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DISTRICT II

June 25, 2025

To:

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Circuit Court Judge
Electronic Notice

John W. Kellis
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Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
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Brian Patrick Mullins
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1799-CR

State of Wisconsin v. Kyle E. Gustin (L.C. #2020CF649)

Before Gundrum, P.J., Grogan, and Lazar, 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).

Kyle E. Gustin appeals the judgment convicting him of second-degree sexual assault of a child, incest, possession of THC, and possession of an improvised explosive. He also appeals the order denying postconviction relief. 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 (2023-24).¹

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

The State, alleging that Gustin sexually abused a family member and three of her friends, charged Gustin with numerous crimes, including, as relevant here: second-degree sexual assault of a child under the age of 16, child enticement, causing children to expose their genitals for his arousal or gratification, incest, and felony intimidation of a victim. The amended criminal complaint detailed Gustin's escalating abuse over a four-year period, during which he concocted pretexts for persuading the victims to allow him to see them naked and touch their bodies, gave the victims marijuana and alcohol while encouraging them to perform sex acts, and claimed to have ties with organized crime and terrorist organizations and suggested the victims were under surveillance in order to discourage them from seeking help.

Gustin pled guilty to 5 of the 28 charges against him, and the circuit court sentenced him to 39 years' initial confinement and 36 years' extended supervision. Given that Gustin was 38 years old when he was sentenced, he would remain incarcerated into his late seventies.

In sentencing Gustin, the circuit court acknowledged that it needed to consider public protection, the gravity of Gustin's offenses, Gustin's rehabilitative needs, punishment, and deterrence. After stressing the seriousness of Gustin's offenses, the court declared that public protection was its "primary driving objective" behind the sentence:

Protection of the public. It is the primary driving objective in this sentence. Mr. Gustin, your days of molesting children are done. Because you're probably not going to get out of prison to ever touch a child again. By putting you in prison pretty much for the rest of your life, I'm going to ensure myself and the community that you are never going to molest another child again.

The circuit court also stressed the degree to which Gustin manipulated his victims, which it characterized as "stunning in its depth and purpose" and included Gustin telling his victims he planned to secure them modeling jobs in order to persuade them to expose themselves as well as

supplying them with marijuana and alcohol and threatening them as detailed above. The court further recounted how Gustin minimized his behavior by claiming he was “just goofing ... or being stupid” when in reality his behavior was extremely serious.

Gustin subsequently moved the circuit court to either resentence him or modify his sentence. As relevant to this appeal, Gustin asked the circuit court to modify his sentence from 39 years of initial confinement to 30-33 years. Gustin argued that the court should shorten his prison sentence based on a postsentencing psychosexual evaluation suggesting that Gustin had a low recidivism risk, ranging from 5 to 9 percent within 5 to 20 years of his prison release.

At the postconviction hearing, the psychologist who evaluated Gustin testified that one of the “most remarkable findings” over the past 20 years is the fact that, on average, an offender’s risk of reoffending “decreases quite significantly after the age of sixty.” The psychologist explained that as men grow older their testosterone levels decrease, leading to “less risk-taking” and “[l]ess aggression.” The psychologist also admitted, however, that age does not necessarily affect an offender’s ability to manipulate.

The circuit court denied Gustin’s motion, concluding that the psychosexual evaluation did not constitute a new factor justifying sentence modification because it did not add any new information highly relevant to the sentence. The court explained that while the evaluation gave Gustin a relatively low likelihood of reoffending after the age of 60, that likelihood was still a theoretical estimate, not a certainty, and the sentence was fashioned to ensure Gustin would never be able to come into contact with children. The court further explained that the evaluation and hearing testimony were not relevant regarding the gravity of the offense and the need for punishment. It reiterated the degree of manipulation, Gustin’s ongoing attempts to either

minimize or demonstrate he did not fully comprehend the seriousness of his crimes, and the large number of charges against him. The court also noted that Gustin’s health issues were factored into the sentence, which was not the maximum that could have been imposed.

Gustin appeals, again arguing that the psychosexual evaluation is a new factor justifying the modification of his sentence.

“Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences.” *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. Although “reflection and second thoughts alone” are insufficient to warrant modification, a court “may base a sentence modification upon the defendant’s showing of a ‘new factor.’” *Id.* (quoting *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.” *Harbor*, 333 Wis. 2d 53, ¶36. First, a defendant must establish a new factor, which 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.” *Id.*, ¶¶36, 40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant bears the burden to demonstrate a new factor by clear and convincing evidence. *Harbor*, 333 Wis. 2d 53, ¶36. Second, “if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.*, ¶ 37. We review de novo whether a defendant presented facts that constitute a “new factor.” See *id.*, ¶33. We review whether a new factor justifies sentence modification for an erroneous exercise of discretion. See *id.*

We conclude that the psychosexual evaluation does not constitute a new factor because it was not highly relevant. *See Harbor*, 333 Wis. 2d 53, ¶40. As the circuit court noted, the primary objective of the sentence was to protect the public and ensure Gustin would *never again* contact a child, not just to reduce the risk that he would reoffend. This was particularly important given not only the sheer number of charges against Gustin and how serious they were, but also the highly manipulative tactics he used to groom his victims and prevent them from seeking help—none of which were meaningfully addressed by the evaluation. Notably, the psychologist who evaluated Gustin testified that age would not necessarily affect an offender’s ability to manipulate. Moreover, while the evaluation put Gustin at a low risk of reoffending based on a number of risk assessments, the presentence investigation report (“PSI”) relied on by the circuit court also put Gustin at a low-to-medium risk of reoffending. Thus, while the postsentencing psychosexual evaluation may have used different assessment tools than the PSI, its conclusions did not add anything new to the court’s understanding of factors affecting the sentence. *See Harbor*, 333 Wis. 2d 53, ¶40.

Therefore, because the psychosexual evaluation is not a “new factor,” we need not consider whether it justifies sentence modification. *See Harbor*, 333 Wis. 2d 53, ¶¶36-37.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* 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