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March 6, 2013

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

2012AP1138-CR State of Wisconsin v. James W. Johnson (L.C. #2010CF1023)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

James W. Johnson pled guilty to one count of third-degree sexual assault; three counts of second-degree sexual assault of a child were dismissed and read in for sentencing. He was sentenced to four years' initial confinement and four years' extended supervision. Postconviction, he moved for sentence modification alleging that the lack of medically necessary treatment in prison and the unavailability of sex offender treatment (SOT) until near the end of his prison sentence constitute new factors. Alternatively, he sought to withdraw his plea on the basis of ineffective assistance of counsel, a claim he abandons on appeal. The motion was

denied. Upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the judgment of conviction and the order denying his motion for postconviction relief.

A circuit court has inherent authority to modify a sentence based upon the showing of a new factor. ***State v. Ninham***, 2011 WI 33, ¶88, 333 Wis. 2d 335, 797 N.W.2d 451. A "new factor" is a fact or set of facts highly relevant to the imposition of sentence unknown to the trial judge at the time of original sentencing either because it did not then exist or it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must prove the existence of a new factor by clear and convincing evidence. ***Ninham***, 333 Wis. 2d 335, ¶89. Whether a fact or set of facts constitutes a new factor is a question of law we review de novo. *See* ***id.***, ¶90. Whether it warrants sentence modification is left to the circuit court's sound discretion. ***Id.***, ¶89. The court may consider whether the new factor "frustrates the purpose of the original sentence," ***id.***, but that consideration is not an independent requirement, ***State v. Harbor***, 2011 WI 28, ¶48, 333 Wis. 2d 53, 797 N.W.2d 828.

Johnson apparently has bilateral shoulder impingement syndrome. He had right shoulder surgery just before the postconviction motion hearing. He claims he has not received the care he needs for proper recovery of his right shoulder and that his left shoulder pain is "intense." The unnecessary pain and potential permanent disability constitute a new factor, he asserts, because it makes his punishment far more punitive than intended.

Johnson's shoulder issues are not a "new factor." The circuit court was aware from the presentence investigation report (PSI) that Johnson said he needed right shoulder surgery and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that his left also was "bad." Johnson's surgeon testified at the postconviction motion hearing that he had no reason to think there were any problems, and Johnson testified that he has received narcotics and physical therapy and that a left shoulder evaluation was scheduled. The court thus concluded that the prison was addressing Johnson's medical needs.[2] More importantly, in fashioning Johnson's sentence, the court focused on the seriousness of his offenses, especially because the assaults spanned several years and the victim was his stepdaughter.

The delayed availability of SOT likewise does not amount to a new factor. The circuit court agreed with the PSI that Johnson needs intensive SOT and that it is best conducted in prison rather than in the community, but disagreed with the PSI's recommended sentence of one to two years. Johnson suggests that the court would have ordered a lesser sentence if it knew he would not get four years' SOT. We disagree. Once a prison term is ordered, control over the care of prisoners is vested by statute in the Department of Corrections, *see* WIS. STAT. § 301.03(2), and a court may not order the DOC to provide specific treatment, *see* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981). Moreover, as noted above, the thrust of the sentencing rationale was the offense and its long-lasting impact on the victim and both the nuclear and extended family. Even if we were to accept that the possible unavailability of SOT did strike at the heart of the original sentence, Johnson has not shown that it warrants sentence modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). It would require a topsy-turvy logic to find that a sentence with a strong punitive component

[2] If Johnson believes he has a claim for inadequate medical care, he may make a claim through the administrative review process, *see* WIS. ADMIN. CODE § DOC 310.08(1), petition for the appropriate writ, *see* ***State v. Krieger***, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991), or pursue a civil rights action, *see* ***Cody v. Dane Cnty.***, 2001 WI App 60, ¶9, 242 Wis. 2d 173, 625 N.W.2d 630.

should be modified—shortened, we presume—because the DOC cannot provide the sex offender the amount of treatment the court deemed desirable.

Finally, Johnson asserts that the circuit court did not adequately consider probation as an option. Even a cursory reading of the transcript deflates this argument. The court began its comments by noting that sexual offenses against children are "grave offenses" that are "viewed with great repulsion" and "have the harshest penalties in our community next to homicide." The court reminded Johnson of the three second-degree sexual assault read-ins. After ten pages of explanation, the court concluded that, despite mitigating factors, "probation is not an option [and] not appropriate given the underlying conduct in this case." The court's discretionary sentencing decision has a patently "rational and explainable basis." *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis.2d 535, 678 N.W.2d 197 (citation omitted).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals