STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP918-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIMITRI C. BOONE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID BOROWSKI PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES ON APPEAL

The State rephrases the issues on appeal as follows:

1. After the circuit court sentenced Dimitri C. Boone to second-degree sexual assault of a child, a "client services specialist," who was employed by the public defender's office, filed a report. This post-sentence report challenged "inaccurate" and "misleading" statements that were included in the PSI report. Did Boone demonstrate that this post-sentence report constitutes a "new factor" that warrants sentence modification?

   The circuit court held that Boone "has not alleged a new factor." (40:4.)

2. Even assuming that the post-sentence report constitutes a "new factor," does the report warrant sentence modification?

   The circuit court held that it did not. It ruled that "the purportedly inaccurate information presented [in the PSI report] was not highly relevant to this court's sentencing determination and that the information now offered does not warrant a sentence modification." (40:3, 4.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL FACTUAL BACKGROUND

The complaint in this case reveals that in December 2013, Boone sexually assaulted the niece of his live-in girlfriend, S.W. (2:1.). S.W. was thirteen years old at the time, and she was spending the night at her aunt's house. (*Id.*) Boone arrived home from work in the early morning. (*Id.*) He went into S.W.'s room, woke her, and asked her to give him a back massage. (*Id.*) After the massage, Boone laid on top of S.W. and pressed his erect penis against her. (*Id.*) He forced his body between S.W.'s legs and unhooked her bra. (*Id.*) He then placed his head between S.W.'s thighs and bit her inner thigh three times. (*Id.*) Boone next placed his hand inside of S.W.'s pajama pants, under her underwear, and rubbed her vagina. (*Id.*)

Boone, a repeat sex offender, pled guilty to second-degree sexual assault of a child. (9; 47:25.) The maximum punishment for the crime was 25 years of initial confinement, followed by 15 years of extended supervision. (*Id.*)

The PSI report recommended 12 to 15 years of initial confinement, followed by seven to eight years of extended supervision.[1] (*See* 47:26.) But at sentencing, both the State and Boone's attorney recommended two years of initial confinement followed by one year of extended supervision. (47:6,13.) The court sentenced Boone to ten years of confinement, followed by five years of extended supervision. (47:38.)[2] The court explained that based on the information

[1] As the court observed, the PSI actually recommended 12 to 25 years of initial confinement, but the court treated "25" as a typographical error. (40:2 n.1.)

[2] The court's thorough 17-page decision on Boone's sentence is found in Boone's appendix of his appellate brief.

presented to it, Boone was a serious danger to the public as an unrepentant and repeated sex offender:

> I believe, clearly, that Mr. Boone is a predator, that he is a pedophile and that he is a serious, serious, serious danger to this community. He is largely unrepentant. As the State noted, the preposterous stories that he gave to make excuses for all of his criminal offenses[.]

(47:27.).

> [T]his is a defendant who presents to the court as a multiple time habitual offender. I don't mean that literally or legally, but someone who has on multiple occasions offended in a sexual nature.
>
> I agree with the [PSI] writer. This defendant is a sexual deviant. He has not learned from his repeated sex offender treatment . . . .
>
> In my view as someone who is part of my job beyond adjudicating cases fairly and justly, which is the main thrust of this position, is to protect the community from dangerous individuals. And yes, there has been a break in Mr. Boone's criminal behavior, but what is disturbing, very disturbing is the repetitive nature of his sexual assaults. He has now been convicted of three sexual assaults in, approximately, 20 years. . . .

(47:27-28.)

> He's a danger to children. He's a danger to any children he comes in contact with. He's a danger, in particular, to children that he may, and I don't know how much grooming there was in this case exactly, but he's a danger to girls particularly, kids particularly that he comes in contact through his connections with other adults, meaning females or other adults, and then he has access one way or another to their children or nieces and nephews and then he prays on those kids.

(47:35.)

> The recommendation of both sides, again, with all due respect, is too low. I might and probably not even in that case, but I might if Mr. Boone presented as someone who is 46, who has no criminal record, whatsoever, complete, absolute 45 or 46 years of law-abiding behavior, no offenses, and this defendant presents with multiple offense, maybe two or three years in and one or two years out is then appropriate. It's not in this case.

