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DISTRICT II

March 27, 2024

To:

Hon. J. Arthur Melvin III Circuit Court Judge Electronic Notice	Anna Ganz Electronic Notice
Monica Paz Clerk of Circuit Court Waukesha County Courthouse Electronic Notice	David Malkus Electronic Notice

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

2023AP1061-CR	State of Wisconsin v. Brandon A. Morgan (L.C. #2020CF1234)
2023AP1062-CR	State of Wisconsin v. Brandon A. Morgan (L.C. #2020CF1309)

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).

Brandon A. Morgan appeals from judgments of conviction and an order denying postconviction relief. He contends that the circuit court erred in denying his motion for sentence modification based on an alleged new factor that, he asserts, supports overturning the circuit court's denial of his participation in the substance abuse program described in WIS. STAT. § 302.05 (2021-22).[1] 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.

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

Morgan has failed to show the existence of a new factor highly relevant to his sentence, so we affirm the judgments and the order denying postconviction relief.

Morgan pleaded no contest to two burglary charges and one bail jumping charge, and the State moved to dismiss and read in various other charges in these consolidated cases. The circuit court ordered a presentence investigation report ("PSI"). Based on her interview of Morgan, the PSI writer noted that Morgan "rarely consumes alcohol" and "rarely" uses marijuana. Morgan reported an attempt to "overdose with pills and shooting up whatever he was given after his brother died" but stated that "beyond that he has no other history with any other substances" and "denie[d] any history or need for alcohol or drug treatment."

The circuit court imposed a global sentence that consisted of a total of five-and-one-half years of initial confinement and eight years of extended supervision. The court deemed Morgan eligible for the Challenge Incarceration Program (after serving one year), but when Morgan's counsel inquired about the Substance Abuse Program ("SAP") (by its former name, Earned Release Program or "ERP") "for potential drug issues," the court stated: "I don't know that we have an issue with drugs so I'm not going to make him eligible for Substance Abuse Programming. In the PSI he talked about he occasionally used marijuana but it doesn't sound like marijuana was the driver in any of this."

The Department of Corrections ("DOC") created an inmate classification report on Morgan after he was incarcerated. This report indicated that Morgan had reported "heav[y]" use of both alcohol and marijuana "following the passing of his brother in July 2020." It further noted that Morgan was a low priority for SAP (based on his judgment of conviction denying eligibility) and a high priority for substance use disorder programming. Morgan filed a

postconviction motion requesting that the court modify his sentence to make him eligible for SAP based on the "new factor" of this classification report, which was created after sentencing and which he asserted was highly relevant to the imposition of sentence because the court had denied SAP eligibility based on its lack of "information indicating that Mr. Morgan had a substance abuse disorder." The court denied Morgan's motion on the ground that the report was not a new factor. Morgan appeals.

It is well established that a "circuit court has the 'inherent power' to modify a previously imposed sentence after the sentence has commenced." ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). This does not mean, however, that a circuit court may change a sentence merely upon "reflection" or "second thoughts." ***State v. Wuensch***, 69 Wis. 2d 467, 474-75, 480, 230 N.W.2d 665 (1975) (citation omitted). Rather, sentence modification may only be done if a "new factor" is brought to the court's attention or if the original sentence was "unduly harsh or unconscionable." ***Grindemann***, 255 Wis. 2d 632, ¶21 (citations omitted). Morgan asserts only the former.

As explained by this court in ***State v. Vaughn***, 2012 WI App 129, ¶35, 344 Wis. 2d 764, 823 N.W.2d 543,

> 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."

(quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)); *see also* ***State v. Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828 (reaffirming ***Rosado***'s definition). A defendant bears the burden of demonstrating the existence of a new factor by clear and

convincing evidence. ***Vaughn***, 344 Wis. 2d 764, ¶35. Whether a fact or set of facts constitutes a new factor is a question of law reviewed independently by this court. ***Harbor***, 333 Wis. 2d 53, ¶33.

The DOC report is based on Morgan's self-reporting.[2] It states, for both alcohol and marijuana, that "Mr. Morgan reported using heavily following the passing of his brother in July 2020." The PSI—which is also based exclusively on Morgan's self-reporting insofar as it relates to substance abuse—states substantially the same thing: that Morgan abused substances following his brother's death, even attempting to overdose.[3] Thus, as the circuit court noted in denying Morgan's motion for postconviction relief, Morgan has not "changed his story." The only thing new here is the DOC's conclusion that the same information considered by the sentencing court, which denied eligibility for SAP, was sufficient to categorize Morgan as "high" priority for Substance Use Disorder programming.

Under ***Grindemann***, "a court's altered view of facts known to the court at sentencing, or a reweighing of their significance" does not "constitute[] a new factor for sentencing purposes." 255 Wis. 2d 632, ¶¶24-25. At most, the DOC's conclusion is an altered view of the same facts known and reviewed by the sentencing court, and thus "a classic example of the 'mere reflection'

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[2] WISCONSIN STAT. § 972.15 outlines the procedures by which a PSI is to be ordered and conducted. Once a defendant is sentenced to prison, additional assessments and evaluations are conducted. *See* WIS. ADMIN. CODE § DOC 302.01-.02 (June 2018) (granting authority to DOC to "[c]lassify every inmate based on factors related to public, staff, and inmate safety," as well to "[m]atch inmate needs to institution resources when possible"). In both cases (for the PSI and the DOC assessment and evaluation), much of the information is provided directly by the defendant.

[3] The PSI contains more information than the DOC report regarding Morgan's substance use outside of the time period surrounding his brother's death in July 2020; written in March 2021, it states that he "rarely" consumes alcohol and "rarely used" marijuana, with his last use of marijuana reportedly in July 2020.

or 'second thoughts' which cannot form the basis for a sentence reduction." ***Id.*** (quoting ***State v. Foellmi***, 57 Wis. 2d 572, 582, 205 N.W.2d 144 (1973), *overruled on other grounds by* ***Korpela v. State***, 63 Wis. 2d 697, 218 N.W.2d 368 (1974)). Indeed, when asked by the court at the hearing on Morgan's postconviction motion, Morgan's counsel could not explain what the DOC's "high" priority assessment means or what factors go into the DOC's categorization.

Morgan's argument that the sentencing court "expressly acknowledged a deficit of information in regards to substance abuse treatment needs" that was somehow filled in by the DOC report is not persuasive. At sentencing, the court said that it "[did not] know that we have an issue with drugs," explicitly reviewed Morgan's self-reported history of substance use—which, again, matches the self-reported heavy use in July 2020 reflected in the DOC report—and concluded that Morgan's reported occasional marijuana use did not necessitate SAP. It did not say that it was unaware *whether* Morgan had an issue with drugs or that Morgan's substance use history was not known.

For the foregoing reasons, Morgan has failed to show the existence of a new factor highly relevant to the imposition of sentence.

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