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DISTRICT II

June 21, 2023

To:

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Circuit Court Judge
Electronic Notice

Tristan Breedlove
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Jacob J. Wittwer
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1348-CR

State of Wisconsin v. Earl D. Chapman (L.C. #2018CF94)

Before Neubauer, Grogan and Lazar, 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).

Earl D. Chapman appeals from an order denying his motion for sentence modification. He contends that the circuit court erred in denying his new factor claims. 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 We reverse and remand for further proceedings consistent with this opinion.

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

In 2016, Chapman went on what the circuit court described as a crime “spree,” committing a number of crimes in several different jurisdictions (i.e., federal and multiple Wisconsin counties). The instant appeal arises from Kenosha County case No. 2018CF94. However, other cases are relevant to Chapman’s argument on appeal. Thus, we provide a brief overview of the cases in the order that Chapman was sentenced.

Eastern District of Missouri case No. 2016CF440-RLW

In Chapman’s federal case, he pled guilty to conspiracy to commit offenses against the United States, fraudulent use of access devices, and two counts of aggravated identity theft. The district court imposed an aggregate sentence of five years and three months in federal prison and three years of supervised release. It ordered the sentence to run consecutive to any sentences that may be imposed in Chapman’s Wisconsin state cases.²

Racine County cases Nos. 2016CF737 and 2016CF998

In Chapman’s Racine County cases, he pled guilty to theft by false representation, attempted theft by false representation, and unauthorized use of an individual’s personal identifying information or documents. The circuit court ordered probation on the first count with an imposed and stayed sentence. On the remaining counts, it imposed an aggregate sentence of

² Although Chapman was sentenced first in his federal case, he was always going to serve his Wisconsin sentences first because he was in state custody before he was in federal custody. See *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005) (the sovereign which first arrested the offender has primary jurisdiction over him and if a state has primary jurisdiction it remains until the state authorities relinquish the prisoner on satisfaction of the state sentence; it does not relinquish the prisoner simply upon being produced to federal court). United States district courts are permitted to order a federal sentence to run consecutively to an anticipated state sentence. *Setser v. United States*, 566 U.S. 231, 244-45 (2012).

five years of initial confinement and three years of extended supervision. The court ordered the sentence to run concurrent to the previously imposed federal sentence.

Waukesha County case No. 2016CF652

In Chapman's Waukesha County case, he pled guilty to theft by false representation. The circuit court imposed a sentence of three years and four months of initial confinement and five years of extended supervision. The court ordered the sentence to run concurrent to Chapman's other sentences.

Kenosha County case No. 2018CF94

In the case underlying this appeal, Chapman pled guilty to unauthorized use of an individual's personal identifying information or documents and forgery. The circuit court imposed a sentence of two years and six months of initial confinement and three years of extended supervision on the first count. On the second count, it imposed a sentence of one year and three months of initial confinement and three years of extended supervision. The court ordered the first sentence to run concurrent to Chapman's other sentences and the second sentence to run consecutive.

Motion for Sentence Modification in Racine County Cases

In 2019, Chapman filed a motion for sentence modification in his Racine County cases. He asked that his sentence be reduced to costs and restitution in light of the fact that federal authorities were treating his federal sentence as consecutive to his state sentences, which was contrary to the circuit court's understanding at sentencing. Because this treatment resulted in a longer period of incarceration than the circuit court intended, the court granted the requested

relief. By then, Chapman had already served over one year of confinement in his Racine County cases.

Motion for Sentence Modification in Kenosha County Case

In 2021, Chapman filed a similar motion for sentence modification in his Kenosha County case. Again, he asked that his sentences be reduced to costs and restitution. Chapman cited two new factors in favor of his argument: (1) that federal authorities were treating his federal sentence as consecutive to his state sentences, which was contrary to the circuit court's understanding at sentencing; and (2) that he had unnecessarily served over one year of confinement in his Racine County cases. After a hearing on the matter, the circuit court denied Chapman's motion. This appeal follows.

Discussion

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶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 ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See Harbor*,

333 Wis. 2d 53, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court, and we review such decisions for an erroneous exercise of discretion. *Id.*

Here, the circuit court rightly acknowledged that Chapman had demonstrated the existence of new factors. However, the court was not persuaded that the new factors warranted sentence modification. With respect to the first new factor (i.e., federal authorities treating Chapman’s federal sentence as consecutive to his state sentences), the court downplayed its significance, observing that, “although how a sentence is served might be relevant on one hand, it’s not the sentence itself.” The court went on to explain how its original sentence was “not unduly harsh or unconscionable.” With respect to the second new factor (i.e., the unnecessarily served confinement time in the Racine County cases), the court stated that, “the sentence is what it is. It’s what I pronounced with the credit that I pronounced....”

Reviewing the circuit court’s decision, we cannot say that it properly exercised its discretion in denying Chapman’s motion. Contrary to the court’s suggestion, how a sentence is served—whether concurrent or consecutive—is directly relevant to the sentence itself and cannot be meaningfully distinguished. Moreover, the court appeared to employ an irrelevant legal standard (i.e., whether a sentence is unduly harsh or unconscionable), which undermines its analysis. See *State v. Carlson*, 2003 WI 40, ¶24, 261 Wis. 2d 97, 661 N.W.2d 51 (an exercise of discretion based on an erroneous application of the law constitutes an erroneous exercise of discretion). Accordingly, the State concedes, and we agree, that the circuit court erred in denying Chapman’s first new factor claim.

As for the second new factor claim, Chapman never asserted that he was due sentence credit in his Kenosha County case for the unnecessarily served confinement time in his Racine County cases. Rather, he was simply noting that the mistaken belief that he could serve his state and federal sentences concurrently resulted in harm beyond just the total length of his sentences. In particular, it meant that he was incarcerated for a longer period than any state court intended. Citing this unfair result, Chapman was essentially making a new factor claim based in equity. Because the circuit court did not adequately explain its reasons for rejecting such an argument, we conclude that it erred in denying this claim too. *See Finley v. Culligan*, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996) (an erroneous exercise of discretion occurs if the court fails to exercise its discretion).

For these reasons, we reverse and remand for further proceedings consistent with this opinion. On remand, the circuit court shall either grant Chapman's motion or provide a reasoned explanation for its denial using the correct legal standard.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause is remanded with directions pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals