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DISTRICT III

October 31, 2023

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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1789-CR State of Wisconsin v. Aaron Wayne Weso (L. C. No. 2021CF562)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Aaron Weso appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), as a fourth offense, and felony bail jumping. Weso also appeals an order denying his postconviction motion for sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the reasons explained below, we summarily affirm the judgment of conviction and the order denying sentence modification.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Following his arrest for OWI, the State charged Weso with eight offenses. Pursuant to a plea agreement, Weso entered no-contest pleas to one count of fourth-offense OWI and one count of felony bail jumping. The remaining counts were dismissed and read in for purposes of sentencing.

The circuit court subsequently imposed consecutive sentences consisting of one year of initial confinement followed by one year of extended supervision on each count of conviction. During its sentencing remarks, the court discussed at length Weso's mental health issues and their impact on his criminal history. Then, when discussing Weso's character, the court noted that although Weso was "a good worker,"

> it's just managing the whole interaction with people that you seem to have a hard time with. I don't know, we need to figure out how we can help you do that, but in the meantime we can't—we can't have you keep trying while the community—we don't want to put our community in danger while you manage and try to figure this out. We want you to figure it out; I want you to figure it out. But I also have to protect the community and people that haven't quite yet learned how to regulate their emotions because—and I think you might even agree with me, that there [are] times where you just—you lose yourself, you lose control, and I think until we know how to regulate that, you know, I think that we need to do what we can to help.

The court later stated:

> I don't want to impose a sentence that I know you're going to walk out that door and there's going to be nothing there for you but stress and problems and knowing that you haven't fully learned how to cope with what you have going on inside of you. What is the point then?

After the circuit court announced Weso's sentences, Weso addressed the court personally, stating that he was "not going to get the help that [he needed] in prison," that he had been to prison seven times before, and that he was "going to go in there and drink coffee

and … pass time." Weso's attorney then informed the court that there were "substantial wait[ing] lists for various types of programming" in prison and that counsel was not aware of any order that the court could enter to advance Weso on those waiting lists. The court did not change its sentencing decision based on this information.

Weso later filed a postconviction motion for sentence modification, asking the circuit court to make his sentences concurrent, rather than consecutive.[2] Weso argued that this modification was appropriate because the court had "implied" at sentencing "that one of the reasons it would impose consecutive sentences of prison time was so that [Weso] could enroll in programs that would be helpful to his needs." Weso asserted, however, that the Department of Corrections (DOC) had "denied [his] admittance to any of the helpful programs." He therefore asked the court to modify his sentences so that they would run concurrently because his needs would be "better served outside of the correctional system[]."

The circuit court denied Weso's motion, concluding he had not established the existence of a new factor for purposes of sentence modification. Citing ***State v. Schladweiler***, 2009 WI App 177, ¶15, 322 Wis. 2d 642, 777 N.W.2d 114, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47 n.11, 52, 333 Wis. 2d 53, 797 N.W.2d 828, the court stated that "[t]he decision of whether a defendant actually participates in a program lies with [the] DOC; therefore, it will not be a new factor when [the] DOC denies admission to programming."

[2] Weso's postconviction motion also sought plea withdrawal, which the circuit court denied. On appeal, Weso challenges only that portion of the court's decision denying his motion for sentence modification.

A circuit court may modify a defendant's sentence "upon the defendant's showing of a 'new factor.'" ***Harbor***, 333 Wis. 2d 53, ¶35 (citation omitted). A new factor is a fact or set of facts that is highly relevant to the imposition of the defendant's sentence but was not known to the circuit court at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Id.***, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶36.

In ***Schladweiler***, the defendant argued that he was entitled to sentence modification based on a new factor because the circuit court had made him eligible for the Challenge Incarceration Program (CIP) at sentencing, but the DOC subsequently denied him placement in that program. ***Schladweiler***, 322 Wis. 2d 642, ¶1. We concluded that the DOC's eligibility determination did not constitute a new factor because the court "expressly indicated" during sentencing "that participation in the CIP is a possibility to be ultimately determined by the [DOC]." ***Id.***, ¶11. Based on the court's statements at sentencing and "the statutory framework which provides the DOC with the final word on [a defendant's] eligibility" for the CIP, we concluded the defendant could not show "that the DOC's potential denial of placement was a fact not known to the [circuit] court at the time of sentencing." ***Id.***

Similarly, in this case, Weso and his attorney informed the circuit court at sentencing that there were significant waiting lists for treatment programs in prison and that it was unlikely Weso would receive treatment while incarcerated. Thus, the court was aware at the time of sentencing that there was no guarantee that Weso would receive treatment while in prison and that, in fact, it was unlikely he would receive such treatment. Under these circumstances, Weso's inability to receive treatment in prison is not a new factor because, as in ***Schladweiler***,

the possibility of that outcome was known to the court at the time of sentencing.[3] *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

On appeal, Weso argues that the circuit court erred by denying his motion for sentence modification because the court incorrectly stated that sentence modification may be granted "only" when the defendant has established the existence of a new factor. Weso correctly notes that a circuit court also has authority to modify a sentence when it concludes that the sentence was unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. Weso's postconviction motion, however, did not ask the court to modify his sentences on the grounds that they were unduly harsh or unconscionable. Weso has therefore forfeited any claim that he was entitled to sentence modification on that basis. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

Moreover, Weso does not develop any argument on appeal that his sentences were unduly harsh or unconscionable—that is, that they were "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[3] In addition to showing the existence of a new factor, a defendant seeking sentence modification must also show that the purported new factor justifies modification of his or her sentence. ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. Because we conclude that Weso failed to demonstrate the existence of a new factor, we need not discuss this second step of the analysis. *See* ***id.***

Regardless, we note that a sentence that is well within the statutory maximum is presumptively not unduly harsh or unconscionable. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32. Both fourth-offense OWI and felony bail jumping are Class H felonies with maximum sentences of three years' initial confinement followed by three years' extended supervision. *See* WIS. STAT. §§ 346.65(2)(am)4., 946.49(1)(b), 939.50(3)(h), 973.01(2)(b)8. Thus, the circuit court could have sentenced Weso to a total of six years' initial confinement followed by six years' extended supervision. Weso's consecutive sentences totaling two years' initial confinement followed by two years' extended supervision are well within the statutory maximums and are therefore presumptively not unduly harsh or unconscionable.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals