COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2574-CR **Cir. Ct. No. 2010CF1786**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY R. DUNBECK, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Randy R. Dunbeck, Jr., appeals an order denying his motion for sentence modification. He asserts that a new factor, namely, the conclusions reflected in a psychiatric report prepared during his imprisonment, warrants relief. The circuit court disagreed, and we affirm.

BACKGROUND

¶2 Dunbeck pled guilty to one count of second-degree sexual assault of a child. He faced maximum penalties of forty years in prison and a $100,000 fine. The circuit court imposed ten years of initial confinement and five years of extended supervision.

¶3 According to the criminal complaint, Dunbeck sexually assaulted his thirteen-year-old daughter on multiple occasions and in multiple ways over a six-month period.[1] Among the allegations, the complaint reflected that Dunbeck: (1) asked his daughter if she wanted to 'pleasure him,' then took her to his bedroom and had finger-to-vagina and mouth-to-vagina sexual contact with her; (2) removed his daughter's pants and put his mouth and tongue in her vagina; (3) asked his daughter to "help him release" during an act of mouth-to-vagina intercourse, leading her to masturbate his penis; (4) massaged his daughter's breasts; and (5) performed mouth-to-vagina intercourse on his daughter while she performed mouth-to-penis intercourse on him. The record also reflects that, after the State filed the criminal complaint, Dunbeck's daughter disclosed that he had penetrated her anally with his penis, had engaged in penis-to-vagina contact with her, and that on one occasion he handcuffed her to a table and performed oral sex on her for half an hour.

[1] Dunbeck begins his opening brief in this court by stating that "the charge involved Dunbeck taking sexual liberties with his 14-year old daughter when he suddenly found himself her primary custodian." The record reflects that his daughter was thirteen years old throughout the six-month period that he sexually assaulted her. The record further reflects that Dunbeck was awarded primary placement of his daughter when she was six years old, approximately seven years before the sexual assaults began.

¶4 At sentencing, Dunbeck submitted a psychological report prepared at his request by Dr. James Harasymiw. Harasymiw opined that Dunbeck suffered from a clinical disorder, namely, dysthymia, and a personality disorder, namely, avoidant personality disorder. The psychologist concluded, however, that Dunbeck's mental disorders did not predispose him to commit acts of sexual violence and that he was a low risk to reoffend sexually as determined by multiple risk assessment tools. Based upon these assessments and conclusions, Harasymiw recommended either a long period of probation with intense supervision and sex offender treatment, or a period of incarceration long enough for Dunbeck to receive sex offender treatment, followed by a long term of extended supervision. Dunbeck, through counsel, asked the circuit court to adopt one of Harasymiw's two recommendations. The State, as required by the plea bargain, recommended "substantial prison."

¶5 The circuit court deemed the offense "heinous," and observed that "part of its job is to see that ... [Dunbeck] never does this to another little girl." The circuit court considered Dunbeck's character at length, first summarizing the diagnoses he had received from Harasymiw: "dysthymia which is mild chronic depression[,] and an avoidant personality disorder[,] that means that he is timid, shy, inhibited, a fear of rejection." The circuit court discussed and considered Harasymiw's conclusion that Dunbeck was a low risk to reoffend. The circuit court credited Dunbeck for his prompt admission of the crime and his remorse, and the circuit court acknowledged that Dunbeck did not make any effort to justify his sexual assaults. The circuit court also noted his high school diploma and time in college, and his positive work history.

¶6 In selecting a specific punishment for Dunbeck, the circuit court noted that the community strongly supports lengthy prison terms for sexual

offenders. The circuit court concluded, however, that Dunbeck's character and low risk to reoffend were significant mitigating factors. The circuit court explained that it nonetheless "c[ould no]t put [him] on probation" because "all the good stuff that [Dunbeck has] done does not outweigh the bad stuff [he] did over a six month period. For that, [he] ha[s] to go to prison."

¶7 Approximately three years after sentencing, Dunbeck filed the motion for sentence modification that underlies this appeal. In support of the claim, Dunbeck submitted a report reflecting an evaluation conducted by Dr. Charles Grade, a psychiatrist. Grade opined that Dunbeck suffers from social anxiety disorder with resultant avoidant personality disorder, bipolar II disorder,[2] and attention deficit hyperactivity disorder, combined type.[3] Grade noted that Dunbeck had previously been assessed as a "very low risk for reoffending," but, in Grade's view, "treatment aimed at [Dunbeck's] underlying medical problems further reduces any risk for reoffending in the future, making it even 'lower than low.'" Dunbeck contended that the diagnoses and the conclusions in the psychiatric report constituted a new factor warranting a reduction in the term of his initial confinement.

[2] Grade's report defines bipolar II disorder, stating, in pertinent part: "[t]his chronic disorder is characterized by repeated episodes of major depression in the context of mood swings involving hypomania and judgment problems. It is differentiated from bipolar I disorder by the absence of mania during the life of an individual."

[3] In explaining attention deficit hyperactivity disorder, combined type, Grade's report states, in pertinent part: "Significant symptoms include the inability to sustain attention, the inability to complete projects, easy distractibility with sites [sic] and sounds, daydreaming, avoidance of tasks that required sustained mental effort, hyperactivity, blurting out answers, talking excessively, in interacting and intruding on others (the last three symptoms being examples of impulsivity)."

