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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT II

Case No. 2017AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT P. VESPER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION FOR
POSTCONVICTION RELIEF, BOTH ENTERED IN
THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL J. APRAHAMIAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court properly exercise its discretion when it fined Robert Vesper \$1,900 for seventh-offense operating while intoxicated?

The circuit court implicitly answered yes by imposing the fine.

2. Has Vesper failed to prove that denial of duplicate sentence credit and the revocation of his extended supervision in a different case warrant sentence modification?

The circuit court concluded that Vesper is not entitled to sentence modification.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Vesper seeks reduction of his prison sentence and vacation of his fine. He drove drunk while on extended supervision for sixth-offense operating while intoxicated (OWI). He pled guilty to seventh-offense OWI, and the circuit court sentenced him to prison, imposed a \$1,900 fine, and ordered 76 days of sentence credit. Several weeks later, Vesper's extended supervision in his sixth-offense OWI case was revoked and he was sentenced to prison at a reconfinement hearing. Several more weeks later, the circuit court removed the sentence credit in this case because it was duplicative of the sentence credit that Vesper had been

granted in his sixth-offense OWI case. He argues on appeal that the circuit court should have reduced his seventh-offense OWI prison sentence based on his reconfinement sentence and his denial of duplicate sentence credit. He also argues that the circuit court misused its discretion in imposing the fine.

Vesper is not entitled to any relief. First, the circuit court properly exercised its discretion in imposing the fine. The record provides a reasonable basis for the fine and shows that Vesper will be able to pay it during his sentence. Second, Vesper is not entitled to reduction of his prison sentence. The denial of duplicate sentence credit and the revocation of his extended supervision were not highly relevant to his sentence.

STATEMENT OF THE CASE

Vesper was convicted of sixth-offense OWI in October 2013. (R. 1:3; 66:16.) In October 2014, Vesper was released from prison onto extended supervision in that case, Waukesha County case number 2013CF1205. (R. 25:5; 45:12.)

Vesper drove drunk again in March 2015. (R. 1.) As a result, the State charged him with seventh-offense OWI and operating a motor vehicle while revoked, in Waukesha County case number 2015CF283. (R. 1:1–2.)

The State Public Defender's Office determined that Vesper did not qualify for appointed counsel because his wife earned \$36,000 per year. (R. 60:1; 61:2; 62:1.) Vesper asked the circuit court to appoint counsel for him at county expense. (R. 3; 61:2.) A Waukesha County pretrial services screening report dated March 6, 2015, indicated that Vesper was employed at Menards, where he earned \$11 an hour or \$1,760 per month. (R. 2:2.) The report stated that Vesper had been working at Menards for four months over the past

two years. (R. 2:2.) The report also indicated that he had completed some college. (R. 2:2.)

The circuit court held a hearing on Vesper's request for counsel on March 13, 2015. (R. 62.) Vesper filed a petition for appointment of counsel at the hearing. (R. 62:4–5; *see also* R. 3.) Vesper stated in the petition that he was unemployed and had no income. (R. 3:1.) He acknowledged that his wife earned \$3,000 per month. (R. 3:2.) He told the court that his wife supported their two children (R. 62:3), then aged 12 and 14 (R. 3:1). The court appointed counsel “on a cost reimbursement basis,” telling Vesper that he might have to repay Waukesha County for the attorney. (R. 62:3.)

The circuit court held a plea and sentencing hearing in May 2015. (R. 66.) The State added a charge of operating with a prohibited alcohol concentration because Vesper's blood-alcohol concentration was .139. (R. 66:2, 16.) Vesper pled guilty to seventh-offense OWI. (R. 66:7.) The court accepted the plea and found him guilty, dismissed and read-in the count of operating after revocation, and dismissed the prohibited-alcohol-concentration count “by operation of law.” (R. 66:16–17.)

The circuit court proceeded to sentencing after hearing from the parties. (R. 66:17–25.) The court's main objective was protecting the community from Vesper's drunk driving. (R. 66:27–28.) The court noted that Vesper had six prior convictions for drunk driving. (R. 66:26, 28.) The court found many facts of this case “aggravating.” (R. 66:27–28.) One such fact was that Vesper's blood-alcohol level was .139, which was “well beyond” his legal limit of .02. (R. 66:27.) The other aggravating facts were that Vesper drove drunk shortly after being released from prison for his sixth OWI conviction, was still on extended supervision at the time, and should not have been driving at all because his driver license was revoked. (R. 66:26–28.) Before imposing sentence, the

court mentioned three times that Vesper was on extended supervision when he drove drunk. (R. 66:26–27.) The court noted that Vesper was “in violation of [his] extended supervision” when he drove drunk. (R. 66:27.) In terms of Vesper’s character and need for rehabilitation, the court said that Vesper was “an alcoholic” and he had “not wrestled with [his] demons well.” (R. 66:28.)

