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DISTRICT I

June 20, 2023

To:

Hon. Brittany C. Grayson
Circuit Court Judge
Electronic Notice

Hon. David C. Swanson
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Sonya Bice
Electronic Notice

Brian Patrick Mullins
Electronic Notice

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

2021AP1625-CR State of Wisconsin v. Christopher D. Foster (L.C. # 2018CF3416)

Before Brash, C.J., Dugan and White, 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).

Christopher D. Foster appeals from a judgment of conviction and from an order denying his postconviction motion for sentence modification. 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 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Arrested following a controlled heroin buy, Foster pled guilty to one count of possession with intent to deliver between ten and fifty grams of heroin. On July 15, 2019, the sentencing court imposed seven years of initial confinement and five years of extended supervision.[2] The sentencing court further stated that Foster was eligible for the challenge incarceration and substance abuse programs, but only after serving four years of initial confinement.

In August 2021, Foster moved for postconviction relief, seeking sentence modification based on an alleged new factor. When Foster was sentenced, the Department of Corrections' policy was that inmates had to be within three years of their mandatory release date before the Department would consider placing them in the substance abuse program (SAP). By the time of Foster's postconviction motion, the Department had modified its policy so that it would consider placing individuals in early release programs if they were within four years of their mandatory release date.[3] Thus, Foster argued, "the … revised policy allowing an inmate to enroll in [SAP] four years before release, instead of three, is a new factor that justifies modifying the sentence." The circuit court denied the postconviction motion without a hearing, concluding that the policy change was not a new factor and that, even if it were, it did not justify sentence modification.[4] Foster appeals.

[2] The Honorable David C. Swanson accepted Foster's plea and imposed sentence, and will be referred to as the sentencing court.

[3] While a sentencing court, as part of the exercise of sentencing discretion, must determine whether a person being sentenced is eligible or ineligible to participate in either program, *see* WIS. STAT. § 973.01(3g)-(3m), final placement in the programs is left to the Department of Corrections, *see* ***State v. Schladweiler***, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114 , *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

[4] The Honorable Brittany C. Grayson denied the postconviction motion and will be referred to as the circuit court.

A new factor is a fact or a set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of the 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden of proving a new factor by clear and convincing evidence. *See* ***id.***, ¶36. Whether the facts presented by the defendant constitute a new factor is a question of law that this court reviews *de novo*. ***Id.***, ¶33. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether sentence modification is warranted. ***Id.***, ¶37

The State does not dispute that the Department revised its policy, and the revised eligibility policy obviously was not in existence at the time Foster was sentenced. However, to be a new factor, the alleged new information must also be highly relevant to the imposition of sentence. In his postconviction motion, Foster argued that his eligibility date was "highly relevant to his sentence because the Court ordered that he serve at least four years of his seven-year sentence of initial confinement before he enrolled in [SAP] which suggests that the Court based its eligibility date on the DOC's policy at the time that an inmate was not eligible until he was within 36 months of release"; thus, the "revised eligibility date … justifies modifying Mr. Foster's sentence given his postconviction rehabilitation." The circuit court rejected this argument, noting that "[n]othing in the sentencing transcript supports that conclusion." Rather, the sentencing court "stated that the DOC would make its own determination whether and when the defendant would be placed in programming, which suggests that his eligibility date was *not*

highly relevant" to the sentencing decision. Thus, the circuit court concluded, the policy change was not a new factor.

We agree with the circuit court that Foster has not shown the Department's policy was highly relevant to his sentence. First, to be entitled to a hearing on a postconviction motion, a defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Despite having the burden to demonstrate a new factor by clear and convincing evidence, Foster points us to nothing in the record that would indicate the sentencing court even knew of, much less considered or based its eligibility decision on, the Department's internal eligibility policies. Indeed, there is nothing to suggest that the parallel between the sentencing court's determination of Foster's eligibility date and the Department's policy is anything more than coincidence.[5]

Second, in his appellant's brief, Foster argues that his eligibility date "is highly relevant to his sentence because the circuit court considered drug treatment an essential component of its sentence," as evidenced by its comment that "[i]t's obviously critically important for [Foster] to handle [his] incarceration time appropriately, possibly get into one of those programs and complete it." In reviewing the sufficiency of the pleadings, which is a question of law, *see* ***id.***, we review "only the allegations contained in the four corners of [the] postconviction motion, and not any additional allegations" within the brief, *see* ***id.***, ¶27. Foster's motion makes no mention of this particular sentencing comment outside of the procedural history section; there is no

[5] It is equally plausible that the sentencing court believed Foster should serve at least half of his incarceration time before becoming eligible for either early release program, which is why it opted to have Foster serve at least four years rather than three years before eligibility.

argument developed around its significance. Even overlooking that omission, Foster's appellate brief on this point is fatally conclusory, as it fails to explain how a single sentence reflects the significance of Department policy to the sentencing court. Accordingly, we are not persuaded that the change in Department policy constitutes a new factor.

The circuit court also noted that even if the revised Department policy were a new factor, it did not justify sentencing modification. It reflected on the sentencing court's commentary, stating:

> In this instance, the seriousness of the defendant's conduct cannot be overstated. The defendant was convicted of dealing a large amount of heroin, which the [sentencing] court observed was "just an incredibly dangerous drug. It is the most dangerous drug we've seen on the streets right now, due to the heroin itself, but then also due to other substances which are being mixed with it here." The court commented on the "incredibly destructive effect on the community" in terms of overdose deaths, the toll on surviving family members, and the gun violence that often accompanies the drug trade. Crimes of this nature are extremely serious and have repercussion for the entire community.
>
> The defendant's case was aggravated by his record and his willingness to reoffend, regardless of the risks to himself or the community. [The sentencing court] recognized the need to protect the public was "a big issue here" because of the large amount of heroin the defendant was trafficking. Despite these factors, the court imposed less time than the State recommended and qualified the defendant for an early release by making him eligible for earned release programming after four years. Given the nature of the defendant's conduct and rehabilitative needs, as well as the specific sentencing factors … considered in this case, [this] court finds that a modification of the defendant's programming eligibility based upon the change in DOC policy is neither warranted nor in the public interest.

Foster counters that there is no evidence that he "was responsible for any overdose deaths or that he possessed a firearm" so the circuit court "erroneously exercised its discretion by embellishing the seriousness of the offense and the public's need for protection when it ascribed

to Mr. Foster the more harmful effects of selling heroin without evidence that those harms occurred." However, the circuit court did not independently attribute those effects to Foster; the sentencing court had already done that. Further, the sentencing court acknowledged there was no evidence any overdose death or firearm in this case, but, because those effects often are associated with heroin trafficking, community protection—which the sentencing court identified as its primary objective—required the court to take steps to limit Foster's opportunity for further trafficking. Foster has not challenged the sentencing court's original exercise of discretion, and the circuit court did not erroneously exercise its discretion in concluding sentence modification was not be warranted.[6]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[6] Foster also argued that the Department's "revised eligibility date … justifies modifying Mr. Foster's sentence given his postconviction rehabilitation." However, postconviction rehabilitation is not a new factor. *See* ***State v. McDermott***, 2012 WI App 14, ¶15, 339 Wis. 2d 316, 810 N.W.2d 237. In his reply brief, Foster counters that he "does not argue that his post-sentencing rehabilitation is a new factor, but that his efforts to rehabilitate himself are relevant to the whether the DOC's revised eligibility criteria justifying modifying its sentence." He reasons his rehabilitate efforts are relevant in deciding whether to grant modification because they go to his character, which the circuit court overlooked by giving too much weight to the seriousness of the offense, and because character is a consideration when setting program eligibility in the first place.

This argument assumes that the Department's policy change is a new factor; as explained herein, it is not. In any event, Foster does not adequately explain how his post-sentencing rehabilitative efforts are relevant to the new factor analysis when they were not something available for consideration at the time of the original sentencing.

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

Samuel A. Christensen
Clerk of Court of Appeals