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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2016AP000918-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIMITRI C. BOONE,

Defendant-Appellant.

On Appeal from Judgments of Conviction
Entered July 31, 2014 in Milwaukee County Circuit Court,
the Honorable David Borowski Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Where the PSI described Mr. Boone's performance on supervision as "atrocious," and the circuit court cited that as one of the bases for its decision to impose a term of initial confinement in prison five times the length recommended by the State, did the fact that the PSI was grossly inaccurate in its description of Mr. Boone's performance on supervision constitute a "new factor" that could warrant sentence modification as a matter of law?

Circuit Court Answer: No.

2. Did the circuit court erroneously exercise its discretion when it declined to modify Mr. Boone's sentence based on the "new factor" that his DOC records revealed that his performance on supervision was largely good?

Circuit Court Answer: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted in this case, which involves the application of well-settled law to a unique set of facts.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issue raised, the opportunity to present oral argument is welcomed if this Court would find it helpful.

STATEMENT OF THE CASE

Mr. Boone pled guilty to one count of Second Degree Sexual Assault of a Child in violation of Wis. Stat. § 948.02(2). The complaint alleged that Mr. Boone had sexually assaulted 13-year-old S.W., who was his girlfriend's niece. The assault consisted of his lying on top of her (clothed) with an erection, unhooking her bra, biting her on the inner thigh three times, and rubbing her vagina under her underwear for about five seconds. (R. 2).

A PSI was filed. In it, the agent recommended 12-25 years initial confinement and 7-8 years extended supervision.¹(PSI at 12). The agent described Mr. Boone's criminal history, which included two prior convictions for child sexual assault. The agent described Mr. Boone's performance while on supervision as follows:

He enrolled in Sex Offender Treatment with Otis Locket, but showed little progress. He began complaining of back problems, making it difficult to sit in group. He participated in and completed a 16 week program at project return in 2007.

It should be noted that Mr. Boone separated from Ms. Sorg and began an approved relationship with Angela Jackson. He attempted to obtain a position with Direct TV, but was precluded from employment after they were informed of his sexual offense with the 13 year old victim in 1992. There were an increased number of contacts he had with minors which were against the rules of supervision. He had overnight female guest, namely Angela Jackson, at his residence without permission. He failed to participate actively in SOT and appeared to be

¹ The circuit court believed that the “25” was a typographical error and assumed that the PSI writer meant to recommend 12-15 years of initial confinement. (R. 47: 2, n. 1).

demonstrating concerning behaviors for reoffending. When asked to submit to a polygraph test he refused and was sanctioned. Mr. Boone was held in custody on several occasions: 5-11-07 thru 7-3-07, 9-18-08 thru 9-25-08, 3-11-10 thru 3-19-10 and 3-26-11 thru 3-28-11 until his ultimate discharge on 5-5-12.

(PSI at 7).

When asked if there were corrections to the PSI, Mr. Boone's attorney stated that Mr. Boone objected to the characterization of his lack of success in sex offender treatment, noting that he remained in treatment and completed the program. (R. 47: 5). Mr. Boone's attorney also noted that Mr. Boone said he was held in custody due to malfunctions with his monitoring bracelet. (R. 47: 5).

At sentencing the State recommended a sentence of three years prison, made up of two years initial confinement and one year of extended supervision. (R. 47: 6). The State acknowledged Mr. Boone's prior record, but noted there were no offenses for the past 15 years. (R. 47: 11). The State also noted Mr. Boone's consistent work history.

The court noted that the PSI was "very bad." The court was troubled by Mr. Boone's "preposterous" explanations for his conduct. (R. 47: 10). The court examined the gravity of the offense and noted that Mr. Boone was a repeat offender. (R. 47: 25). The court found that Mr. Boone was a serious danger to the community. (R. 47: 27, 31). Ultimately, the court placed a great deal of weight on the conclusions of the presentence writer, saying "So with all due respect to the lawyers, I just see this case absolutely different and much more close to the way the PSI writer sees it." (R. 47: 36).

The court described Mr. Boone's performance while on supervision as "as they note in the PSI, atrocious." (R. 47: 38).

The court sentenced Mr. Boone to 10 years of initial confinement and 5 years of extended supervision. Undersigned counsel was appointed to represent Mr. Boone in connection with an appeal or postconviction relief. Undersigned counsel enlisted the aid of Justin Heim, MA, a Client Services Specialist employed by the office of the State Public Defender. Mr. Heim examined the chronological log contained in Mr. Boone's probation file to evaluate the accuracy of the PSI writer's characterization of Mr. Boone's performance on probation.

Undersigned counsel filed a postconviction motion for sentence modification on Mr. Boone's behalf, attaching Mr. Heim's report and also attaching Mr. Boone's complete probation file, which was accepted for filing under seal (R. 39). The postconviction motion asserted that Mr. Boone's performance on probation was actually quite good and refuted the allegations contained in the PSI. (R. 37).

The circuit court denied the motion, ruling that Mr. Boone had not presented a new factor and that "even if he has, a modification of the sentence is not warranted under the circumstances." (R. 40: 4; App. 104).

This appeal follows.

ARGUMENT

I. Mr. Boone Presented a New Factor to the Circuit Court.

Wisconsin circuit courts have inherent authority to modify criminal sentences. *State v. Hegwood*, 113 Wis.2d 544, 546, 335 N.W.2d 399 (1983). This authority is not unlimited. A court cannot modify a sentence based on reflection and second thoughts alone. *State v. Wuensch*, 69 Wis.2d 467, 474, 480, 230 N.W.2d 665 (1975). However, it may base a sentence modification upon the defendant's showing of a "new factor." *Hegwood*, 113 Wis.2d at 546, 335 N.W.2d 399.

Deciding a motion for sentence modification is a two-step process. First, the defendant must demonstrate the existence of a new factor. 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, 74, 797 N.W.2d 828 (citation omitted).

Erroneous or inaccurate information used at sentencing may constitute a "new factor" *if* it was highly relevant to the imposed sentence and was relied upon by the trial court. *State v. Norton*, 2001 WI App 245, ¶ 9, 248 Wis. 2d 162, 168, 635 N.W.2d 656, 659.

Whether a particular fact constitutes a new factor is a question of law which is reviewed *de novo*. *Hegwood*, 113 Wis.2d at 547, 335 N.W.2d at 401. Accordingly, on review this court need not give deference to the trial court's

determination. *Id.*, (citing *First National Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251 (1977)).

Mr. Boone was on parole from March 21, 2006 through May 5, 2012. He was discharged approximately 18 months prior to committing the offense in this case. At sentencing, the Court described Mr. Boone's performance on parole as "atrocious." (R. 47: 38; App. 119).

This was based on the information contained in the PSI. (R. 15: 7). The two paragraphs in the PSI describing Mr. Boone's abysmal performance on supervision portrayed him as uncooperative, unengaged, and persistently demonstrating risky behavior. Because Mr. Boone protested that this was not a fair portrayal of his performance on parole (*see, e.g.* R. 47: 17), undersigned counsel asked Justin Heim, MA, a Client Services Specialist employed by the office of the State Public Defender to obtain and analyze records from Mr. Boone's parole file. He did so, and his report was attached to Mr. Boone's postconviction motion. (R. 37: attachment). The records Mr. Heim he relied upon were filed as attachments to the postconviction motion under seal. (R. 39).

The parole records and Mr. Heim's report reveal that the above quoted passage from the PSI was *grossly* inaccurate (often misleading by omission) in nearly every particular. It is necessary to break this dense and damning passage down into smaller pieces in order to explore the full extent of the misrepresentations. The following is an attempt to do so:

"He enrolled in Sex Offender Treatment with Otis Locket, but showed little progress. He began complaining of back problems, making it difficult to sit in group."

The first sentence accused Mr. Boone of showing "little progress" in treatment and at least implied by omission that this was true throughout his supervision. Mr. Heim's review of the records reveals a very different reality. As Mr. Heim states:

Mr. Boone immediately started Sex Offender Aftercare upon release from prison in 2006 and though he struggled at times and required some intervention early on, it is noted that Mr. Boone was an active and appropriate participant in the majority of his groups throughout his time on supervision. Records indicate Mr. Boone regularly displayed "good participation," provided "good challenging questions," regularly gave feedback to others, completed assignments on time, and helped new members with their assignments. On a few instances early on in his period of supervision, Mr. Boone was confronted for not correctly completing an assignment and there was concern that he was being evasive

However, after DOC intervention, Mr. Boone began to take the program more seriously and there is no indication of any concerns for the last several years of supervision.

