COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP464-CR
2015AP465-CR

Cir. Ct. Nos. 2009CF12
2009CF57

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ANTHONY DARLAND,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Mark Darland appeals an order denying his postconviction motion for sentence modification. Darland sought an eighteen-month reduction in the first of his two consecutive terms of initial confinement

based on the existence of a new sentencing factor. The new factor, according to Darland, is that, given the consecutive nature of his sentences on the two drug-related offenses, he could never attain the minimum custody classification required by the Department of Corrections (DOC) to take advantage of the risk reduction sentence (RRS) program while serving his first sentence. We affirm because Darland's inability to complete the RRS program during his first sentence was not highly relevant to the circuit court's sentencing decision and thus does not constitute a new factor warranting sentence modification.

BACKGROUND

¶2 On February 3, 2009, Darland was charged in Marinette County Case No. 2009CF12 with delivery of heroin following a confidential informant's January 2009 drug purchase from Darland. In April 2009, Darland was charged in Marinette County Case No. 2009CF57 with possession with intent to deliver heroin and cocaine, and possession of tetrahydrocannabinols and drug paraphernalia, all as a party to a crime. The 2009CF57 charges arose out of a separate January 2009 incident in which law enforcement intercepted Darland and others while they were returning from purchasing narcotics in Chicago.

¶3 Darland reached a plea agreement with the State resolving both cases. In 2009CF12, Darland pled no contest to delivery of heroin. In 2009CF57, Darland pled no contest to possession with intent to deliver cocaine. The remaining counts in 2009CF57 were dismissed but read in for sentencing purposes, and the State agreed not to prosecute a bail jumping charge arising out of an arrest for possession of heroin in Illinois. The State also agreed not to make a specific sentencing recommendation, other than to support Darland's eligibility

for the Challenge Incarceration Program (CIP) and Earned Release Program (ERP).

¶4 The sentencing hearing in both cases was held on February 25, 2010.[1] The State stood silent regarding sentence length and supported Darland's CIP and ERP eligibility. The circuit court then inquired of defense counsel about Darland's RRS eligibility. Defense counsel responded that Darland "would probably be eligible and would be willing to make the agreements that are necessary for that."[2] However, defense counsel made clear that Darland was "not specifically requesting" an RRS, and counsel urged the court to make Darland eligible for CIP and ERP because those programs would "work[] out better mathematically for him than would the calculus on [RRS]." The court ultimately sentenced Darland to consecutive ten-year sentences, consisting of six years' initial confinement and four years' extended supervision on each count.

¶5 There were two problems with the judgments of conviction that became apparent in the years following the judgments' entry. First, the circuit court made Darland eligible for CIP and ERP on the first of his two sentences, which, by virtue of the consecutive nature of his sentences and DOC protocols, made it impossible for Darland to participate in those programs. In 2011, Darland

[1] The sentencing was held before the Hon. Tim A. Duket. Darland's postconviction motion was heard by the Hon. James A. Morrison.

[2] A court may order an RRS if it determines an RRS is appropriate and the defendant agrees both to cooperate in an assessment of his or her criminogenic factors and risk of reoffending, and to participate in programming or treatment developed by the DOC. WIS. STAT. § 973.031 (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted, which was the version of the statutes in effect at the time of the offenses in this case.

successfully moved to amend the judgments of conviction to reassign his CIP and ERP eligibility from his sentence in 2009CF12 to his sentence in 2009CF57. Second, despite the court's oral statement at the sentencing hearing that Darland would be eligible for RRS in both cases, only the judgment of conviction in 2009CF12 reflected Darland's RRS eligibility. In September 2014, Darland successfully moved, upon the parties' stipulation, to correct this clerical error on the 2009CF57 judgment.

¶6 One month later, Darland filed a postconviction motion to modify his sentence in 2009CF12 based on the existence of a new factor. An RRS-eligible inmate may be released to extended supervision after serving no less than seventy-five percent of his or her sentence if he or she completes the programming or treatment plan developed by the DOC and maintains a good conduct record while confined. WIS. STAT. § 302.042.[3] The RRS plan the DOC developed for Darland required him to attain a "minimum" custody classification. *See* WIS. ADMIN. CODE § DOC 302.05 (Dec. 2014). However, the DOC denied Darland's request for reclassification to minimum custody, due to his sentence structure and anticipated release date. As a result, Darland asserted it was "impossible" for him to successfully complete the RRS program during his first of the two consecutive sentences, and he argued this impossibility constituted a new factor warranting an

[3] Risk reduction sentences were eliminated as a sentencing option in 2011. *See* 2011 Wis. Act 38, §§ 13, 92.

eighteen-month reduction in the initial confinement term of his 2009CF12 sentence.[4]

¶7 The circuit court denied Darland's postconviction motion following a nonevidentiary hearing. The court reasoned that an outright reduction in Darland's sentence by eighteen months was contrary to the stated purposes of Darland's sentence, which were protection of the community and deterrence. In the circuit court's view, when Darland's sentences were looked at as a whole, he "was supposed to get the benefit of a substantial early out, and he has that." Darland appeals.