(47:38.)[3]

Boone filed a motion for postconviction relief. (37.) He argued that a post-sentence report, which was prepared by a "Client Services Specialist" (Justin Heim, MA, employed by the public defender), constitutes a new factor that warrants sentence modification. (37:3.) The motion stated that Heim "obtain[ed] and analyze[d] records from Mr. Boone's parole file." (37:5.) Boone argued that a passage in the PSI report was "grossly inadequate" based on Heim's review of Boone's parole file. (37:5-6; *see also* Boone Br. at 5-6). And, because the court's sentence was "based largely on an alignment with the PSI[,]" Boone argued that modification was warranted. (37:12.)

The court denied Boone's motion without a hearing. It determined that (1) the information in the report did not

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[3] The court also recognized Boone's "positives":

> (1) He pleaded guilty.
>
> (2) He accepted responsibility.
>
> (3) He avoided having the child victim testify.
>
> (4) He had a "decent, not great, but decent" employment history.

(47:30.)

constitute a new factor and, (2) even if it did constitute a new factor, modification is not warranted. (40:4.)

Boone appeals.

STANDARD OF REVIEW AND LEGAL PRINCIPLES

The definition of a "new factor" is set forth in *Rosado v. State,* 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) as follows: "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."

Whether a defendant has presented facts or a set of facts that constitute a "new factor" is a question of law that this Court decides independently of the trial court. *State v. Harbor,* 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a new factor justifies sentence modification is a matter for the trial court that this Court reviews for an erroneous exercise of discretion. *State v. Sobonya*, 2015 WI App 86, ¶ 4, 365 Wis. 2d 559, 872 N.W.2d 134 (citation omitted).

Deciding a motion for sentence modification based on a new factor is a two-step inquiry. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. *State v. Franklin,* 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether the facts submitted by a defendant constitute a "new factor" is a question of law. *State v. Hegwood,* 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). If a court determines that the facts do not constitute a new factor as a matter of law, "'it need go no further in its analysis'" to decide a defendant's motion. *Harbor*, 333 Wis. 2d 53, ¶ 38. That is, it need not determine whether, in

the exercise of its discretion, the sentence should be modified. *Id.*

But if a new factor is present, the circuit court then determines whether the new factor justifies sentence modification. *Franklin,* 148 Wis. 2d at 8. In making that determination, the circuit court exercises its discretion. *Hegwood,* 113 Wis. 2d at 546.

Therefore, to prevail, a defendant must demonstrate both (1) the existence of a new factor and (2) that the new factor justifies modification. *Harbor,* 333 Wis. 2d 53, ¶ 38. If a court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law. *Id.*

ARGUMENT

I. The post-sentence report that was prepared by the public defender's office is not a new factor as a matter of law because it is based on "previously known or knowable facts."

Boone argues that his post-sentence report constitutes a new factor because it (1) did not exist at the time of sentencing, and (2) indicates that the PSI report contained misleading and inaccurate information. (Boone Br. 6, 8, 15, 17, 19.) Because this Court recently rejected a similar argument regarding a post-sentence report in *Sobonya*, 365 Wis. 2d 559, the State disagrees.

In *Sobonya*, the trial court placed Sobonya on probation for two years and denied Sobonya's request that her record be expunged upon successful completion of her sentence. 365 Wis. 2d 559, ¶ 2. The court found that while Sobonya would benefit from expungement, society would be

harmed by it. *Id*. The court reasoned that Sobonya's conviction for possession of heroin would send a message of deterrence to the community, which would be undermined if her record were expunged. *Id*.

After sentencing, Sobonya employed a sociology professor to prepare a report "'analyzing the current state of the social science and criminological literature as it relates to the circuit court's stated reasons for denying' Sobonya's request for expungement." *Sobonya*, 365 Wis. 2d 559, ¶ 3. The report concluded that "'the relevant research shows that the public interest and public safety are best served by lowering barriers to reintegration and granting Ms. Sobonya, a special disposition—expungement—upon the completion of her sentence.'" *Id*. Sobonya moved for sentence modification, arguing that the post-sentence report constituted a new factor related to the court's denial of her expungement request. *Id*. The postconviction court concluded that the report was a "new factor," but it denied Sobonya's motion, and Sobonya appealed. *Id.*

Sobonya argued that her post-sentence report constituted a new factor because (1) the report did not exist at the time of sentencing, and (2) "its underlying research was unknowingly overlooked by the parties at sentencing, and it is highly relevant because it directly contradicts the court's belief that granting expungement would harm society." *Sobonya*, 365 Wis. 2d 559, ¶ 6. This Court was not persuaded.

