COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2822-CR **Cir. Ct. No. 2013CF2061**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANET M. PEHOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Bradley, JJ.

¶1 PER CURIAM. Janet M. Pehowski appeals from a judgment of conviction for one count of operating with a prohibited alcohol concentration (5th

offense), contrary to WIS. STAT. § 346.63(1)(b) (2013-14),[1] and from an order denying her postconviction motion seeking sentencing modification.[2] She argues that the trial court erred when it denied her request for sentence modification after concluding that she had not demonstrated the existence of this alleged new factor: "the fact that 'sleep-driving' is a well-documented side effect of [the prescription sleep aid] Ambien." (Bolding and some capitalization omitted.) We affirm.

BACKGROUND

¶2 Pehowski was charged with one count of operating while intoxicated and one count of operating with a prohibited alcohol concentration, both as her fifth offense. According to the criminal complaint, an officer found Pehowski in her vehicle with the engine running, parked outside a closed grocery store at three o'clock in the morning. The officer said that Pehowski "appeared very confused and often surprised by basic information that he was giving her such as the time of the morning and the fact that the business was closed." Subsequent chemical testing of Pehowski's blood indicated that her blood alcohol content was .045 percent, which was a prohibited alcohol content for Pehowski because she had prior convictions for operating while intoxicated. *See* WIS. STAT. § 340.01(46m)(c) (For persons with three or more prior countable convictions, prohibited alcohol concentration is .02 or more.).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The order also granted Pehowski's request for the removal of one condition of probation. That condition is not at issue on appeal and will not be discussed.

¶3 Pehowski entered a plea agreement with the State pursuant to which she pled guilty to operating with a prohibited alcohol concentration and the State agreed to recommend an imposed and stayed sentence, with the sentence length left to the trial court's discretion, and three years of probation with nine months of condition time in the House of Correction. The other charge was dismissed outright. Pehowski was free to argue for a lesser sentence.

¶4 The trial court accepted Pehowski's guilty plea, found her guilty, and proceeded to sentencing. Trial counsel noted that Pehowski had numerous medical issues for which she took twenty-one medications. Trial counsel continued: "Now, it's my understanding having talked to her that all this combination of drugs plus a relatively limited amount of alcohol caused her to hallucinate and to get into a car and go out and do what she did. She was hallucinating." Later, trial counsel added:

> [I]t appears to me that the drug that may have caused all this is Ambien. And we have a letter from her physician … indicating as of [a date about three months after Pehowski's arrest] that [Ambien] had been discontinued due to adverse reaction, and I think this is the adverse reaction that we witnessed in this particular case.

Pehowski also personally told the trial court that she had been affected by taking Ambien after having "a few beers" with a friend the night of her arrest. She said:

> [My friend] left at 9:30 [p.m.], I took the Ambien, I fell asleep, I woke up at 3:00 in the morning, I still thought it was [ten] o'clock at night. I thought I was having a birthday party for my niece's son in my hallway. I went downstairs, tried to get into [my neighbors' home]…. I said that they kidnapped my daughter and were giving her drugs and cigarettes. They tried to get my keys away from me. I swore at them. And that's when I went to the store because I thought I had to get a birthday card for my nephew.

> When they incarcerated me while I was in the holding cell, I thought it was snowing inside the jail and I thought that all the windows were being flooded, I thought it was like a waterfall. I was totally hallucinating. They had to take me to the hospital.

¶5 The trial court imposed and stayed a sentence of two years of initial confinement and two years of extended supervision and placed Pehowski on probation for three years with nine months of condition time in the House of Correction. In its sentencing remarks, the trial court agreed with Pehowski's self-assessment that she cannot drink even a little alcohol and remain in control, and it also commented on Pehowski's use of medications, including Ambien, stating:

> [Y]ou also have all these other maladies that are going on in your life, all of which are serious, all of which by themselves actually make your driving inappropriate. I mean I don't care about Ambien, that's one of the issues that obviously you take a sleep inducer, you don't drive, it doesn't take a rocket scientist to figure that one out….
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> ….
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> … [Alcohol] particularly is a problem when you do it in a combination factor, especially with these drugs that are built in to affect you like Ambien is, I mean there's no question about that. Ambien … lets people sleep that can't. But that's the purpose of it is to put you to sleep, it's not to make you get ready for a party….
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> ….
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> … [Y]ou should have been more interactive in terms of bringing all these things together to know the effects and to have your medical providers be advised fully so that they understood the effects.

¶6 With the assistance of postconviction counsel, Pehowski filed a postconviction motion seeking sentence modification based on a new factor.[3] She argued that even though trial counsel told the trial court that Pehowski's "behavior may have been a negative reaction to Ambien, the fact that 'sleep-driving' is a well-document[ed] side effect of Ambien was not presented and was therefore apparently unknowingly overlooked by the parties." Pehowski asked the trial court to modify her sentence by imposing and staying a sentence of twelve months in the House of Correction, in place of the two years of initial confinement and two years of extended supervision that was originally imposed and stayed.

¶7 The trial court denied the motion in an oral ruling, concluding that the information on Ambien provided in Pehowski's postconviction motion was not a new factor. The trial court explained:

> I don't think it was a new factor because I certainly took into account her Ambien, and the suggestion that it was the Ambien whether they referred to it as sleep[-]driving, I can't tell you right off the bat, but I did remember this thing about Patrick Kennedy,[4] that made me worry right off the bat…. [E]ven if you discount Ambien all the way or give her some credit for the Ambien, she shouldn't have been driving with any of that stuff in her system, and that's basically the message she got from this Court.

The trial court also said: "I feel I did mitigate because ordinarily I can tell you, even though I have no written protocol because we're not allowed to do that, I

[3] Pehowski also sought additional sentence credit and sought to vacate the DNA surcharge. The trial court granted the sentence credit but denied the motion to vacate the DNA surcharge. Pehowski has not pursued the DNA surcharge issue on appeal and it will not be addressed.

[4] The postconviction motion asserted that "'[s]leep-driving' gained national attention after [United States Congressional] Representative Patrick Kennedy was involved in a car accident in the middle of the night and told police that he was running late for a vote."

exercised my discretion when I put her on probation…. I only gave her nine months [of] condition time. In my mind that was mitigating." This appeal follows.

DISCUSSION

¶8 At issue is whether Pehowski established a new factor that warrants sentence modification. 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 ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the trial court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶9 Pehowski asserts that "'[s]leep-driving,' or 'driving while not fully awake after ingestion of a sedative-hypnotic, with amnesia for the event,' is a bizarre, well-documented side effect of the prescription drug Ambien." She notes that Ambien's own prescribing information includes a warning that it can cause serious side effects, including getting out of bed "while not being fully awake and do[ing] an activity that you do not know you are doing." (Bolding omitted.)

¶10 Pehowski acknowledges that at sentencing, trial counsel provided the trial court with a letter from Pehowski's doctor concerning her reaction to Ambien and told the trial court that the combination of prescription drugs and alcohol Pehowski consumed "caused her to hallucinate and get into a car and go

out and do what she did." However, she notes that trial "[c]ounsel did not … explain to the court that 'sleep-driving' is a well-documented side effect of Ambien." She argues that this well-documented side effect is the new factor that was unknowingly overlooked at sentencing.

¶11 In response, the State argues that even if it accepts Pehowski's assertion "that sleep-driving is a well-documented side effect of Ambien, that fact is not a new sentencing factor" in this case, because it was not "'unknowingly overlooked by all of the parties.'" *See* ***id.***, ¶40 (citation omitted). The State explains: "Pehowski does not demonstrate that she or her counsel were unaware of the possibility of sleep-driving after taking Ambien. In addition, she does not assert that she or her counsel were unaware that taking Ambien after consuming alcohol or other drugs would give her a 'higher chance' of sleep-driving." The State also points out that trial counsel mentioned that the prescription drugs and alcohol caused Pehowski to hallucinate, even if trial counsel "did not say that sleep-driving is a well-documented side effect of Ambien."[5]

¶12 We agree with the trial court that Pehowski has not demonstrated that the alleged fact that sleep-driving is a well-documented side effect of Ambien "'was unknowingly overlooked by *all* of the parties.'" *See* ***id.*** (citation omitted; emphasis added). Pehowski's postconviction motion did not allege, much less

[5] The State speculates that trial counsel may have chosen not to emphasize that sleep-driving is a well-known side effect of taking Ambien because that "might make Pehowski more culpable rather than less culpable," given that she intentionally took Ambien after drinking alcohol, despite the "well-known" risk of sleep-driving. Pehowski disagrees with this analysis. We decline to weigh in on the speculation about trial counsel's strategic decisions. The narrow issue before this court is whether the fact that sleep-driving is a well-known side effect was a fact unknowingly overlooked by all of the parties. For reasons discussed above, we conclude Pehowski has not shown that it was.

demonstrate, that Pehowski, trial counsel, and the State were unaware of that fact.[6] We reject her assertion that because no one specifically discussed "sleep-driving" at sentencing, and because "no apparent reason exists as to why this information would not have been presented had defense counsel been aware of it," that side effect "was therefore apparently unknowingly overlooked by the parties." This speculation is insufficient to demonstrate that the fact was unknowingly overlooked by all of the parties. Further, why the parties may have chosen not to highlight that specific fact for the trial court—although trial counsel did hint at Ambien's effects when he shared the doctor's letter and told the trial court Pehowski had hallucinated—is not relevant to our determination of whether a new factor exists.

¶13 For these reasons, we conclude that Pehowski has not shown a new factor. Accordingly, we need not address whether this new factor was "highly relevant" to the sentencing or whether it warrants sentence modification. *See* ***id.***, ¶38. Because Pehowski has not demonstrated a new factor, she was not entitled to sentence modification on that basis.

By the Court.—Judgment and order affirmed.

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

[6] The record also suggests that the trial court was, in fact, aware of some of the effects of Ambien, which it discussed in its sentencing remarks, but our decision does not depend on the trial court having knowledge of the specific facts Pehowski submitted in her postconviction motion. Pehowski is required to show that these facts were unknown to *all* parties, and she has not done so.