COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2130-CR **Cir. Ct. No. 2011CF149**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL W. DUTTON,

DEFENDANT-APPELLANT.

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

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael W. Dutton appeals an order denying his WIS. STAT. § 974.06[1] motion seeking sentence modification following his no

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

contest pleas to stalking, WIS. STAT. § 940.32(2) (2009-10), and threatening to communicate derogatory information, WIS. STAT. § 943.31(2009-10). Since his conviction, Dutton has been sending letters to, and filing motions in, the circuit court asking the court to remove the requirement imposed at sentencing that Dutton register as a sex offender pursuant to WIS. STAT. § 973.048. Dutton argues the circuit court erroneously relied on the read-in offense of second-degree sexual assault when it imposed the sex-offender-registration requirement, and that the requirement cannot be imposed based on a stalking conviction. Because the circuit court ordered Dutton to register as a sex offender based on the stalking charge for which he was convicted, and because sex offender registration can be ordered based on a stalking conviction, we affirm.

BACKGROUND

¶2 In February 2011, the State charged Dutton with second-degree sexual assault, stalking, threats to injure or accuse of a crime, and threatening to communicate derogatory information, all as a repeater. The charges stemmed from the alleged sexual assault of D.H., the repeated threats to D.H. trying to get her to have sex with Dutton, and emails sent to D.H.'s husband saying D.H. was having an extra-marital affair. Dutton entered into a plea agreement, wherein the sexual assault and threat to injure charges would be dismissed but read in at sentencing, and he would enter no contest pleas to the stalking and threatening to communicate derogatory information charges.

¶3 At the sentencing hearing, the prosecutor asked the circuit court to order Dutton to register as a sex offender because the stalking charge was sexually motivated to attempt to get D.H. to have sex with Dutton. Dutton objected to the sex-offender-registration requirement and the circuit court offered to let Dutton

withdraw his plea and go to trial. After discussing the option with his attorney, Dutton decided to proceed with sentencing knowing that he could be ordered to register as a sex offender as a part of the sentence. The circuit court imposed a sentence consisting of eighteen months initial confinement, followed by two years of extended supervision on both the stalking and the threatening to communicate derogatory information counts, to be served consecutive to each other and any other sentence.

¶4 As a part of the extended supervision conditions, the circuit court ordered Dutton to register as a sex offender and found that under WIS. STAT. § 973.048, Dutton qualified as a sex offender based on the "facts of this case" and the need to protect the public. The circuit court specifically said:

> [W]hat's important about this, Mr. Dutton, is today you are not being sentenced for the second[-]degree sexual assault, you are being sentenced for stalking, which you've acknowledged you've done, and you are being sentenced for threatening to communicate derogatory information, which you've agreed you've done ….

Since judgment was entered, Dutton has filed at least a dozen motions in which he asked the circuit court to remove the requirement that he register as a sex offender, including the most recent motion, the denial of which underlies this appeal. Although we could deny Dutton's appeal on procedural grounds under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (successive postconviction motions making the same arguments are procedurally barred unless a sufficient reason exists for the defendant's failure to raise the issue earlier), we elect to address the merits to avoid additional motions from Dutton in the future.

DISCUSSION

¶5 Dutton argues his sentence should be modified—that is, the requirement that he register as a sex offender be removed. Dutton claims the circuit court erroneously relied on the sexual assault, a read-in offense, to impose the sex-offender-registration requirement, and that the requirement cannot be imposed on the stalking conviction.

¶6 To succeed on a motion for sentence modification, Dutton must show a new factor exists to support his motion. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is defined as "'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.*** (citation omitted). Whether a new factor exists is a question of law we review de novo. ***Id.*** If Dutton proves a new factor exists, the circuit court makes a discretionary call on whether the new factor warrants a change in the sentence. *See* ***id.***

¶7 Dutton has not shown a new factor exists. Requiring him to register as a sex offender was discussed extensively at the sentencing hearing. The circuit court even gave Dutton the opportunity to withdraw his plea and go to trial when his exposure to the sex offender registration became known. This requirement was known to all parties at the time of sentence, and therefore cannot be a new factor.

¶8 The crux of Dutton's complaint is that he believes the circuit court imposed the sex-offender-registration requirement based on the read-in offense of sexual assault rather than on the stalking charge. He makes this argument because

he believes the crime of stalking cannot support a court's order to register as a sex offender. Dutton is wrong on both accounts.

¶9 With respect to basing the registration requirement on the read-in offense, the record shows this is not what the circuit court did. As noted, the circuit court explained it was sentencing Dutton on the two charges he admitted committing—the stalking and the threatening to communicate derogatory information. There is nothing in the Record convincing us the circuit court imposed the sex offender registration based on the read-in offense of sexual assault.

¶10 With respect to Dutton's contention that sex offender registration cannot be ordered based on stalking, he is incorrect. There is no question that sex offender registration may be ordered based on a stalking conviction. WISCONSIN STAT. § 973.048(1m) authorizes the circuit court to require a person convicted of any crime under WIS. STAT. "ch. 940" "to comply with the reporting requirements under [WIS. STAT.] s. 301.45 [the statute outlining the process of sex offender registration] if the court determines that the underlying conduct was sexually motivated, as defined in [WIS. STAT.] s. 980.01(5)," and when necessary for protection of the public. Section 980.01(5) defines sexually motivated to mean: "that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim."

¶11 Here, all the statutory requirements are met. First, stalking is a crime under WIS. STAT. "ch. 940." WISCONSIN STAT. § 940.32 is a crime under chapter 940. Second, the circuit court found the conduct underlying the stalking to be sexually motivated: the stalking occurred because D.H. refused to continue a relationship or have sexual contact with Dutton, and Dutton made threats to try to

coerce D.H. into having sex with him. The circuit court's finding is reasonable based on the allegations in the complaint, which formed the factual basis for Dutton's pleas. Dutton stalked D.H. to achieve sexual arousal or gratification. Third, the circuit court ruled registration as a sex offender was necessary to protect the public based on Dutton's age, the seriousness of the offenses, the fact he committed the crimes "both before and after prison sentences" and while he was on extended supervision. The circuit court's decision is reasonable based on the facts of the case and the pertinent law.

¶12 Accordingly, the circuit court did not err in ordering Dutton to register as a sex offender based on the stalking conviction, and Dutton has failed to show any new factor exists.

¶13 Dutton also complains the circuit court's order does not provide a sufficient explanation for its decisions denying his repeated requests to remove from his sentence the requirement that he register as a sex offender. The sentencing transcript and the transcript of the hearing on this postconviction motion show the circuit court spent a significant amount of time addressing the proper sentencing factors, discussing the changes with Dutton, and explaining its reasoning. Thus, there is no merit to Dutton's claim the circuit court erroneously exercised its discretion when it denied his postconviction motion. *See generally* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20 (no erroneous exercise of discretion when the totality of the record shows the circuit court addressed the proper factors and gave an explanation for its decision).

By the Court.—Order affirmed.

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