COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP352-CR **Cir. Ct. No. 2013CF802**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONNIE MARIE PLUNKETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Connie Marie Plunkett appeals a judgment convicting her of substantial battery with use of a dangerous weapon, as a party to a crime, and assault by a prisoner/throwing a bodily substance. She also appeals the circuit court's order denying her postconviction motion to modify her

sentence. Plunkett argues that her sentence should be reduced because she is statutorily ineligible for the Substance Abuse Program in prison. We affirm.

¶2 Plunkett and two men, Michael Pagelsdorf and Anthony Stiltner, planned to rob Brian Curik as revenge for Curik's alleged mistreatment of Plunkett. Plunkett brought Curik to a hotel parking lot, where Pagelsdorf and Stiltner robbed him. Stiltner became enraged and stabbed Curik ten times when he saw nude photos of Plunkett on Curik's phone. Curik got in his car to flee, but Pagelsdorf got into Curik's car with a sword and ordered Curik to drive to an Amtrak Station. Plunkett and Stiltner followed in a second car. According to the complaint, the plan was to "finish [Curik] off" at the station. When they arrived at the Amtrak Station parking lot, Pagelsdorf jumped into the car with Plunkett and Stiltner because a squad car started driving toward them. They all fled, but they were later apprehended. At the jail, Plunkett threw her soiled underwear at a police officer.

¶3 Pursuant to a plea agreement, Plunkett pled guilty to reduced charges of substantial battery with use of a dangerous weapon, as a party to a crime, and assaulting a police officer. The circuit court sentenced Plunkett to three and a half years of initial confinement and eighteen months of extended supervision for substantial battery and a consecutive nine-month term for assault by a prisoner.

¶4 Sentence modification motions require a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) if a new factor exists, the circuit court must exercise its discretion to determine whether the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. 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.'" ***Id.***, ¶40 (citation omitted). Whether a new factor exists is a question of law that we review *de novo*. ***Id.***, ¶36.

¶5 Plunkett contends that her statutory ineligibility for the Substance Abuse Program is a new factor because it was highly relevant to the imposition of her sentence and was unknowingly overlooked by all of the parties. After explaining the time Plunkett would be required to serve on each charge, the circuit court ruled that Plunkett would be eligible for the Substance Abuse Program, but only after she had first served two years of confinement. The circuit court and the parties did not realize at the time that Plunkett was ineligible for the program by statute because she was convicted of an offense under WIS. STAT. ch. 940 (2011-12).[1] *See* WIS. STAT. § 973.01(3g).

¶6 Plunkett's statutory ineligibility for the Substance Abuse Program is not a "new factor" because it was not highly relevant to the imposition of her sentence. The circuit court focused on the seriousness of the crime and the harm Curik suffered when it framed the sentence, explaining that it considered imposing the maximum due to Curik's injuries. The circuit court explained in its order denying postconviction relief that the reason that it did not impose the maximum was because the factual circumstances distanced Plunkett from the actual beating and stabbing, not because she had alcohol and drug abuse issues. The circuit court also explained that although it incorrectly stated that Plunkett would be eligible for

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

the Substance Abuse Program after serving two years of initial confinement, it based its sentence on the seriousness of the crime and the impact on the victim, not on Plunkett's eligibility—or lack thereof—for the Substance Abuse Program. Because Plunkett's eligibility for the program was not highly relevant to the circuit court's sentence, the fact that she is not statutorily eligible for the program is not a new factor.

By the Court.—Judgment and order affirmed.

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