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February 6, 2019

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

2018AP387-CR State of Wisconsin v. Demont L. Cowley (L.C. #2016CF154)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Demont L. Cowley appeals from a judgment of conviction and an order denying his motion for postconviction relief, which sought modification of his sentence. 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 (2015-16).[1] We affirm.

On May 7, 2016, Cowley and Earl Cosey went to Boston Store in West Bend. Driving Cosey's car, Cowley dropped Cosey off near the entrance and parked nearby. After a few minutes, Cosey left the store with several purses, and Cowley quickly pulled up. As a marked police car arrived, Cosey threw the purses in the backseat and took a seat in the front. Cowley sped away, and a chase ensued. Cowley entered the highway at approximately 90 miles per hour. His speed during the chase at times reached almost 125 miles per hour. Cowley evaded a police-deployed tire-deflation device, but then struck others, slowing him down to about 25 miles per hour. He nonetheless continued to flee until a tire came off. The chase spanned almost fourteen miles, involving five different police departments.

Police arrested Cowley and Cosey, finding twenty-seven purses and a loaded handgun in the car. Cowley was charged with felony retail theft as a party to a crime, attempting to flee a traffic officer, and possession of a firearm by a felon, all as a repeater. After a two-day trial, the jury found Cowley guilty of the theft and fleeing charges and acquitted him on the firearm charge.

A presentence investigation (PSI) reviewed Cowley's lengthy criminal history, family relationships, education, employment, finances, and substance abuse. It noted Cowley has two children with his wife and four other children with whom he maintains a relationship. He told the PSI writer that he did "not believe he has a drug problem and does not feel he needs

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

treatment." The PSI concluded that Cowley was "unlikely to have a serious substance abuse problem," but that "in some cases a substance abuse education program may still be appropriate."

At sentencing, the court asked if there were any corrections that should be made to the PSI. Cowley's counsel stated that both he and Cowley had reviewed it and that there were no corrections "of any substance" to be made. The court discussed Cowley's lengthy criminal history, his children and other family ties, the seriousness of the fleeing charge, and the fact that Cowley had been driving without a license. It noted Cowley's high recidivism risk as described in the PSI. The court discerned Cowley to be neither credible nor remorseful.

The court stated that the sentencing objectives were community protection, punishment, and deterrence. It emphasized the "aggravated" nature of the fleeing offense and its concern that a lesser sentence would "unduly depreciate the seriousness of the offense." The court sentenced Cowley to a total of three and one-half years' initial confinement and two years' extended supervision. The court also determined that, although Cowley was statutorily eligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP), it was, as an exercise of its discretion, denying his eligibility to participate in those programs.[2] In so doing, the court referred to its general sentencing comments, but also specifically pointed out the seriousness of the offenses, particularly the fleeing offense, and reasoned that program participation would be inconsistent with the objective of punishment.

[2] CIP (also known as boot camp) and SAP allow an eligible inmate who successfully completes either program to be released early from prison to extended supervision. *See* WIS. STAT. §§ 302.045, 302.05(3).

In December 2017, Cowley moved for postconviction relief from his sentence, specifically asking to be made eligible to participate in CIP and SAP. In support, Cowley asserted that, since sentencing, his cousin was killed, leaving behind two minor children, and Cowley wanted to assist in their upbringing. He also asserted that the PSI contained inaccuracies regarding his earlier participation in programming and that CIP and SAP could help him address his substance abuse issues. The court denied the motion. It did not specifically determine whether the cousin's death constituted a new factor for sentencing purposes, but instead determined that, even if it was, it did not warrant sentence modification in light of the seriousness of the crime. The court also determined that, while it was unclear whether the PSI was inaccurate, it had not relied on the alleged inaccuracies in any event when sentencing Cowley. Cowley appeals.

Cowley argues the death of his cousin is a new factor that warrants modification of his sentence, such that he should be allowed to participate in CIP and SAP. We disagree.

Before new information can serve as a basis to modify a sentence, two requirements must be met. First, the defendant must show a "new factor," which specifically means information "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." ***State v. Boyden***, 2012 WI App 38, ¶5, 340 Wis. 2d 155, 814 N.W.2d 505 (citation omitted). Such a new factor must be shown by clear and convincing evidence, which presents a question of law we review independently. ***Id.***, ¶¶5-6. Second, if such a factor is shown, whether it justifies sentence modification is within the circuit court's discretion, a decision we will uphold unless the discretion was exercised erroneously. ***Id.***, ¶6.

Cowley has not shown that his cousin's death constitutes a new factor. Although the death occurred after sentencing and therefore was unknown to the court, such a circumstance cannot reasonably be characterized as "highly relevant" to Cowley's sentence generally or to his participation in CIP and SAP in particular. Because of the aggravated and serious nature of the crime—a lengthy, reckless, and dangerous high-speed chase on the heels of a felony theft—the court's primary sentencing objectives were punishment, community protection, and deterrence. The court set these as objectives, and imposed a sentence pursuant to them that specifically precluded CIP and SAP participation, fully knowing Cowley had children of his own (six in total) to help support. The court expressly reasoned that allowing participation in the programs would undercut the sentencing goal of punishment. While the information of the cousin's death was new, it was not relevant, much less highly so, to the imposition of Cowley's sentence.

Cowley nonetheless asserts the court exercised its discretion in error, specifically asserting it failed to use a "process of reasoning" based on the facts, and the court's "single-sentence conclusion" that his cousin's death did not justify a modified sentence was an insufficient explanation. *See* ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). For essentially the same reasons discussed above, we disagree. Far from being a "single-sentence" explanation, the court, when it denied Cowley's motion, highlighted its view that the seriousness of the crimes outweighed the claimed new factors and also referred to its "extensive explanation" at the sentencing hearing in support of its exercise of discretion.

Cowley also argues, apart from his cousin's death, the circuit court erred when it denied making him eligible for the CIP and SAP programs. He asserts the court mistakenly focused

only on the seriousness of the crime and failed to consider his rehabilitative needs, particularly his need for substance abuse treatment.[3] We see no error.

For both CIP and SAP, a sentencing court first determines whether an offender meets the program's eligibility criteria. ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112; *see also* ***State v. Owens***, 2006 WI App 75, ¶9 & n.3, 291 Wis. 2d 229, 713 N.W.2d 187. If the criteria are met, the sentencing court then determines, "exercising its own sentencing discretion," whether the offender should be made eligible: "Even if the offender meets all of the department's eligibility requirements … the trial court has the discretion … to declare an offender ineligible …." ***Steele***, 246 Wis. 2d 744, ¶8.

Arguments similar to Cowley's have been made before and rejected. In ***Steele***, the defendant argued that a sentencing court, when determining CIP eligibility, is limited to the statutory criteria, and, if the offender meets the criteria, the court has no discretion to preclude participation in the program. The ***Steele*** court rejected the argument, pointing out that the statute requires the sentencing court to independently use its discretion: "[T]he court shall, *as part of the exercise of its sentencing discretion*, decide" eligibility. ***Steele***, 246 Wis. 2d 744, ¶8 (quoting WIS. STAT. § 973.01(3m)). As applied to that case, the ***Steele*** court concluded that the sentencing court did not err when it denied CIP participation "due to the seriousness of the offenses," which was an "appropriate sentencing factor." ***Steele***, 246 Wis. 2d 744, ¶11.

[3] In his postconviction motion, Cowley asserted that inaccuracies within the PSI were an additional reason for sentence modification. He does not advance this as an argument on appeal.

In ***Owens***, the sentencing court denied the defendant's participation in SAP. Based on the defendant's criminal history and the aggravated nature of the crime, the court emphasized the objectives of community protection and punishment of the defendant. ***Owens***, 291 Wis. 2d 229, ¶11. It determined that SAP participation would be inconsistent with those objectives. ***Id.*** As this was an adequate and reasonable explanation, the ***Owens*** court concluded that the sentencing court properly exercised its discretion. ***Id.***

Likewise, here, the sentencing court adequately explained why it denied Cowley participation in CIP and SAP. As noted, it discussed a variety of relevant factors, including a review of the PSI and Cowley's rehabilitative needs. It determined, however, that the seriousness of the offense, the need to punish Cowley, the need to protect the public, and the need for deterrence outweighed the benefit of Cowley's participation in the programs. Cowley's contention that the court did not adequately consider the benefit of the programs in addressing his substance abuse problem is unfounded as he, himself, had previously denied such a problem and the need for treatment. The sentencing court did not err in the exercise of its discretion. *See* ***Steele***, 246 Wis. 2d 744, ¶11; ***Owens***, 291 Wis. 2d 229, ¶11.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals