

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1998-CR

Cir. Ct. No. 1999CF252

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES A. EGGENBERGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Charles Eggenberger appeals an order denying his request for either sentence modification or resentencing. Eggenberger argues the sentence he received after he was convicted of sexual contact with a child should

be reduced because recent research has established his crimes likely stemmed from his adverse reaction to Prozac. We affirm.

BACKGROUND

¶2 On December 23, 1999, Eggenberger was convicted of three counts of sexual contact with his nine-year-old step-granddaughter. Eggenberger submitted a defense presentence investigation, which included a report by Dr. George Palermo, a forensic psychiatrist. Palermo's report noted Eggenberger was prescribed Prozac before the assaults and discussed the effect Prozac may have had on his conduct. The report explained, "Prozac, at times ... causes mental confusion and excitement. It has been thought by some experts to precipitate suicide, especially when combined with a benzodiazepine [which Eggenberger was also taking]." Palermo concluded, "[I]t is my professional psychiatric opinion to a reasonable degree of medical certainty that Mr. Eggenberger's sexual molestation of his granddaughter ... may be the outcome of the disinhibiting, confusion-producing action of Prozac"

¶3 At the sentencing hearing, Eggenberger testified Prozac played a role in the assaults. "After consulting with experts and reading the results and research, it is now clear to me that the Prozac medication ... had a negative [e]ffect on me. Among other things, [it] impaired [my] judgment" Eggenberger's wife also testified: "I can understand that the Prozac caused this to happen. ... Prozac causes mental confusion and excitement, per Dr. Palermo's report" His son concurred, pointing out Dr. Palermo's observation that pairing Prozac with anti-anxiety benzodiazepines increases the odds of negative side-effects. In his closing argument, Eggenberger's counsel again drew the court's attention to the possibility Prozac affected Eggenberger's conduct: "Then, before the [assault]

incident ... he got put on Prozac. ... And as far as I'm concerned, the book is still out on Prozac."

¶4 The court did not explicitly reference Eggenberger's Prozac theory, but stated it "reviewed the information [Eggenberger's counsel] submitted [and found it] quite enlightening." It concluded: "[A]t the core of this proceeding ... is the fact that what we are dealing with is sexual contact with a nine-year-old girl. We start with that. That is an extremely serious offense. There is no way that that offense can be in any way minimized or glossed over." The court sentenced Eggenberger to twenty years in prison, followed by two concurrent twenty-year probation terms.

¶5 Ten years later, Eggenberger has moved for either sentence modification or resentencing, arguing that new research on Prozac and other SSRIs (selective serotonin reuptake inhibitors) suggests Eggenberger's conduct was the result of an adverse reaction to his medications. As relevant here, he argued this research constituted a new factor warranting sentence modification.

¶6 After holding a hearing on the motion, the court concluded Eggenberger failed to establish a new factor warranting sentence modification:

[The sentencing judge] knew everything that's being argued in this motion. He may not have called it SSRIs. ... [B]ut there was a strong presentation by the experts that Mr. Eggenberger had by his attorney, by the family members that spoke, and even his comments that one of the causes or the primary cause of this was that Prozac and medication and whatever other factors resulted from taking it.

The court further concluded that even if the research was a new factor, it "would not justify a modification of Mr. Eggenberger's sentence. ... I think the structure of the sentence, the nature of the sentence, the logic behind the sentence, the fact

that Mr. Eggenberger was facing 120 years of incarceration and received only 20 years, would not justify modifying the sentence.”

DISCUSSION

¶7 The issue in this appeal is whether Eggenberger has proved the existence of a new factor that warrants sentence modification.¹ 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). Whether a proven fact or set of facts constitutes a new factor for the purposes of sentence modification is a question of law we review independently. *State v. Crochiere*, 2004 WI 78, ¶10, 273 Wis. 2d 57, 681 N.W.2d 524. However, “whether a new factor warrants a modification of sentence rests within the trial court’s discretion.” *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶8 Eggenberger argues that recent research has established that SSRIs such as Prozac can severely impair one’s behavior, particularly when combined

