COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2869-CR **Cir. Ct. No. 2011CF65**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM W. OLSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: JEFFERY ANDERSON, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Adam Olson appeals the denial of postconviction relief seeking sentence modification or resentencing based upon an alleged new factor. We affirm.

¶2 This matter arises out of a February 27, 2011, alcohol-infused incident in which Olson violently beat his girlfriend and severely injured their fourteen-month-old infant child. Olson allegedly stated he was going to "kill all of them with his shotgun." He also threatened to kill them with a knife, and when he went into the kitchen, the girlfriend escaped to a neighbor's house and called 911.

¶3 Within seconds of police arriving, an individual later identified as Olson came running out of the front door and began to cross the street. He was apprehended and taken into custody. Officers discovered in the laundry room of the residence a 12-gauge semi-automatic shotgun and bag of ammunition. An officer also reported that as he began to transport Olson to jail, Olson slammed his head into the plastic barrier of the cage as he screamed at the officer, requiring the officer to stop the vehicle and pepper-spray Olson to prevent him from injuring himself.

¶4 Olson pled no contest to intentional physical abuse of a child and felony possession of a firearm, both as repeaters. Charges of operating a firearm while intoxicated, disorderly conduct domestic abuse, disorderly conduct strangulation and suffocation, misdemeanor battery domestic abuse, and two counts of causing mental harm to a child, all as repeaters, were dismissed and read in.

¶5 In late March 2011, Olson retained the services of James M. Peterson, a forensic psychologist, to assess Olson's mental health and his prospects for succeeding in treatment for substance abuse. Peterson's written report dated May 9, 2011, noted Olson's history of failure with alcohol and drug treatment, concluding that "[Olson] is likely to continue in a pattern of destructive

rage episodes unless he succeeds in attaining absolute abstinence from substances of abuse."

¶6 On May 14, 2011, Olson began what would ultimately be eight months of inpatient alcohol treatment at the Salvation Army in Minneapolis, followed by approximately two months' outpatient aftercare. The circuit court delayed sentencing for nearly a year to allow Olson to continue alcohol treatment. The court also modified Olson's bond conditions so he could leave the jail and participate in the treatment program.

¶7 A presentence investigation report was completed five months before sentencing. The PSI author concluded:

> This author believes Mr. Olson has taken little to no personal responsibility for his actions and his addiction to drugs and alcohol as an excuse for his behavior. When reviewing history and a previous PSI written when Mr. Olson was sentenced on his 2nd and 3rd OWI, Mr. Olson stated, "I realize the mistakes I made and am going to live without repeating them so I can be there and support my family again." That statement was made in 2007 and for the past four years he has repeated his criminal behavior.
>
> Mr. Olson has had numerous opportunities in the past to attend treatment, be in the community, and utilize resources and possibly build positive relationships; however, he continued to violate rule after rule and committed new offenses with new victims that repeat his past behavior.

¶8 On May 16, 2012, the circuit court conducted the sentencing hearing. The court imposed concurrent sentences totaling eight years, consisting of five years' initial confinement and three years' extended supervision.

¶9 On August 19, 2013, Olson filed a motion for postconviction relief seeking sentence modification or resentencing. Olson argued a 2013 addendum to

Peterson's 2011 report constituted a new factor. In the addendum, Peterson argued Olson was unlikely to reoffend, and questioned the use of the past to assess his character and the need to protect the public. Peterson's addendum concluded:

> Mr. Olson's year-long success in treatment, his personality strengths as identified in my original psychological assessment, and his strong family support, when taken together, provide good indications that he is quite likely to succeed in remaining abstinent and is therefore unlikely to present a danger for future acts of violence.

¶10 The postconviction motion also argued Olson's procedural due process rights were violated by not having access to the 2007 PSI referred to at sentencing. In addition, the motion argued that Olson's trial counsel was ineffective because he did not seek an update to Peterson's report prior to sentencing, request a copy of the 2007 PSI, or request an update to the 2011 PSI used at sentencing. The motion claimed that had counsel done these things, counsel could have questioned the use of Olson's past, provided context for Olson's statements in the 2007 PSI and presented a more updated image of Olson. According to Olson, "it is reasonably probable that Mr. Olson would have received a lesser sentence."