> The postsentencing report is not a "fact or set of facts" that were not in existence or unknowingly overlooked by the parties at the time of sentencing; *the postsentencing report is an expert's opinion based on previously known or knowable facts. Cf. State v. Grindemann,* 2002 WI App 106, ¶ 25, 255 Wis. 2d 632, 648 N.W.2d 507. The report simply

> offers an opinion that is not shared by the trial court and that the court was entitled to accept or disregard as it deemed appropriate. *See State v. Slagoski,* 2001 WI App 112, ¶¶ 9, 11, 244 Wis. 2d 49, 629 N.W.2d 50.

Id. ¶ 7 (emphasis added.) This Court concluded that "a postsentencing report that expresses an opinion different from that of the trial court regarding the objectives of sentencing (protection, punishment, rehabilitation, and deterrence) is nothing more than a challenge to the trial court's discretion and does not constitute a 'new factor' for sentence modification purposes." *Id.* ¶ 8.

In this case, while Heim's post-sentence report is different in that it does not focus on social science, the report is "based on previously known or knowable facts," specifically, the PSI report and Boone's parole file. *See Sobonya*, 365 Wis. 2d 559, ¶ 7. *See also Harbor*, 333 Wis. 2d 53 ¶ 57 (providing, "any fact that was known to the court at the time of sentencing does not constitute a new factor") Both the parole file and the PSI report were "previously known or knowable" at the time of Boone's sentencing. Therefore, under *Sobonya*, Heim's report is not, as a matter of law, a new factor.

Notably, Heim's report concludes that Boone "posed very little risk to the community. Mr. Boone is a good candidate for community supervision as evidenced by his level of compliance[.]" (37:Attachment A:7.) But as indicated above, a post-sentence report "that expresses an opinion different from that of the trial court regarding the objectives of sentencing (protection, punishment, rehabilitation, and deterrence) is nothing more than a challenge to the trial court's discretion and does not constitute a 'new factor' for sentence modification purposes." *Sobonya*, 365 Wis. 2d 559,

¶ 8. Boone does not address, let alone attempt to distinguish *Sobonya* in his brief.

In conclusion, Boone did not present a new factor as a matter of law. Therefore, this Court need not determine whether the circuit court properly exercised its discretion in denying sentence modification. *See Sobonya*, 365 Wis. 2d 559, ¶ 8 n.3 (citing *Harbor*, 333 Wis. 2d 53, ¶ 38.) The State asks this Court to affirm the judgment of conviction and order denying a motion for sentence modification.

II. Even if Boone meets his burden of proving that the post-sentence report constitutes a new factor, the circuit court properly exercised its discretion when it denied Boone's motion for sentence modification.

The circuit court held that even if Boone had met his burden of proving that a new factor exists, "a modification of the sentence is not warranted under the circumstances." (40:4.) Boone appeals this decision, arguing that Heim's post-sentence report shows that the PSI report presented inaccurate and misleading information. (Boone Br. 6, 17-19.)

But the record indicates that the sentencing court was aware that Boone disagreed with the statements in the PSI report. At sentencing, Boone's attorney directed the court to his corrections, including:

- The PSI writer's statement that Boone showed little progress in sex offender treatment.[4] Boone's attorney argued that "[t]he truth of the matter was that [Boone] remained in sex offender treatment and was

[4] Boone discusses the PSI's statements regarding his sex offender treatment in pages 6-7 and 9 of his brief.

deemed to have completed it after six years while on supervision." (47:5.) Boone's attorney continued: "So, Mr. Boone objects to the characterization of him not being successful in sex offender treatment even though he remained in the program all the way until the end of his extended supervision." (*Id.*)

- The PSI writer's statement that when he was asked to submit a polygraph test, Boone refused.[5] (47:5.) Boone's attorney argued, "He denies ever having refused any polygraph testing while on supervision. It says, in fact, he took two polygraphs that he passed." (*Id.*)

- The PSI writer's statement about the dates when Boone was held in custody.[6] (47:5.) Boone's attorney noted that Boone did not dispute that he was in custody on the dates provided in the PSI report, but argued that "those occasions were due to the mal-functioning of his bracelet that was on, and he was released after the bracelet was repaired, and he says that they apologized to him every time[.]" (*Id.*) Boone's attorney brought this issue up again at sentencing, arguing, "So I don't want the section about the times he was held in custody to be overemphasized. I don't think [it] really reflect[s] on his ability to be supervised successfully." (47:17.)

