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DISTRICT III

January 22, 2025

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

2023AP2035-CR State of Wisconsin v. Daniel J. Frausto (L. C. No. 2013CF464)

Before Stark, P.J., Hruz and Donald, 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).

In April 2023, the circuit court granted Daniel J. Frausto's motion for sentence modification. Frausto, pro se, now appeals a subsequent order that denied his later motion for further "review" of his sentences. 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] We summarily affirm.

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

Frausto was charged with numerous crimes committed in eight Wisconsin counties, all of which stemmed from his participation in a burglary ring. The majority of the charges were consolidated into a single twenty-four-count case in Outagamie County. Pursuant to a plea agreement, Frausto entered guilty pleas to seventeen of the twenty-four counts. The remaining seven counts were dismissed and read in, and uncharged offenses in three additional counties were also read in for purposes of sentencing. The crimes of conviction included burglary, false imprisonment, armed robbery, first-degree reckless injury, and battery.

The circuit court held a two-day sentencing hearing in May 2015. The parties jointly recommended sentences totaling fifty years, comprised of twenty-five years' initial confinement followed by twenty-five years' extended supervision. In support of the joint recommendation, the State emphasized that under the plea agreement, Frausto had agreed to cooperate with the State in the prosecution of Edwin Hughes, another individual who was allegedly involved in some of the offenses.

The circuit court sentenced Frausto to a total of sixty years' initial confinement followed by fifty years' extended supervision. The court also withheld sentence on one of the counts and imposed twenty-five years of probation. During its sentencing remarks, the court specifically addressed the gravity of the offenses, Frausto's criminal record, the support provided to Frausto by his family, Frausto's rehabilitative progress since the crimes were committed, Frausto's expressions of remorse, the need for further rehabilitation, and the need to protect the public. In particular, as related to the protection of the public, the court noted that Frausto began committing the crimes at issue in this case almost immediately after he was released from a prior incarceration. The court explained, "[T]he idea of somebody tasting freedom after being incarcerated as long as you were and then going right back to doing this once again is

jaw-dropping. It's aggravating." Based on Frausto's "track record," the court stated that it would probably need to "keep [Frausto] in jail for the rest of [his] life" to "100 percent ensure public protection."

In light of these considerations, the circuit court concluded that the parties' joint recommendation was insufficient "to address the overall crimes and the impact" on the victims. The court stated, however, that it would consider a future motion for sentence modification in the event that Frausto followed through with his promise to assist in the State's prosecution of Hughes.

In November 2021, Frausto filed a motion for sentence modification, based on his postsentencing assistance to the State in Hughes' prosecution. The State agreed that Frausto's assistance constituted a new factor for purposes of sentence modification, and it requested a hearing to determine whether Frausto's sentences should be modified. In August 2022, Frausto submitted a sentencing memorandum, which proposed that the circuit court modify his sentences such that he would be released in May 2024. The State then moved the court to order specific performance of the plea agreement, arguing that Frausto was barred from requesting a sentence below the parties' agreed-upon joint recommendation.

At a motion hearing in January 2023, the circuit court agreed that Frausto had shown the existence of a new factor and had presented "enough information to justify a modification of the sentence[s]." During a subsequent hearing in April 2023, the court ruled that specific performance of the plea agreement was "required under Wisconsin case law and federal law." The court then addressed the extent to which Frausto's sentences should be modified. The court emphasized that the new factor for purposes of sentence modification was Frausto's assistance

with Hughes' prosecution, and it noted that Frausto's rehabilitation while incarcerated did not qualify as a new factor, as a matter of law. As such, the court stated that the impact of Frausto's postsentencing rehabilitation "on the modification is minimal to low, or no input." Ultimately, the court modified Frausto's sentences so that his total initial confinement was reduced from sixty years to twenty-six years and his total extended supervision was reduced from fifty years to thirty-eight years.

In July 2023, Frausto filed a pro se motion "for review of sentence determination." Frausto argued that the circuit court "erroneously exercised its discretion at the sentence modification hearing by failing to consider his rehabilitative needs and any applicable mitigating factors." More specifically, Frausto emphasized his postsentencing rehabilitation and argued that the court was required to consider that factor when modifying his sentences.

The circuit court issued a written order denying Frausto's July 2023 motion. The court explained that Frausto's postsentencing rehabilitation "was not a new factor justifying sentence modification, and therefore, the [c]ourt did not err in its treatment of Frausto's [postsentencing] rehabilitation when modifying Frausto's sentence[s] to account for his assistance to law enforcement."

Frausto now appeals. He contends that the circuit court should have granted his motion for further review of his sentences because the court did not adequately consider his postsentencing rehabilitation when it ruled on his motion for sentence modification. Relatedly, Frausto contends that the court failed to expressly address each of the factors set forth in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, before modifying his sentences.

As the State aptly notes, throughout his brief-in-chief, Frausto confuses the "distinctly different concepts" of sentence modification and resentencing. *See* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81. A circuit court has inherent authority to modify a criminal sentence based upon the defendant's showing of a new factor—that is, a fact or set of facts highly relevant to the imposition of sentence, but not known to the 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. ***State v. Harbor***, 2011 WI 28, ¶¶35, 40, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a particular fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶36. If a new factor is present, the circuit court must exercise its discretion to determine whether that new factor justifies modification of the defendant's sentence. ***Id.***, ¶37. While a defendant's substantial assistance to law enforcement after sentencing may constitute a new factor for purposes of sentence modification, *see* ***State v. Doe***, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101, it is well established that a defendant's postsentencing rehabilitation cannot, as a matter of law, qualify as a new factor, *see* ***State v. Champion***, 2002 WI App 267, ¶¶6, 17, 258 Wis. 2d 781, 654 N.W.2d 242, *abrogated on other grounds by* ***Harbor***, 333 Wis. 2d 53.

While sentence modification is used to "correct specific problems" with a defendant's sentence, resentencing occurs "when it is necessary to completely re-do [an] invalid sentence." ***Wood***, 305 Wis. 2d 133, ¶9. "When a resentencing is required for any reason, the initial sentence is a nullity; it ceases to exist." ***Id.***, ¶6 (citation omitted). At a resentencing, a court may "consider a defendant's conduct after the imposition of the invalid sentence," and it is "not required to defer to the original sentencing objectives." ***Id.*** "In effect, the resentencing court is starting over." ***Id.***

Here, Frausto's November 2021 motion sought sentence modification based upon a new factor—i.e., Frausto's assistance to law enforcement in Hughes' prosecution. Frausto's motion did not assert that his original sentences were invalid, nor did it request resentencing. Under these circumstances, the circuit court properly treated Frausto's November 2021 motion as a motion for sentence modification. *See* ***id.***, ¶4 ("Whether a motion states a request for sentence modification based upon a new factor, or for resentencing because the original sentence is invalid, is a legal determination.").[2]

The fact that Frausto moved for sentence modification, rather than resentencing, is fatal to his claim that the circuit court was required to consider his postsentencing rehabilitation. As discussed above, when ruling on Frausto's November 2021 motion, the court determined that Frausto's substantial assistance to law enforcement constituted a new factor. The court further determined, in the exercise of its discretion, that that new factor warranted modification of Frausto's sentences. Frausto cites no legal authority in support of the proposition that, in determining to what extent to modify his sentences based on a demonstrated new factor—that is, his assistance to law enforcement—the court was also required to consider a different factor—that is, his postsentencing rehabilitation. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). A conclusion that such consideration was required would essentially allow Frausto to circumvent the well-established rule that postsentencing rehabilitation cannot, as a

[2] In his reply brief, Frausto suggests that it does not matter that his November 2021 motion referred to sentence modification, rather than resentencing, and that the difference between those terms is inconsequential. We disagree. As we have explained, sentence modification and resentencing are "distinctly different concepts" and are subject to different legal standards. *See* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81.

matter of law, qualify as a new factor for purposes of sentence modification. *See* ***Champion***, 258 Wis. 2d 781, ¶¶6, 17. Furthermore, unlike a resentencing, a sentence modification does not require a circuit court to "start[] over" and "re-do" an original sentence. *See* ***Wood***, 305 Wis. 2d 133, ¶¶6, 9. For these reasons, we reject Frausto's argument that the court erred by failing to consider his postsentencing rehabilitation when modifying his sentences.

In a related argument, Frausto contends that the circuit court erroneously exercised its discretion when modifying his sentences because the court did not expressly address each of the ***Gallion*** factors on the record. In ***Gallion***, our supreme court stated that circuit courts "are required to specify the objectives of the sentence on the record" and that "[t]hese objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40; *see also* WIS. STAT. § 973.017(2) (stating that when a court makes a sentencing decision, it shall consider the protection of the public, the gravity of the offense, the defendant's rehabilitative needs, and any applicable mitigating and aggravating factors). Frausto asserts that the court was required to address each of the ***Gallion*** factors on the record when modifying his sentences, but the court failed to expressly address his rehabilitation and the protection of the public.