¶8 The judge that presided at sentencing also considered Dunbeck's postconviction motion for sentence modification. After discussing Grade's report in light of the original sentencing decision, the circuit court rejected Dunbeck's claim in a written order entered without a hearing. Dunbeck appeals.

DISCUSSION

¶9 Dunbeck presents a single claim, namely, that the conclusions in Grade's report constitute a new factor warranting sentence modification. For purposes of 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).

¶10 A circuit court may modify a defendant's sentence upon a showing of a new factor. ***Id.***, ¶35. The analysis is two-pronged. *See* ***id.***, ¶36. One prong requires the defendant to show by clear and convincing evidence that a new factor exists. ***Id.*** This presents a question of law. ***Id.***, ¶36. The other prong requires the defendant to show that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. ***Id.*** Because the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence, a court need not address both prongs of the analysis:

> if a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion.... Alternatively, if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the

> facts asserted by the defendant constitute a new factor as a matter of law.

Id., ¶38 (citations omitted).[4]

¶11 In this case, Dunbeck failed to satisfy the first prong of the analysis, because the psychiatric report that he submitted does not reveal a new factor. Both Harasymiw and Grade concluded that Dunbeck has mental health problems, and both assigned him diagnoses with components that include depression and avoidant personality disorder. To be sure, the constellations of diagnoses identified by Harasymiw and Grade are not identical, but we have previously rejected the suggestion that a psychiatric opinion contradicting the conclusions of another mental health professional constitutes a new factor. *See* ***State v. Slagoski***, 2001 WI App 112, ¶11, 244 Wis. 2d 49, 629 N.W.2d 50. Such contradictions "simply establish[] that mental health professionals will sometimes disagree on matters of diagnosis and treatment." ***Id.***

¶12 Dunbeck contends, however, that the psychiatric report satisfies the first prong of the ***Harbor*** analysis because the report is relevant to each of the primary sentencing factors, namely, gravity of the offense, character of the offender and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (noting the mandatory sentencing factors that a court must consider). In Dunbeck's view, the psychiatric report illuminates his character and "greatly inform[s] the need to protect the public and the

[4] Dunbeck observes, at footnote one of his opening brief, that he has a constitutionally protected due process right to be sentenced upon accurate information, and, in support, he cites ***State v. Travis***, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. To the extent Dunbeck implies that this observation states a claim for relief on constitutional grounds, we decline to address the claim because it is undeveloped and inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

likelihood of reoffending." In fact, however, the circuit court recognized at sentencing that Dunbeck's character was a mitigating consideration. Further, although Grade offers an opinion that, with treatment, Dunbeck's risk to reoffend could be "lower than low," Harasymiw previously advised the circuit court that, when using one measure, "Dunbeck's score of 0 placed him in the lowest risk category." We are satisfied that Grade's conclusions are not a new factor within the meaning of ***Harbor***.

¶13 Moreover, were we to agree with Dunbeck that he has identified a new factor, we would nonetheless uphold the order denying sentence modification because the circuit court properly exercised its discretion in rejecting his claim. *See* ***Harbor***, 333 Wis. 2d 53, ¶38 (court has discretion to deny sentence modification upon concluding that alleged new factor does not justify relief). "A discretionary decision will be affirmed if it is made based upon the facts of record and in reliance on the appropriate law." ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. Our review of a circuit court's exercise of sentencing discretion is highly deferential. *See* ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. We adhere to a strong policy against interfering with a circuit court's sentencing discretion. ***Id.***

¶14 In the postconviction order here, the circuit court confirmed that it understood when sentencing Dunbeck that he carried mental health diagnoses and that his mental health "offered some explanation for his behavior." Nonetheless, the circuit court said, it concluded at sentencing that Dunbeck's mental health served neither to excuse his conduct nor to eliminate the need for punishment. Given the information available at sentencing, the circuit court explained, Grade's later report did "not alter the [circuit] court's view of the defendant's character." Although Dunbeck argues that Grade's conclusions "should have" changed the

circuit court's character assessment, he offers no legal basis for that conclusion. To the contrary, a circuit court generally has discretion to determine the weight to assign to sentencing considerations. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶15 In denying postconviction relief, the circuit court emphasized, as it did at sentencing, that Dunbeck committed "heinous acts" and opined that they "called for a significant prison term to punish him and to address the emotional and psychological issues lurking behind his behavior." The circuit court then found that "any lesser confinement time would unduly depreciate the seriousness of the offense and frustrate the purpose and intent of the original sentence in this case." *Cf.* ***State v. Vaughn***, 2012 WI App 129, ¶¶36-37, 344 Wis. 2d 764, 823 N.W.2d 543 (circuit court may consider whether alleged new factor would frustrate purpose of the original sentence).

¶16 The circuit court's postconviction order reflects a proper exercise of discretion. The circuit court made no legal errors, and it explained its reasons for rejecting Dunbeck's request for sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶63. Although the circuit court did not assess the information Dunbeck presented in the manner he had hoped, that is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("our inquiry is whether discretion was exercised, not whether it could have been exercised differently"). We affirm.

By the Court.—Order affirmed.

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