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DISTRICT II

November 16, 2022

To:

Hon. Lee S. Dreyfus Jr.
Circuit Court Judge
Electronic Notice

Hon. Laura F. Lau
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Kara Lynn Janson
Electronic Notice

Brent Simerson
Electronic Notice

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

2021AP1488-CR State of Wisconsin v. Eric J. Joling (L.C. #2018CF5)

Before Gundrum, P.J., Neubauer 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).

Eric J. Joling appeals a judgment of conviction that required him to pay restitution to the victims injured by his intoxicated operation of a vehicle. He also appeals an order denying his motion seeking postconviction relief in which he argued, among other things, that several new factors warranted modification of his current restitution order. 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 (2019-20).¹ Because we conclude that the circuit court did not exercise discretion by setting forth proper reasoning and explanation in denying Joling’s postconviction motion seeking modification of his restitution order on the basis of alleged new factors, we reverse the order on defendant’s motion for postconviction relief.

In the early morning hours of January 1, 2018, Joling drove his truck while intoxicated and hit a limousine head-on. The driver of the limousine and all four passengers inside it suffered injuries. Joling pled no contest to one count of operating a motor vehicle while intoxicated (fifth offense) and to one count of operating while intoxicated causing injury. Pursuant to Joling’s plea agreement with the State, additional counts were dismissed and read in. The circuit court² sentenced Joling to four years of initial confinement followed by four years of extended supervision on one count and to a stayed sentence with three years of probation on the other. Restitution (on the operating while intoxicated causing injury count) was held open, “to be determined at [a] future hearing.”

Three of the victims and their insurers sought restitution under WIS. STAT. § 973.20. The circuit court³ held two hearings related to the amount of loss, which the court found (and the parties do not dispute) is in the total amount of \$59,808.47. Pursuant to § 973.20(13), the circuit court held two additional hearings in 2020 related to Joling’s ability to pay, which Joling argued was affected by (among other things) the fact that he suffered from Crohn’s disease. Joling’s vocational expert explained that Crohn’s disease caused episodic abdominal pain and a need to

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The Honorable Lee S. Dreyfus, Jr. presided over the plea and sentencing.

³ The Honorable Laura F. Lau addressed restitution.

be close to a bathroom that would limit his employment options. Ultimately, the court rejected Joling's proposed plan of paying low monthly restitution installments while he pursued education to become a substance abuse counselor. Instead, in its April 15, 2021 order, the court found that Joling could find employment as a janitor and ordered him to make payments of at least \$500 per month to pay the full amount of restitution within ten years.

Joling filed a motion for postconviction relief under WIS. STAT. § 809.30(2)(h). One of Joling's arguments was that there were new factors in the four months since his last hearing that warranted modification of the restitution order.⁴ Specifically, Joling asserted that his Crohn's disease had worsened significantly, adversely affecting his ability to get a job and pay restitution. In an attempt to combat the disease, he was receiving monthly injections, taking additional medication, and eating only one meal per day. In fact, the Social Security Administration had determined that Joling was partially disabled and was eligible for monthly disability payments of \$1,153 per month because of the severity of his illness. These payments were Joling's sole source of income, and he argued that they could not be used for restitution payments under 42 U.S.C. § 407(a). See *Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 383-85 (2003).

The circuit court denied Joling's motion in a brief order dated August 20, 2021. With respect to Joling's asserted new factors, the court said: "If the court reconsidered its Decision

⁴ Joling also asserted other problems with the circuit court's restitution order, including a violation of Joling's due process rights. Because we reverse on the issue of new factors, we decline to address those issues at this time. See *Grogan v. PSC*, 109 Wis. 2d 75, 77, 325 N.W.2d 82 (Ct. App. 1982) ("We do not decide constitutional issues if the resolution of other issues can dispose of an appeal.").

based upon alleged new facts, there would be no finality to the Order. Therefore, the court declines to ‘reconsider’ its April 15th Decision.” Joling appeals.

A “new factor” 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). A sentence will be modified if the circuit court determines both that a new factor exists and that, as a discretionary matter, the new factor justifies modification of the sentence at issue. *Harbor*, 333 Wis. 2d 53, ¶38. In reviewing a discretionary decision, we first look to see whether discretion was, in fact, exercised. *State v. X.S.*, 2022 WI 49, ¶33, 402 Wis. 2d 481, 976 N.W.2d 425. As opposed to mere decision-making, an exercise of discretion requires “a process of reasoning” and adequate explanation. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971); *State v. Hall*, 2002 WI App 108, ¶¶16-17, 255 Wis. 2d 662, 648 N.W.2d 41.

Here, the circuit court provided neither reasoning nor explanation in its decision. It did not address whether new factors existed, stating it was denying Joling’s motion in the interest of finality. The State concedes, as it must, that this “is not a proper basis on which to deny Joling relief.” Because the circuit court did not, in fact, exercise its discretion in denying Joling’s postconviction motion on the basis of alleged new factors, we reverse with instructions to conduct an analysis of his asserted new factors under *Harbor*. We need not address at this time the issues of whether new factors exist or whether Joling’s other arguments challenging his judgment (as it pertains to restitution) have merit.

IT IS ORDERED that the circuit court's judgment is affirmed and that the August 20, 2021 order denying postconviction relief is reversed and the cause remanded with instructions.

See 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