COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP415-CR **Cir. Ct. No. 2010CF213**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTIAN J. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER and WILLIAM F. KUSSEL, JR., Judges. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Christian Wilson appeals from a judgment of conviction for eighteen counts of possession of child pornography and an order denying his motion for post-conviction relief. He argues that the circuit court

applied the incorrect legal standard when deciding his motion for sentence modification on the basis of a new factor, and that he has established a new factor as a matter of law. We agree with Wilson and reverse.

BACKGROUND

¶2 Wilson, a young man with cognitive disabilities, was charged in 2010 with thirty-one counts of possession of child pornography, based on images that were found on his computer. He entered no contest pleas to eighteen counts; the remaining counts were dismissed and read in.

¶3 The State recommended fifteen to eighteen years' initial confinement and twenty years' extended supervision. Wilson argued for a ten-year sentence consisting of five years' initial confinement and five years' extended supervision. The court ultimately sentenced Wilson to fifty-four years' imprisonment, with a twenty-seven-year term of initial confinement. The lengthy sentence was based on the court's perception that Wilson represented a danger to the public based on two delinquency adjudications for fourth-degree sexual assault of a child. The court also emphasized that the sentence would ensure Wilson received all necessary counseling.

¶4 Wilson filed a post-conviction motion for sentence modification. In it, he alleged the existence of three new factors: (1) Wilson's sentence was grossly disproportionate to the sentences of other individuals in the region convicted of possessing child pornography; (2) Wilson's cognitive disabilities were more severe than the sentencing court realized; and (3) Wilson's risk of re-offending was low to moderate, and would be further reduced by prompt treatment.

¶5 The circuit court held a post-conviction hearing at which two witnesses testified.[1] William Mattert, an investigator for the public defender, testified that he constructed a list of thirty-three other individuals convicted of possession of child pornography in the region[2] between 2009 and 2011. Mattert explained that the most common term of confinement for those defendants was three years. Thirteen individuals received sentences between four and ten years. The four individuals with sentences longer than ten years were also sentenced for sexual assaults at the time they were sentenced for child pornography. However, all four received shorter overall sentences and shorter initial confinement terms than Wilson.

¶6 Doctor Patricia Coffey, a clinical psychologist, also testified. She evaluated Wilson in 2012 and diagnosed him with adjustment disorder. Coffey agreed with prison psychologists that Wilson is "deteriorating psychologically in prison," with symptoms including auditory hallucinations and anxiety attacks. Although Wilson denied his offenses, Coffey testified she believed treatment providers could "break through" that denial "relatively rapidly in treatment that's adapted to his abilities."

¶7 Coffey disagreed that Wilson was a high risk to the community. The actuarial instrument she used, the Static-99, scored his re-offense risk as low to moderate. Individuals with Wilson's score were arrested or convicted of additional offenses at a rate of nineteen percent over a ten-year period. Coffey

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[1] Judge William F. Kussel, Jr., presided over the post-conviction proceedings.

[2] Mattert's search included Shawano, Marathon, Waupaca, Marinette, Brown, Outagamie, Langlade, and Oconto Counties.

stated that individuals with child pornography convictions re-offend at low rates, "even with a significant number of those individuals having a hands-on history."

¶8 Coffey stated sex offender treatment would further reduce Wilson's risk of re-offending. She believed the appropriate treatment program was the Oshkosh Correctional Institute's Adapted Sex-Offender Treatment Program, which is adapted to Wilson's cognitive limitations.[3] That program takes approximately two years to complete, but may extend slightly longer depending on the offender. Coffey was not aware of any individual who took longer than three years to complete the program.

¶9 Coffey also testified that the department of corrections typically begins sex offender treatment after the individual is released from prison, meaning Wilson would not begin treatment for twenty-seven years. Coffey stated the delay would impair long-term management of his risk. She continued:

> I'm also concerned … that if there are sexual-deviance issues here, allowing them to just remain untreated in the prison system for that length of time is likely to just make those issues further entrenched and difficult to address later, so I really believe he would benefit most from treatment promptly, when he's going to remember the offending behavior best, … it's going to be easier to break through the denial the closer it is to the offense period and we stop … the potential that he's going to continue along with … deviant thought processes in prison for twenty-plus years before we start treating it.

[3] Coffey testified that Wilson has borderline intellectual functioning that is "below the low-average range" and just above mild mental retardation. The circuit court concluded Wilson's cognitive disability was not a new factor because it was known at the time of sentencing. Wilson does not challenge that ruling on appeal.

Coffey stated the lengthy delay before treatment was particularly harmful to Wilson given his cognitive difficulties. Coffey opined that a shorter period of initial confinement followed by a longer period of supervision would best protect the public interest.

¶10 At the conclusion of the hearing, the court agreed there was a significant disparity in the sentences, and requested additional briefing. At a subsequent hearing, the court determined Wilson was not entitled to sentence modification based on disparities between his sentence and other regional offenders. The court relied heavily on the notion that "different judges will sentence differently," and concluded the sentencing court did not hand down the sentence "capriciously or without thought, or without laying down the foundation." It did not address whether a regional sentencing disparity could be a new factor, nor did it address whether the evidence regarding Wilson's risk of re-offending or harmful delay in treatment warranted sentence modification.

DISCUSSION

¶11 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." ***State v. Wood***, 2007 WI App 190, ¶5, 305 Wis. 2d 133, 738 N.W.2d 81.

¶12 Although the circuit court applied this standard when analyzing Wilson's cognitive disability argument, it failed to do so when discussing regional sentencing disparities. Instead, the court focused on whether the sentencing court "abused [its] discretion" and "considered … all the factors that [it] should have looked at."