(R. 37, attachment at 6-7).

The agent's description of Mr. Boone's "complaining of back problems" at least implied a lack of verification of any real problem (beyond his "complaining"). What the writer left out was that, as discussed more fully below, Mr. Boone's very real medical condition was verified by two doctors, including one who treated him while in custody. (R. 37, attachment, citing R. 39: DCC Chrono. Log 5/10/07, 5/17/07, 6/11/07).

"He participated in and completed a 16 week program at project return in 2007. It should be noted that Mr. Boone separated from Ms. Sorg and began approved relationship with Angela Jackson. He attempted to obtain a position with Direct TV, but was precluded from employment after they were informed of his sexual offense with the 13year old victim in 1992."

These three sentences appear to be accurate.

"There were an increased number of contacts he had with minors which were against the rules of supervision."

This sentence accused Mr. Boone of having a number of concerning contacts with minors that "increased." This would, indeed, be cause for concern if it were true. However, there is simply no basis for this claim in Mr. Boone's parole records. Mr. Heim found the following:

According to supervision records, the only instances of contact with minors occurred in September of 2006 at the beginning of his supervision period. There was an instance of Mr. Boone being in the presence of family members including his niece and nephew, and another incident when he was in the presence of a friend and her two children. Mr. Boone responded appropriately to his agent's warnings and there were no other unauthorized contacts with minors for the remainder of his supervision.

(R. 37, attachment at 7; citing R. 39: DCC Chrono. Log 9/22/06, 0/26/06) (emphasis added)². The PSI writer's statement was grossly inaccurate.

² The logs reflect that Mr. Boone was briefly taken into custody for the early violations

"He had overnight female guest, namely Angela Jackson, at his residence without permission."

Mr. Boone did not take issue with this assertion. This may be the only well-founded accusation against Mr. Boone in the quoted passage. It appears that he allowed an adult woman with whom he had an approved relationship to spend the night at his home without permission.

"He failed to participate actively in SOT"

Once again, the records do not support this claim and instead reveal that Mr. Boone's participation was often quite active and that there were no concerns about the quality of his participation for the last several years of his supervision. (R. 37, attachment at 2).

"and appeared to be demonstrating concerning behaviors for reoffending."

This statement may have been *technically* accurate in that there were times *early* in his supervision when there were concerns. However, the PSI writer implied by omission that "concerning behaviors" were on the increase during the supervision or were not resolved. There was nothing about Mr. Boone's positive response to DOC interventions or the fact that there were *no* concerns of this kind evident in the records for quite a long time prior to Mr. Boone's discharge from probation. As Mr. Heim observed, the records indicate the following with regard to "concerning behaviors."

While there were some concerns near the beginning of supervision, Mr. Boone seemed to respond to the DOC's interventions (i.e. warnings, EMP restrictions, and additional programming), and for the last couple years of supervision there were no indications of concerning or risky behavior.

(R. 37, attachment at 2).

"When asked to submit to a polygraph test he refused and was sanctioned."

The passage reads as if Mr. Boone's "concerning behaviors" resulted in a request for a polygraph examination, which Mr. Boone willfully refused, resulting in a sanction. The PSI writer made no mention of the fact that, as revealed in DOC records, Mr. Boone had a painful back condition, which required emergency medical intervention at least twice and restricted him from sitting down for more than 30 minutes at a stretch. Mr. Heim summarizes what the records say about Mr. Boone's "refusal" to submit to the polygraph examination.

He had indicated to his agent that he was having severe back pain and was not able to sit for an extended period of time. Mr. Boone was immediately taken into custody and as a result was briefly terminated from his sex offender treatment group. DOC intended to pursue revocation, however then received confirmation that Mr. Boone did indeed suffer from severe back pain that required emergency room intervention on at least two occasions. Mr. Boone was able to provide documentation from both the jail doctor and a physician in the community that his back injury restricted him from sitting for longer than 30 minutes at a time. Mr. Boone was instructed to "get it up to an hour" so that he could sit for the polygraph, which he did eventually complete on 12/03/07.