We reject this argument for two reasons. First, Frausto cites no legal authority in support of the proposition that a circuit court is required to address each of the ***Gallion*** factors on the record when ruling on a motion for sentence modification. *See* ***Pettit***, 171 Wis. 2d at 646. Again, Frausto's motion did not seek resentencing, which would have required the court to "start[] over" and "re-do" his original sentences. *See* ***Wood***, 305 Wis. 2d 133, ¶¶6, 9.

Second, our review of the record shows that the circuit court adequately explained its reasons for modifying Frausto's sentences. *See* ***Gallion***, 270 Wis. 2d 535, ¶39 (stating that circuit courts must "explain the reasons for the particular sentence[s] they impose"). The court began by noting that Frausto's postsentencing rehabilitation was "not a legal factor on the issue of how much modification should be applied," and, accordingly, the court gave that factor "minimal to no[]" weight in modifying Frausto's sentences.

Next, the circuit court emphasized that the information provided by Frausto's victims "remain[ed] significant." The court characterized Frausto's conduct as "beyond violent and nasty" and like something "out of a horror movie." The court stated that the impact of Frausto's crimes on the victims was "expected to last a lifetime" and would constitute a "life sentence" of "emotional anxiety."

The circuit court subsequently noted that its task was to "go back and look at each individual offense" in "light of [Frausto's] cooperation [in Hughes' prosecution]." The court explained that Frausto's cooperation was "the primary and biggest factor" in its decision to modify his sentences. It noted that Frausto's cooperation had resulted in Hughes being held accountable for his crimes, which it characterized as "a very good thing."

The circuit court next stated that it had reviewed the transcript of Frausto's original sentencing hearing and was incorporating "all [of] its comments and sentiments from" that hearing into its ruling on the motion for sentence modification. The court specifically referenced the ***Gallion*** factors, stating that it had "commented on" those factors in the past and was "incorporat[ing]" its previous comments. The court also noted that it had reviewed the

presentence investigation report, which essentially recommended that Frausto "spend the rest of his life in prison."

The circuit court then set forth its modifications of each of Frausto's sentences, providing additional explanations for its decisions regarding certain sentences. For instance, the court described Count 15 as a "more significant" offense due to its "seriousness." The court similarly explained that its reductions of Frausto's sentences on Counts 17, 19, and 23 were tempered by the seriousness of those offenses. In particular, the court described Count 23 as "a horrific case" and stated that a "significant penalty" was necessary for that offense, "considering all the ***Gallion*** factors."

Based on the circuit court's remarks, we cannot conclude that the court erroneously exercised its discretion in modifying Frausto's sentences. In all, the court significantly reduced Frausto's total initial confinement and extended supervision as a result of Frausto's assistance in Hughes' prosecution. However, the court's comments clearly show that the court did not believe that further reductions were warranted, given the seriousness of Frausto's crimes and their lasting impacts on the victims. While the court did not use the specific words "protection of the public," it is clear the court determined that, given the seriousness of the offenses, the public still needed to be protected from Frausto. *See* ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289 ("Proper sentencing discretion can exist without a delineation of sentencing factors; what is required is a *consideration* of the sentencing factors."). The court also explained why Frausto's postsentencing rehabilitation did not factor heavily into its decision. In addition, the court expressly stated that it had reviewed the transcript of Frausto's original sentencing, where it considered the ***Gallion*** factors, and that it was "incorporat[ing]" its previous comments

regarding those factors. On this record, there is no basis to conclude that the court erroneously exercised its discretion when modifying Frausto's sentences.[3]

Therefore,

IT IS ORDERED that the order is 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

[3] In a single sentence in his brief-in-chief, Frausto asserts that when modifying his sentences, the circuit court "fail[ed] to sentence [him] to the minimum amount of confinement needed to address his rehabilitation needs or the protection of the public." *See* ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197 (explaining that the sentence imposed shall "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant" (citation omitted)). As explained above, the court significantly reduced Frausto's sentences but determined that further reductions were not warranted due to the gravity of the offenses and, implicitly, the related need to protect the public. Frausto has not shown that the court erroneously exercised its discretion in that regard. Nor has Frausto shown that the modified sentences are excessive—that is, "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).