¶11 The circuit court denied the postconviction motion. The court determined Peterson's addendum was not a new sentencing factor. The court stated "everything that Dr. Peterson tries to explain with regard to the Salvation Army, the change, the possibility of Mr. Olson's success with regard to community supervision—the Court was aware of all of that at the point of sentencing." The court also stated:

> I would note [defense counsel] made clear the age of the PSI, what had transpired at the Salvation Army …. Not to mention the Court is well aware that individuals who stay in treatment longer, individuals who have longer periods of sobriety with regard to the treatment, have a lesser chance

> of re-offending. The Court knows that. [That all comes] from the knowledge that this Court has of the Salvation Army program and the reason why we send people to the six-month and to a year-plus program because of its success and its duration.

¶12 The court also emphasized its findings made at the sentencing hearing regarding the seriousness of the offenses. The court stated:

> Counsel completely avoids [the] finding by this Court that due to the seriousness of the injuries to the child, the need to protect with regard to the child, also looking at the history of Mr. Olson and that the Court even stated not necessarily the need to protect the public, but it's those closest to Mr. Olson because it was a concern, one drink, one slip could result in him potentially having another violent episode.
>
> Nothing in Dr. Peterson's report would cover that there couldn't be one slip, one problem, only one event could lead us back to where we were. Or, in other words, even with the lengthy period of sobriety it could not be said as an absolute that those closest to Mr. Olson would be protected, finding that it would unduly depreciate the seriousness of the offense, first and foremost; and then secondarily, looking at the protection, as the Court stated, those closest to Mr. Olson …. That's why that argument seems to fall with regard to the arguments by defense counsel.

¶13 The court concluded its sentence "wouldn't be changed as to unduly depreciating the seriousness of the offense even with an updated PSI, not to mention the concerns that the PSI did not update in order to reflect what occurred at Salvation Army, this court had more than ample information …." Olson now appeals.

¶14 A court cannot base a sentence modification on reflection and second thoughts alone. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. To be entitled to sentence modification in the present case, Olson must establish by clear and convincing evidence that a new factor exists, and then the circuit court determines whether that new factor warrants

modification. *See* ***id.***, ¶¶35-37. Whether a new factor justifies sentence modification is reviewable only for an erroneous exercise of discretion. ***Id.***, ¶33. New factors must be unknown to, or overlooked by, the circuit court at the time of sentencing. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶15 Olson insists he was sentenced on outdated and unavailable information. Olson argues, "while some of this reliance was appropriate, it did not fully reflect Olson's successful completion of nearly eight months of alcohol and drug treatment." Olson therefore requests we remand his case to the circuit court for sentence modification or resentencing.

¶16 We conclude Olson's purported rehabilitation is not a new factor as a matter of law. At the outset, we note Peterson's addendum was prepared over a year after Olson was sentenced. The addendum was based on evaluations of Olson that occurred prior to the completion of his treatment program, reports of Olson's conduct during treatment, and his conduct posttreatment. The addendum concluded that Olson's completion of his treatment program while out on bond, his ability to maintain sobriety during outpatient treatment, and his relatively good behavior while incarcerated was evidence that Olson was committed to making a permanent change in his behavior, and therefore unlikely to reoffend.

¶17 To the extent Peterson's opinion is based on Olson's postsentencing conduct, courts have flatly rejected such as a proper basis for sentence modification. *See, e.g.*, ***State v. Kluck***, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997); ***State v. Kaster***, 148 Wis. 2d 789, 804, 436 N.W.2d 891 (Ct. App. 1989).

¶18 Olson nevertheless insists "the bulk of the information in Dr. Peterson's supplemental report came from Olson's progress that occurred after Dr. Peterson's original report, but *before* sentencing." (Emphasis in original.)

However, the circuit court properly observed that during the sentencing hearing defense counsel went into great detail regarding Olson's alleged change in character, his completion of treatment, his actions to maintain sobriety, and his actions to repair relationships. The court thoroughly considered this information, but found Olson's purported new-found acceptance of responsibility and his dedication to his treatment program carried far less weight than the seriousness of the offenses and the need for further rehabilitation.