¹ Eggenberger also argues he is entitled to be resentenced because he was not sentenced on accurate information. This argument, however, simply rehashes Eggenberger’s assertion that new research on Prozac is a new factor. We therefore do not address it. In any event, Eggenberger fails to meet the burden required to show he is entitled to a resentencing. “[I]n a motion for resentencing based on a circuit court’s alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on [that] information.” *State v. Tiepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Eggenberger merely argues that if the sentencing court had the benefit of research published after his sentencing, it would have had a more complete understanding of his conduct. But Eggenberger nowhere alleges, much less proves, the sentencing court was presented with or relied on inaccurate information.

with anti-anxiety medication and alcohol. He contends this research explains why he assaulted his step-granddaughter and is therefore a new factor warranting sentence modification. The State counters that even if recent research has clarified Prozac's side-effects, the general parameters of Eggenberger's argument were nevertheless presented to the sentencing court.

¶9 When Eggenberger was sentenced, evidence was available that Prozac could have affected his behavior. Palermo's report identified Prozac as a possible explanation for Eggenberger's conduct and explained the drug could be particularly problematic when paired with other medication Eggenberger was taking. Eggenberger's expert at the motion hearing conceded that "roughly a decade of research and ... publication [on Prozac's side-effects]," including her own work, existed before Eggenberger was sentenced. Not only was evidence available when Eggenberger was sentenced, it was also presented to the sentencing court. The court was provided with Palermo's report, which contained his "professional psychiatric opinion ... [the assaults] may be the outcome of the disinhibiting, confusion-producing action of Prozac" In addition, Palermo's conclusions were repeated by no fewer than four people at the sentencing hearing.

¶10 Thus, it appears the sentencing court already had the benefit of much of the information Eggenberger presents now as new.² But we need not belabor the point because to secure sentence modification on the basis of a new factor, Eggenberger must prove not only that a new factor exists, but that the new factor warrants sentence modification. See *Crochiere*, 273 Wis. 2d 57, ¶14. As discussed above, this determination lies within the circuit court’s discretion. See *Michels*, 150 Wis. 2d at 97. We will affirm a circuit court’s discretionary decision if it “examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach.” See *American Fam. Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶43, 319 Wis. 2d 397, 768 N.W.2d 729.

¶11 Here, the circuit court found that even if the new research Eggenberger cites were a new factor, it would not justify sentence modification. It observed that the determinative factor in Eggenberger’s sentence was the gravity of his crimes. This factor is not diminished by evidence Eggenberger’s behavior

² Eggenberger’s present argument also appears to misrepresent how much information was previously available and presented. Eggenberger claims that the idea Prozac influenced his behavior “was not more than a speculative hunch [when he was sentenced]. No scientific support was offered to bolster it.” Yet Eggenberger clearly did offer scientific support for that theory at this sentencing, namely the expert opinion of Dr. Palermo, a clinical professor of Psychiatry and Neurology and Director of Criminological Psychiatry at the Medical College of Wisconsin. Similarly, Eggenberger asserts—without citation to authority—that “supporting scientific data was not in existence, such as data about the safe daily dose of SSRIs or about the surprising impact of SSRIs on elderly patients, those with prior cranial injuries, or those taking anti-anxiety drugs.” At the very least, his claim concerning the interaction of Prozac and anti-anxiety drugs is directly contradicted by Palermo’s confirmation Prozac could have negative consequences when combined with benzodiazepines; that is, anti-anxiety drugs.

was driven by a combination of medication and alcohol.³ The circuit court concluded that the sentence imposed reflected an appropriate level of punishment. Referring to the structure, nature, and logic of the sentence, it concluded a sentence of twenty years—a fraction of the time Eggenberger was facing—would be appropriate regardless of Prozac’s role in the crimes. This conclusion was well within the court’s discretion.

By the Court.—Order affirmed.

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

³ Even if there were merit to this argument, though, it still falls short. For one thing, new evidence about Prozac’s side-effects does not necessarily prove—as Eggenberger suggests it does—that Prozac sapped him of volition with respect to his conduct with his step-granddaughter. The State argues that the record shows Eggenberger knew what he was doing, knew it was wrong, attempted to coerce his victim into staying silent, and even tried to shift the blame to her when explaining his conduct to Dr. Palermo.