(R. 37, attachment at 2-3, citing R. 39: DCC Chrono. Log 5/10/07, 5/11/07, 6/11/07, 8/8/07). To be clear, Mr. Boone did not simply refuse the polygraph. He appeared for it as scheduled. (R. 39: Chrono. Log 5/11/07).

"Mr. Boone was held in custody on several occasions: 5-11-07 thru 7-3-07, 9-18-08 thru 9-25-08, 3-11-10 thru 3-19-10 and 3-26-11 thru 3-28-11 until his ultimate discharge on 5-5-12."

Of all the examples of misleading by omission in the PSI, this may have been the worst. This sentence portrayed Mr. Boone as someone who was frequently taken into custody, presumably for rule violations of some kind, throughout his supervision. The PSI writer provided no further detail and failed to mention that for the most part these instances of Mr. Boone being detained resulted from no actual wrong-doing on his part. Mr. Boone had clearly said as much to his attorney, who, at sentencing, urged the Court not to "overemphasize" these instances, since Mr. Boone had indicated that he was taken into custody due to technical EMP violations resulting from equipment problems. (R. 47: 17)³. Defense counsel was not able to offer any documentation to substantiate this account, which he could only attribute to his client.

Mr. Heim examined the chronological logs relating to each instance when Mr. Boone was taken into custody. Here is what he learned:

5-11-07 through 7-3-07

This period of custody resulted from Mr. Boone's failure to take a polygraph examination due to his back condition. As discussed above, Mr. Boone ultimately

³ Mr. Boone's representation to his attorney that he was taken into custody more than once based on what turned out to be errors was accurate. Aside from the instances noted in the PSI, the Chronological Logs reflect that Mr. Boone was taken into custody on the following occasions: 7/31/06 (agent forgot to change his "in time"); 10/8/07 (warrant that turned out to be a system error).

provided documentation from two physicians, as discussed above, and the Department abandoned its plan to seek revocation. (R. 37: attachment at 2, citing R. 39: DCC Chrono Log 5/10/07, 5/17/07, 6/11/07).

9-18-08 through 9-25-08

Mr. Boone was taken into custody for being absent for a home visit. It is unclear whether he received notice of the home visit because his phone was disconnected due to a billing error at the phone company. Once this was confirmed, Mr. Boone was released with no penalty. (R. 37: attachment at 3, citing R. 39: DCC Chrono. Log 9/17/08-9/26/08).

3-11-10 through 3-19-10

Mr. Heim summarizes the records regarding this incident as follows:

The incident leading to the 3/11/10 custody hold involved an anonymous male leaving a message with Mr. Boone's prior agent on 1/28/10. The man claimed that Mr. Boone was stalking his daughter, Angela Jackson. (Mr. Boone's long-time girlfriend). He also reported that Mr. Boone had a new job and had not reported it. On 2/2/10, Mr. Boone admitted that he had been doing some shoveling work for cash at Badger Auto. The issue was staffed and Mr. Boone had some privileges taken away, however with the agent's approval Mr. Boone began working fulltime at Badger Auto as a lot attendant on 2/11/10. There is no indication in the records that the stalking report was investigated at that time, until 3/08/10 when Mr. Boone's new agent noticed it had not been followed up on. Mr. Boone was taken into custody on 3/11/10 and questioned about the stalking accusation, which he denied and stated that he believed a coworker who did not like him was "messing with him." He was released on 3/18/10 with a scheduled

polygraph on 3/26/10 to investigate these allegations. Mr. Boone passed his polygraph and there were no - indications of concerning behavior. Ms. Jackson was also questioned and denied any stalking or harassment.

(R. 37: attachment at 3, citing R. 39: DCC Chrono Log 3/26/10). It appears that Mr. Boone's wrong-doing in this incident was limited to his having done some work for Badger Auto without prior approval. He was ultimately approved to work there full time.

3-26-11 through 3-28-11

This detention resulted from a problem with Mr. Boone's EMP monitoring strap, not attributable to any wrongdoing by him. When the issue was resolved, Mr. Boone was released and *taken off* of EMP monitoring due to his continued *compliance*. (R. 37: attachment at 3, citing R. 39: DCC Chrono Log 3/28/11).