¶13 As Wilson observes, reviewing a court's exercise of sentencing discretion is much different than determining the existence of a new factor. "The 'new factor' analysis does not depend upon a circuit court's review of its exercise of discretion in imposing the original sentence for the obvious reason that the circuit court could not have taken into account in sentencing information that it did not have." ***State v. Klubertanz***, 2006 WI App 71, ¶35, 291 Wis. 2d 751, 713 N.W.2d 116. Whether a new factor exists is a question of law. ***State v. Doe***, 2005 WI App 68, ¶5, 280 Wis. 2d 731, 697 N.W.2d 101.

¶14 Wilson urges us to hold that an extreme disparity between his sentence and the sentences of similarly situated individuals in the region constitutes a new factor entitling him to sentence modification. This would require expanding the scope of ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990).[4] We need not decide that issue, as Wilson has demonstrated an alternative basis for relief. *See* ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105,

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[4] In ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990), we concluded that a co-defendant's prior unknown jail term was a new factor where the court had expressed a desire for parity in the sentences. However, we declined to address whether this factor alone warranted sentence modification, and instead concluded that the circuit court properly modified the defendant's sentence based on its harshness compared to that of the similarly situated co-defendant. ***Id.***

While we do not today decide whether regional sentencing disparities can constitute a new factor entitling a defendant to sentence modification, we emphasize that Wilson may have prevailed on an alternative ground. A claim that Wilson's sentence was so excessive as to shock the public conscience may have succeeded, had it been raised. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (It is an erroneous exercise of discretion to render a sentence that is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). However, we will not abandon our neutrality to develop arguments. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶5 n.3, 303 Wis. 2d 514, 735 N.W.2d 477 (appellate courts should decide cases on the narrowest grounds presented).

¶15 We conclude that, as a matter of law, the new information regarding Wilson's likelihood of re-offending and the harmful delay of treatment constitutes a new factor entitling him to sentence modification. At sentencing, the prosecutor did not present any evidence regarding Wilson's likelihood to re-offend, but publicly wondered aloud "whether or not [Wilson] gets it" and "what type of risk is he in the future …." The prosecutor identified the need to protect the public as "paramount in this situation." He continued, "[Y]ou have what seems to be a pervasive or continuous viewing of these materials it seems that it's just another opportunity … that he may re-offend and … that's one of the things … we also need to look at as far as the need to protect the public." The prosecutor also argued that Wilson would need a lengthy term of confinement for treatment, stating, "[H]e needs to be afforded proper treatment under the Sex Offender Programming in the prison system and in somebody like this it's gonna take a very long time …."

¶16 At the sentencing hearing, the court explained that protection of the public was a primary reason for the lengthy sentence. Although the court cited no data regarding Wilson's likelihood to re-offend, it stated a long sentence was necessary because "I want to make sure that I protect young girls or children from him …." The court also emphasized rehabilitation, which it apparently believed could only come from a lengthy prison term: "I want to make sure that he has the opportunity to go through all of the counseling. He needs to learn to avoid this in the future and … I don't trust that he will do that."

¶17 The new information is highly relevant to both protection of the public and rehabilitation sentencing objectives. The sentencing court apparently believed Wilson represented a high risk of re-offending; the new data suggests Wilson presents a substantially lower risk. Further, Coffey's testimony directly rebuts the sentencing court's belief that a longer sentence would provide Wilson with the opportunity to receive adequate treatment. Coffey's testimony suggests the opposite is true; a lengthy term of initial incarceration actually diminishes the likelihood of rehabilitation, as Wilson will not receive sex offender treatment until its completion. Further, an extremely lengthy period of treatment is not necessary, according to Coffey; the pertinent treatment program can at most be expected to last three years.

¶18 The State counters with two cases. The first, ***State v. Slagoski***, 2001 WI App 112, ¶11, 244 Wis. 2d 49, 629 N.W.2d 50, held that a postconviction psychiatric report that contradicted and duplicated information available at sentencing did not constitute a new factor. In that case, Doctor George Palermo, in connection with a mental responsibility examination, opined that Slagoski had mental health issues and posed a "homicidal-suicidal risk." ***Id.***, ¶3. The sentencing court believed these factors increased Slagoski's risk of future dangerousness, and handed down a lengthy sentence on burglary charges. ***Id.***, ¶5. Slagoski sought sentence modification and presented an expert report that contradicted Palermo's. ***Id.***, ¶6. We held that Slagoski's evidence was not a new factor because it "simply establishes that mental health professionals will sometimes disagree on matters of diagnosis and treatment," and the information was already available to the sentencing court in a social worker's letter to the court. ***Id.***, ¶11. By contrast, here the sentencing court was not presented with any

expert psychiatric reports, and Wilson's evidence regarding his risk of re-offending was not presented in any form at sentencing.

¶19 Finally, the State relies on, inter alia, ***State v. Prince***, 147 Wis. 2d 134, 136-37, 432 N.W.2d 646 (Ct. App. 1988), for the proposition that "a defendant's responsiveness to treatment as part of a prison rehabilitation program is not a new factor." However, Wilson is not claiming he is entitled to sentence modification because he has responded positively to a prison treatment program. Rather, he is asserting that the new factors for the court's consideration are the delay in treatment necessitated by the lengthy prison term and the length of the treatment program. Further, at the time of sentencing the court was unaware its sentence was actually counterproductive to its stated goal of rehabilitation.

¶20 Because Wilson has established the existence of new factors, he is entitled to sentence modification. We remand so that the circuit court may carry out that task.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).