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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 17, 2024

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

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

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

2023AP45-CR

State of Wisconsin v. Thomas E. Lee (L.C. #2020CF1317)

Before Gundrum, P.J., 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).

Thomas E. Lee appeals from a judgment of conviction and an order denying his postconviction motion for sentence modification. He challenges the circuit court's finding of ineligibility for the substance abuse program (SAP). 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 affirm.

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

Lee was convicted following guilty pleas to delivering cocaine and maintaining a drug trafficking place—both near a school, as a repeater, and as a second or subsequent offense. On the first charge, the circuit court sentenced him to ten years of initial confinement and three years of extended supervision. On the second charge, it ordered a consecutive period of probation. The court declined to find Lee eligible for the early release program known as SAP,² citing Lee’s past failure with treatment programs and its sentencing goal of deterrence.

Lee subsequently filed a postconviction motion for sentence modification. In it, he asked the circuit court to reconsider its decision regarding SAP and find him eligible to participate. Lee argued that the details of his drug addiction—specifically, that his most recent relapse was triggered by prescription opiates after a work injury—constituted a new factor warranting such relief. After a hearing on the matter, the court denied the motion. It reiterated the need for deterrence. This appeal follows.

On appeal, Lee contends that the circuit court erroneously exercised its discretion in finding him ineligible for SAP. He also renews his claim of a new factor.

A circuit court exercises its discretion when determining a defendant’s eligibility to participate in SAP. *See State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g). We will sustain the court’s decision if it is supported by the overall sentencing rationale. *Owens*, 291 Wis. 2d 229, ¶9.

² Inmates who have “served not less than 75 percent of the term of confinement portion” of their sentence, WIS. STAT. § 302.043(1), and then successfully complete SAP can convert their remaining initial confinement time to extended supervision time. *See* WIS. STAT. § 302.05(3)(c)2.

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 (quoting *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 id.*, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See id.*, ¶¶37, 66.

Here, we are not persuaded that the circuit court erroneously exercised its discretion in finding Lee ineligible for SAP. As noted, the court's decision was based on Lee's past failure with treatment programs and its sentencing goal of deterrence. It was reasonable for the court to question the benefit of SAP given Lee's poor history with treatment programs. Likewise, it was reasonable for the court to conclude that eligibility for an early release program like SAP would undermine its sentencing goal of deterrence. On this Record, we perceive no basis to disturb the court's decision.

We are also not persuaded that Lee has demonstrated the existence of a new factor warranting sentencing modification. To begin, the details of Lee's drug addiction were not new facts to the circuit court. They were included in the presentence investigation report, which the

court said it reviewed. In any event, the court was not convinced that the facts warranted sentence modification because of the need for deterrence. At the postconviction motion hearing, the court emphasized that deterrence was “[t]he dominating fact” in Lee’s sentence. It stated that if the sentence “deters one additional person from getting involved in drug use or trafficking then it’s totally justified in [the court’s] estimation.” Again, it was reasonable for the court to view eligibility for an early release program as incompatible with its sentencing goal of deterrence. Accordingly, we are satisfied that it properly denied Lee’s motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment 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