The PSI writer summed up Mr. Boone's performance on parole in less than two paragraphs. In that short passage, the writer managed to thoroughly excoriate Mr. Boone as someone who failed to meaningfully participate in treatment, had increasing concerning contact with minors, was engaging in "concerning behaviors" indicating a risk to reoffend, flatly refused to sit for a polygraph, and had to be taken into custody on multiple occasions, presumably for rule violations. It is no wonder that the Court characterized his performance on supervision as "atrocious" and expressed dismay that the Department of Corrections would consider someone a success on supervision merely because he had "run out the clock." (R. 47: 28; App.109).

Mr. Heim's report was based on a complete review of the DOC Chronological Log for the six years Mr. Boone spent on supervision and contains a thorough analysis of his performance. Mr. Heim's report painted a picture of an offender who stumbled, mostly in minor ways (particularly at the beginning) but who was extremely cooperative: participated actively in programming, embraced treatment, and did not just "run out the clock" but successfully discharged from supervision. (R. 37: attachment).

One would never know from the PSI writer's description that Mr. Boone's performance on parole not only did not deteriorate, but actually improved over time and was quite good for a period of years. This more accurate picture was unknown to the Court or the parties and was "unknowingly overlooked." *Harbor*, 2011 WI at ¶ 40, 333 Wis. 2d at 74. Had this information been available to the Court it would have been highly relevant to the sentencing decision.

In explaining its sentencing decision, the Court said:

The basis for my sentence is the defendant's third sexually assaultive behavior, third sexual assault conviction in a period of, approximately, 20 years. He's been on supervision previously. He's had sex offender treatment previously. He's been in prison previously. He's been revoked previously. His level of compliance with probation and the DOC has been, as they note in the PSI, atrocious.

(R. 47: 37-38; App. 118-119). The court's words reflect that it relied at least in part on the PSI writer's description of Mr. Boone's performance on parole in sentencing him. The court imposed 10 years of initial confinement — five times the amount recommended by the State — based largely on an alignment with the PSI. For example, the Court said “With all

due respect to the lawyers, I view this case a lot closer to the way the PSI writer views it.” (R. 47: 33; App. 112). The Court believed that the PSI was objective — that it could be relied upon to produce a recommendation that was “norm[ed]” for similar cases. (R. 47: 26; App. 107).

In its decision denying Mr. Boone’s postconviction motion, the court did not acknowledge that the PSI had contained misleading information about Mr. Boone. The court dismissed this, saying only “[t]he *purportedly* inaccurate or misleading statements regarding his supervision are contained in two paragraphs of a thirteen-page presentence investigation report.” (R. 47: 3; App. 103) (emphasis added). But it is no answer to say the misleading information was confined to two paragraphs when they were two very dense paragraphs that clearly got the attention of the court, as evidenced by the court’s comment about Mr. Boone’s “atrocious” performance.

The court admitted only to having “briefly commented on the defendant’s performance on supervision during its extensive sentencing remarks” and insisted that Mr. Boone’s performance on parole was “not highly relevant to the court’s sentence.” (R. 47: 3; App. 103). This assertion is belied by the record. The court expressly relied on the PSI’s view of Mr. Boone’s “atrocious” performance as one of the bases of its sentence. (R. 47: 37-38; App. 118-119). Beyond that, the court commented:

I said in the last case on a much more minor matter, a sex registry case, and I said this as long as I’ve been on the criminal bench, that only DOC believes you’ve successfully completed probation if you run out the clock, you’re on probation for two years, you make it two years no new offenses, adios, sayonara, see you later, we’re done, let’s have a party because Mr.

Defendant, in this case Mr. Boone, completed “successfully” probation.

(R. 37: 28; App. 116). Thus, the judge revealed that the DOC’s willingness to discharge defendants when they simply run out the clock, as he believed Mr. Boone had done, was a kind of pet peeve of his for as long as he had presided over criminal cases.

To be sure, the Court's impression of Mr. Boone's “atrocious” performance on supervision was far from the only thing the Court found to be aggravated about the case. Mr. Boone's prior record and his tendency to offer "preposterous" minimizing explanations of his conduct were clearly of concern as well. The Court concluded that Mr. Boone needed to be "taken off the streets" because he was "a serious danger to the public." (R. 47: 37-38; App. 118-119).