[5] Boone refutes his "refusal" to submit to a polygraph test in page 10 of his brief.

[6] Boone discusses the dates that he was held in custody in pages 11-13 of his brief.

The sentencing transcript reveals therefore that Boone's counsel *did address* the statements that Heim considered in his report.

As indicated in Boone's brief, Heim's report criticizes other statements in the PSI report – but these are statements that his counsel never corrected or objected to at sentencing, including:

- "'There were an increased number of contacts [Boone] had with minors which were against the rules of supervision.'" (Boone Br. 8.)

- "'He failed to participate actively in SOT and appeared to be demonstrating concerning behaviors for reoffending.'" (Boone Br. 9.)

But the PSI was made available to Boone and his attorney prior to sentencing, and the parties confirmed at the commencement of the sentencing hearing that they reviewed it. (47:3.) "Where the information stated in the PSI is not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider that information." *State v. Schultz*, No. 2007AP356-CR, 2008 WL 4866282, ¶ 13, (Wis. Ct. App. Nov. 12, 2008) (per curiam) (unpublished). (R-App. 101-04.)

Finally, the circuit court appropriately exercised its discretion when it concluded, "[T]he purportedly inaccurate information presented was not highly relevant to this court's sentencing determination and that the information now offered does not warrant a sentence modification." (40:3.) The record supports the court's conclusion.

Regarding Boone's performance on community supervision, the court found that it was not highly relevant to Boone's sentence:

> The purportedly inaccurate or misleading statements regarding his supervision are contained in two paragraphs of the thirteen-page presentence investigation report. . . . Although the court briefly commented on the defendant's performance on supervision during its extensive sentencing remarks, it was not highly relevant to the court's sentence. The court sentenced the defendant to 15 years because he was a repeat sex offender who shows little remorse for his crimes. . . . The court commented on the defendant's tendency to make up preposterous excuses for his sexually assaultive behavior.

(40:3.) The court noted that, at sentencing, it opined that Boone "'clearly has not learned anything from his prior sexual assaults and from his sex offender treatment.'" (40:4, citing 47:32.)

The court also found the fact that Boone may have been compliant during his previous community supervision did not "paint his two prior sexual assaults or general lack of remorse in a more positive light, nor does it warrant a downward modification of his sentence." (40:4.) The court observed that the fact Boone performed well on supervision from March 2006 through May 2012 "and *then committed another sexual assault in 2014*, makes this offense even more egregious." (40:4) (court's emphasis.) The court continued: "supervision and treatment, even if well-received, did not work for this repeat sex offender. The defendant's commission of another sexual assault offense says everything about his need for close rehabilitative control and his risk of recidivism." (*Id.*). Consequently, the court stated, "had this information been presented at sentencing, the

court would have imposed the same sentence, particularly since the court was sentencing the defendant for a third sexual assault, which makes him a serious danger to the community." (*Id.*)

In this case, the record reflects that the circuit properly provided the reasons for its sentence. As the *Sobonya* Court provided:

> "[A]ll an appellate court can ask of a trial judge is that he [or she] state the facts on which he [or she] predicates his [or her] judgment, and that he [or she] give the reasons for his [or her] conclusion. If the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed."

365 Wis. 2d 559, ¶ 8 (quoting *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W. 2d 512 (1971)). Because the circuit court properly exercised its discretion, this Court should affirm the circuit court's judgment of conviction and order denying postconviction relief.

CONCLUSION

The circuit court did not erroneously exercise its discretion. It made no error of law, and it explained its reasons for concluding that the facts Boone presented did not justify modification of his sentence. Boone has not met his burden of proving that a new factor exits or that he is

entitled to sentence modification. The State respectfully requests that this Court affirm the judgment of conviction and order denying postconviction relief.

Dated this 17th day of October, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3164 words.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 17th day of October, 2016.

_____
SARA LYNN SHAEFFER
Assistant Attorney General