factor for sentence modification purposes." ***Id.*** at 804. We further rejected any distinction between rehabilitative efforts inside and outside of prison, concluding, "We reject the argument that individuals released from prison pending appeal should have their sentence modified for good conduct outside of the prison. *We see no distinction between rehabilitation in and outside prison*." ***Id.*** (emphasis added).

In her reply, Dugan seeks to distinguish ***Kluck*** and ***Kaster***, arguing that, unlike in the instant case, in those cases it was not established that the defendants' rehabilitative efforts were "highly relevant" to sentencing. *See* ***Rosado***, 70 Wis. 2d at 288. Dugan misconstrues the rationale of ***Kluck*** and ***Kaster***. In neither case did the court rely on an analysis as to whether the defendant's rehabilitation efforts were "highly relevant" to sentencing; instead, the courts applied well-established precedent concluding that post-sentencing rehabilitation, as a matter of law, is not a new factor. *See e.g.*, ***Kluck***, 210 Wis. 2d at 7 ("[C]ourts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentencing modification."). Moreover, Dugan cites no authority to support her argument that post-sentencing rehabilitation may constitute a new factor. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). For all of the reasons stated, I reject Dugan's arguments and affirm the circuit court's order denying her postconviction motion.

Therefore,

IT IS ORDERED that the circuit court's amended judgments and order are summarily affirmed. *See* 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