COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2675-CR **Cir. Ct. No. 2009CF579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. MAHOWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Anthony Mahowald appeals a judgment sentencing him after revocation of probation and an order denying his motion for sentence modification. He contends a new factor justifies a reduction of his sentence. The circuit court denied the motion without a hearing. Because we conclude

Mahowald's motion failed to establish a new factor by clear and convincing evidence, and the circuit court properly exercised its discretion when it concluded Mahowald's alleged new factor would not justify modification of the sentence, we affirm the judgment and order.[1]

BACKGROUND

¶2 In 2010, Mahowald entered guilty pleas to one count of possession of child pornography, invasion of privacy—using a surveillance device as a repeater, and attempting to capture an image of nudity as a repeater. Five other felony counts and one misdemeanor were read in for sentencing purposes. The court withheld sentence and placed Mahowald on probation on the child pornography and invasion of privacy counts, and imposed a jail sentence on the count of attempting to capture an image of nudity. Mahowald's probation on the child pornography count was later revoked and the court imposed a sentence of seven and one-half years' initial confinement and ten years' extended supervision.

¶3 Seven months later, Mahowald filed a motion to modify the sentence, requesting a reduction of the initial confinement to four years. The motion emphasized the sentencing court's statement that Mahowald needed treatment in prison because the treatment he received in the community did not work. The court stated: "We know that good sex-offender treatment, good sex-offender programming, depending upon how well the person does, how amenable they are to do it, it's—it's at least a four-year process." The motion also noted the

[1] Although Mahowald appeals the judgment of conviction, he raises no issue on appeal directly relating to the judgment.

court's conclusion that Mahowald needed to be removed from society for a period of time to afford the public some protection.

¶4 The motion says the Department of Corrections "has found Mr. Mahowald appropriate for the SO-4 sex offender treatment, a two-year program." A description of the Department's SO-4 program was attached to the motion. That attachment described the length of programming:

> Consistent with DOC standards, SO-4 participants will have a minimum of 960 hours of programming. This number includes hours the participants spend in group and completing related work/activities individually or with other group members outside of the structured treatment groups. It is anticipated that most SO-4 participants will complete programming in approximately two years.

Mahowald contends the DOC finding that Mahowald was appropriate for the two-year program shows that his treatment needs can be met in two years rather than the four years the court thought necessary. He contends the potential completion of treatment in two years constitutes a new factor sufficient to justify a sentence reduction.

¶5 The circuit court denied the motion, concluding Mahowald failed to establish by clear and convincing evidence the existence of a new factor. The court concluded, as a matter of law, the presence or absence of prison programming or the opportunity for prison programming is not a new factor entitling a person to sentence modification.[2] Further, the court noted Mahowald

[2] Mahowald claims the circuit court misunderstood his alleged new factor by describing it as the presence, absence or opportunity of treatment rather than the length of the treatment program the DOC found "appropriate" for him. We attach no significance to the semantic difference. Mahowald's eligibility for the SO-4 program can correctly be described as the presence or opportunity for treatment.

submitted no proof or evidence, merely his own statement, that he was found appropriate for the SO-4 sex offender treatment program. He presented no evidence that he would get into the program, when he would enter the program, or how long the waiting list might be, and he overlooks the fact that nobody can predict whether a sex offender will successfully complete the program. The court further concluded that, even if the sex offender programming could constitute a new factor, it would not justify modification of the sentence because the sentence was partially based on factors other than Mahowald's need for treatment, specifically, how poorly he did on probation, his long history of inappropriate sexual behavior, and the need to protect the public.

DISCUSSION

¶6 Deciding a motion for sentence modification based on a new factor involves a two-step inquiry. ***State v. Boyden***, 2012 WI App 38, ¶5, 340 Wis. 2d 155, 814 N.W.2d 505. First, the defendant must demonstrate by clear and convincing evidence the existence of a new factor. ***Id.*** Whether a new factor exists is a question of law subject to de novo review. ***Id.***, ¶6. 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. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If the defendant establishes a new factor, the second step requires the court to exercise its discretion to determine whether the new factor justifies modification of the sentence. ***State v. Harbor***, 2011 WI 28, ¶27, 333 Wis. 2d 53, 797 N.W.2d 828.

¶7 The allegation in Mahowald's postconviction motion that the DOC has found him "appropriate" for the SO-4 treatment program does not establish a new factor. Eligibility for a program in which it is "anticipated" that "most" of the participants will complete programming in "approximately" two years, with no information provided about the starting date and no reason to conclude Mahowald will successfully complete the program, is not a factor highly relevant to the length of his sentence nor unknowingly overlooked by the sentencing court.

¶8 Finally, the circuit court properly exercised its discretion when it concluded that, even if eligibility for the program constituted a new factor, it would not justify a reduced sentence. At the sentencing hearing, the court appropriately considered Mahowald's lengthy history of sex offenses, his lack of steady employment which meant he had no distraction from his sexual obsessions, the effect his actions had on the victims and the need to protect the public. Although the court expressed its belief that a four-year treatment program existed, it also noted the unpredictability of whether a person would satisfactorily complete the program. The analysis is the same when a two-year program is substituted for the four-year program.

By the Court.—Judgment and order affirmed.

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