DISCUSSION

¶8 A circuit court has the inherent authority to modify a criminal sentence when a defendant demonstrates the existence of a "new factor." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citing ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983)). "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***Id.*** The defendant has the burden to demonstrate, by clear and convincing evidence, the existence of a new factor. ***Id.***, ¶36 (citing ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989)). If a court determines the facts presented by the defendant do not constitute a new factor as a matter of law, it need go no further in its analysis of the defendant's motion. ***Id.***, ¶38. If, on the other hand, the defendant establishes the existence of a new factor, the circuit court then

[4] Darland reasoned that because his term of initial confinement in 2009CF12 was six years, if he had successfully completed the RRS program, he would have been able to convert twenty-five percent of that amount (eighteen months) to extended supervision, by operation of WIS. STAT. § 302.042(4).

determines, in its discretion, whether that new factor justifies modification of the sentence. ***Id.***, ¶37.

¶9 Darland argues the "DOC's refusal to grant [Darland] minimum custody status during his first term of confinement due to his sentence structure is a new sentencing factor."[5] A new factor is a fact that was "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). We conclude, as a matter of law, that under the circumstances of this case, Darland's inability to achieve minimum custody classification during his first term of initial confinement as a result of his sentence structure is not a new factor because Darland's completion of the RRS program was not "highly relevant" to his original sentence.

¶10 The most prominent evidence supporting this conclusion is defense counsel's own statements when questioned by the circuit court about Darland's RRS eligibility at the sentencing hearing. As part of the plea agreement, Darland required the State to support his CIP and ERP eligibility. These programs were the focus of defense counsel's arguments at the sentencing hearing. Indeed, defense counsel specifically told the circuit court that while Darland would make the necessary agreements to enter the RRS program, he was not specifically

[5] Darland improperly cites an unpublished 2014 per curiam court of appeals opinion. *See* WIS. STAT. RULE 809.23(3) (2013-14). We admonish Darland's counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2) (2013-14).

requesting an RRS and counsel believed it would be more beneficial for Darland to complete the CIP and ERP programs.

¶11 Despite the foregoing, Darland argues his ability to serve an RRS on both counts was highly relevant because the sentencing court emphasized rehabilitation and was motivated by a desire to see Darland address his drug addiction. While a fact that frustrates the purpose of the original sentence is not an independent requirement, such a fact "likely satisfies the ***Rosado*** test, provided that the fact was also unknown to the court at the time of sentencing." ***Harbor***, 333 Wis. 2d 53, ¶¶48-49. However, contrary to Darland's argument, the transcript of the sentencing hearing reflects that the court's primary purpose in sentencing Darland was protection of the community, with a secondary emphasis on deterrence.

¶12 The circuit court began its sentencing remarks by emphasizing the danger to the community presented by heroin and cocaine. Labeling them "pernicious substances" and emphasizing their "highly addictive" nature, the court stated these drugs were becoming increasingly common and were "killing the community very slowly." The court noted heroin in particular had "wrecked a lot of people's lives," including Darland's. The court condemned Darland's "predatory behavior" of bringing out-of-state drugs into the local community.

¶13 The circuit court also found Darland's course of conduct did not show good character. Darland, at age thirty-five, became addicted to narcotics and left his wife and children to live with a much younger woman, who was also an addict and involved in drug dealing. The court expressed skepticism that Darland was genuinely remorseful, noting that Darland repeatedly denied committing drug offenses and that he had attempted to shift blame to others. The court also

observed that Darland had been arrested for a heroin offense in Illinois even after the present charges were filed.

¶14 The circuit court also stated there needed to be "a deterrent effect of the sentence." The court sought to fashion a sentence that would dissuade individuals from becoming addicted to drugs and engaging in drug dealing activity. Noting Darland "has skills that he can use to make 35 bucks an hour legitimately," the court emphasized that Darland was better situated than individuals who were making much less and "struggl[ing] to get by." Despite his ability to succeed with lawful employment, Darland chose to engage in illegal conduct, and the court expressed that it wanted to send a message to "all these younger people that think you don't have to go to work and earn a living and pay taxes because … all you have to do is sell cocaine and heroin to your friends, and it's tax free, and it's easy."

¶15 Darland focuses on one particular paragraph in the circuit court's sentencing remarks, in which the court addressed Darland's eligibility for the various sentencing programs:

> Now, I understand about [RRS], and if he agrees to cooperate with the assessment and follow through with the programming he could chop significant time off this sentence. Also if he participates in [CIP] and/or [ERP], he could significantly reduce the time on the sentence. It's up to him to get into these programs and succeed, but there is authority … of the court to make sure that he doesn't get in too quickly and get back on to the streets too soon because I think the message has to be sent and deterrence has to be had and people have to have satisfaction that this was a just and fair sentence, taking into consideration all the facts and circumstances.

The court's passing reference to the potential for early release, taken in context, does not demonstrate that Darland's ability to attain early release through an RRS

was highly relevant to his sentence or that his inability to do so frustrated the purposes of the sentence. It certainly does not establish that Darland should now receive the benefit of an eighteen-month sentence reduction simply because he cannot complete the program given the DOC's rules.

¶16 Given the foregoing, we reject Darland's argument that the circuit court "anchored its sentencing decision on [Darland's] ability to successfully complete a[n RRS]." Indeed, the court specifically downplayed the need for rehabilitation in this case, stating that because of Darland's age, "there is less … of a cry for rehabilitation than if he were a young person [of] 18 or 20." The court recognized Darland had a drug addiction problem, and it provided him with an opportunity to address that problem. However, the court did not make any assumptions about Darland's ability to obtain early release. To the contrary, the circuit court stated Darland was not "a good risk," and it clearly wanted Darland confined for a significant period of time, explicitly fashioning a sentence that would prevent Darland from being released before adequately addressing his addiction issues.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).