But the court's comments indicate that its belief that Mr. Boone performed atrociously on supervision was highly relevant and that at least *some* of the distance between the sentence the State recommended and the one the Court imposed was attributable to the PSI writer's characterization of Mr. Boone as willfully noncompliant with supervision — a characterization that turned out to be false. And if Mr. Boone’s perceived poor performance was highly relevant, then it stands to reason that records revealing that the perception had no basis in reality would also have been highly relevant. Nowhere in the case law is there a requirement that a defendant show that a new factor would have been the *only* thing that was highly relevant to the sentencing decision. A defendant need not show that the new factor would have overshadowed all other considerations.

When a defendant moves for resentencing based on reliance by the sentencing court on inaccurate information, “[a] circuit court’s after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance.” *State v. Travis*, 2013 WI 38, ¶ 48, 347 Wis. 2d 142, 164, 832 N.W.2d 491, 502. The same should be true when, as here, the court asserts after the fact that information presented at sentencing was not “highly relevant.” This Court owes no deference to the circuit court’s after-the-fact assertion that the misleading information about Mr. Boone’s poor performance on supervision was not highly relevant to the sentencing decision and that the corrected information is not a new factor. *Hegwood*, 113 Wis.2d at 547, 335 N.W.2d at 401.

Mr. Boone submits that he has presented a new factor as a matter of law.

II The Circuit Court Erroneously Exercised Its Discretion When It Refused to Modify Mr. Boone’s Sentence Based on the New Factor He Presented.

Once the defendant has established a new factor, whether it warrants modification of the sentence is left to the discretion of the circuit court. *Id.*, at 546, 335 N.W.2d at 401. This Court reviews the circuit court’s decision whether or not to modify the sentence for erroneous exercise of discretion. *State v. Franklin*, 148 Wis. 2d 1, 8434 N.W.2d 609 (1989).

In this case, the circuit court concluded that Mr. Boone had not presented a new factor, but that “even if he has, a modification of the sentence is not warranted under the circumstances.” (R. 47: 4; App. 104). The court’s conclusion that a sentence modification was not warranted was based on the court’s assertion that if the true nature of Mr. Boone’s

performance on probation had been known, the sentence would nonetheless have been the same. (R. 47: 4; App. 104).

The court does not exercise discretion by simply stating that the sentence would have been the same if the truth had been known.

In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

McCleary v. State, 49 Wis.2d 263, 277, 182 N.W. 2d 512, 519 (1971).

The court's after-the-fact statement that the sentence would have been the same even if the court had known about the misleading statements in the PSI was not reasonable in light of the facts in this record. First, the court expressly cited the PSI and its characterization of Mr. Boone's performance on supervision as one of the bases for its sentence. (R. 47: 37-38; App. 118-119). Further, the judge rejected the reasoning of both parties and expressly aligned himself with the PSI writer to impose a period of initial confinement five times greater than requested by the State. (R. 47: 33; App. 114). It is doubtful that this would have occurred if the judge had been aware that the PSI was not the objective document he thought it was. In its decision denying Mr. Boone's motion for postconviction relief, the court did not even acknowledge the inaccuracies or address the effect of them on its decision to align itself entirely with the PSI writer.

This Court must review the judge's sentencing decision "in light of the strong policy against interference with the discretion of the trial court in passing sentence." *Ocanas v. State*, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975), citing *State v. Tuttle*, 21 Wis.2d 147, 124 N.W.2d 9 (1963); *Voigt v. State*, 61 Wis.2d 17, 211 N.W.2d 445 (1973). However, to require this Court to uncritically accept the circuit court's subjective after-the-fact assertion that the new factor would not have changed the sentence would be to insulate the circuit court's decision from any meaningful review.

Mr. Boone submits that such uncritical acceptance is not appropriate in this case given the volume of materially inaccurate information that was presented to and expressly relied upon by the circuit court. The court's denial of Mr. Boone's motion to modify his sentence was founded on an erroneous exercise of discretion, and this court should reverse it.

CONCLUSION

For these reasons, Mr. Boone requests that the Court reverse the circuit court's order denying his motion to modify his sentence.

Dated this 15th day of August, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,737 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of August, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of August, 2016.

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