¶19 Olson also argues he is entitled to resentencing because his due process rights were violated when the State did not provide him with a copy of his 2007 PSI prior to the sentencing hearing. He also claims counsel was ineffective for not presenting updated information and for not requesting a copy of the 2007 PSI prior to the sentencing hearing. We review these issues de novo. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶20 Olson's resentencing argument is based upon several improper premises. He argues, "[T]he State used Olson's 2007 PSI to show that Olson was likely to reoffend." Contrary to Olson's perception, the postconviction court correctly determined that the only PSI used at sentencing was the 2011 PSI. Moreover, the court properly rejected Olson's suggestion that he was denied the means to ascertain whether there was any misinformation. The court stated:

> Mr. Olson obtained the 2011 PSI and reviewed that with his attorney. The court has no other information on this record [that] he did not. The cases cited by defense counsel go to the heart of secret information, unknown information, was the defendant unable to obtain a copy of their PSI for review for correctness of the information, for, as the Court stated, the defendant is the best source to know the credibility of the information set forth in the PSI. Mr. Olson should know the credibility of his own statement.

¶21 The 2011 PSI contained Olson's statement made in 2007 and memorialized in his 2007 PSI. The 2011 PSI author used Olson's 2007 statement, "I realize the mistakes I made and am going to live without repeating them so I can be there and support my family again," to demonstrate the PSI writer's opinion that regardless of Olson's stated desire to change his behavior, he was likely to reoffend based on his history of recidivism. The court noted Olson was the best source to know the credibility of his own statement.

¶22 Olson's trial counsel addressed the 2007 statement at length during the sentencing hearing. He argued:

> There isn't a statement in this presentence investigation like that with regard to the current case I don't see it in the presentence investigation …. I think in 2007 you see Mr. Olson talking at that point in time he had no treatment, he had had—he hadn't gone into any counselling, he had done none of it[.] I agree that it was at his own resistance that he was not following through with what needed to be done on probation. That has changed, Your Honor, and it's changed in a significant manner and it's changed and has changed by Mr. Olson's own actions. He has entered into a treatment program he did go into a treatment program. He's been in the Salvation Army program. He completed the first initial phase of that program the first six months where he was on campus almost continually from May 14, 2011 through January 19, 2012. Then he went into the aftercare program with the Salvation Army working to build safety nets, build his treatment program, get sponsors, get set in the community that he's going back into and he graduated from that program yesterday …. He's involved in the AA here it's within blocks of the house that he is living in currently. He is doing what he needs to do to maintain sobriety at this point in time.

¶23 Defense counsel went on to explain Olson's plans for continued treatment for his alcohol dependency, plans for mental health treatment, and Olson's progress in rebuilding relationships with the victims. Counsel then argued:

> Mr. Olson has at this step for the past year shown the court something he [has] never shown the court before on probation which is a willingness and actually doing it ... willingness to participate and do what he needs to do and I see nothing that is going to stop Mr. Olson from continuing to follow the court orders once they are made ….

¶24 Significantly, Olson was not denied the opportunity to rebut information supplied at sentencing. There was no undisclosed information because all the information considered was in the 2011 PSI. The court specifically asked whether the defense noted "errors, corrections, concerns that the court should be aware of as to the presentence investigation report?" There was no objection to the information within the PSI. Counsel artfully responded to the conclusions and opinions contained therein. Olson's assertion that he was denied due process because the State allegedly failed to provide him with a copy of the 2007 PSI is meritless.

¶25 Olson's claims of ineffective assistance of counsel were also properly denied. As mentioned above, counsel went into great detail during the sentencing hearing regarding Olson's character, his completion of treatment, his actions to maintain sobriety, and his actions to repair relationships. The sentencing court emphasized that it was provided with much other information regarding Olson's treatment as well, including information from the Salvation Army, Olson's girlfriend, her father and others. Nonetheless, the court concluded incarceration was required due to the seriousness of the offenses and the need to protect those closest to Olson.

¶26 In its postconviction ruling, the court indicated it had reviewed its sentencing decision with specificity and concluded that the alleged missing information would not have affected its decision. As the court properly found, "Mr. Olson was not prejudiced, with regard to the use of the one quote …

explained by [defense counsel] during argument with Mr. Olson having a chance to explain it … himself." Accordingly, we conclude Olson has failed to meet his burden to establish ineffective assistance of counsel and is not entitled to resentencing. *See* ***Strickland v. Washington***, 466 U.S. 668, 693-94 (1984); ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515.

By the Court.—Order affirmed.

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