The circuit court then sentenced Vesper to 50 months of initial confinement and five years of extended supervision. (R. 66:28.) It ordered the sentence to run “consecutive to whatever [Vesper is] serving.” (R. 66:28.) The court also imposed a \$1,900 fine. (R. 66:30.) At the very end of the sentencing hearing, defense counsel said that Vesper was entitled to 76 days of sentence credit. (R. 66:31.) The prosecutor agreed, so the circuit court ordered 76 days of sentence credit. (R. 66:31.)

In July 2015, the Department of Administration revoked Vesper’s extended supervision in case number 2013CF1205 and ordered him to be reconfined for four years and four days. (R. 25:5; 45:12.)

In August 2015, the Department of Corrections informed the circuit court that the 76 days of sentence credit ordered in case number 2015CF283 was duplicative of the sentence credit that Vesper was granted in case number 2013CF1205. (R. 25.) The parties seemed to agree. (R. 27; 28.) The court then amended the judgment of conviction in case number 2015CF283 to remove the duplicate sentence credit. (R. 29:3.)

In December 2016, Vesper filed a postconviction motion. (R. 45.) As relevant here, he argued that the circuit court should reduce his sentence based on his denial of duplicate sentence credit and his reconfinement sentence in case number 2013CF1205. (R. 45:5–7.) He also argued that the court should vacate his fine. (R. 45:8–10.) The court

denied the motion in a written order in January 2017. (R. 50.) Vesper appeals from that order and his judgment of conviction. (R. 52.)

SUMMARY OF ARGUMENT

I. The circuit court properly used its discretion when it fined Vesper \$1,900.

A. The record supports the circuit court's decision to fine Vesper. The fine will properly punish Vesper for his egregious OWI offense: he drove drunk while on extended supervision for a sixth-offense OWI conviction, his driver license was revoked at the time, and his blood-alcohol level was high. The fine also will help deter Vesper from future OWI offenses and, as a result, will help protect the community.

B. The record shows that Vesper will be able to pay his fine during his sentence. He has some college education, obtained a full-time job that paid over \$1,700 per month shortly after he was released from prison before, and has a spouse who can help pay joint household expenses.

II. The circuit court correctly determined that Vesper is not entitled to modification of his prison sentence. Vesper must show that the sentencing court overlooked a factor highly relevant to his sentence. He cannot make that showing.

A. The revocation of Vesper's extended supervision in a different case does not justify sentence modification here. The circuit court here knew that Vesper had violated his extended supervision when it sentenced him. It also made his sentence consecutive to any other sentence. The court did not sentence Vesper on the false assumption that his extended supervision would not be revoked.

B. The denial of duplicate sentence credit does not justify sentence modification. The issue of sentence credit

was not relevant to Vesper's sentence. Nobody mentioned the issue of sentence credit until the very end of Vesper's sentencing hearing, after the circuit court had already imposed its sentence.

ARGUMENT

I. The circuit court properly used its discretion when it imposed a \$1,900 fine.

A. Controlling legal principles.

“A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised.” *State v. Ramel*, 2007 WI App 271, ¶ 8, 306 Wis. 2d 654, 743 N.W.2d 502 (citation omitted). “Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.* ¶ 11 (citation omitted).

If a circuit court imposes a fine, it must explain why. *Id.* ¶ 14. But if a circuit court does not adequately explain its sentence, this Court “will search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *Id.* ¶ 9 (citation omitted).

“It is also necessary that a sentencing court determine at the time of sentencing whether a defendant has the ability to pay a fine if the court intends to impose one.” *Id.* ¶ 15. “A trial court must consider the defendant's ability to pay the fine during the total sentence, that is, any term of probation, imprisonment and extended supervision.” *Id.* If a defendant argues in a postconviction motion that he is unable to pay a fine, the circuit court must determine if the defendant is able to pay the fine. *Id.* ¶ 21. If the circuit court did not make a finding on a defendant's ability to pay, this

Court must “search the record to determine whether it supports such a finding.” *Id.* ¶ 26 (citation omitted).

B. The record supports the circuit court’s decision to impose a fine.

When sentencing Vesper, the circuit court’s main objective was protecting the community from Vesper’s drunk driving. (R. 66:27–28.) The court noted that Vesper had six prior convictions for drunk driving. (R. 66:26, 28.) The court found many facts of this case “aggravating.” (R. 66:27–28.) One such fact was that Vesper’s blood-alcohol level in this case was .139, which was “well beyond” his legal limit of .02. (R. 66:27.) The other aggravating facts were that Vesper drove drunk shortly after being released from prison for his sixth drunk-driving offense, was still on extended supervision at the time, and should not have been driving at all because his driver license was revoked. (R. 66:26–28.) In terms of Vesper’s character and need for rehabilitation, the court said that Vesper was “an alcoholic” and he had “not wrestled with [his] demons well.” (R. 66:28.)

Those sentencing considerations justify the fine, which will help achieve the primary goals of sentencing. The fine will punish Vesper by depriving him of \$1,900 of his money. Vesper deserves punishment because he drove drunk while on extended supervision for sixth-offense OWI, his driver license was revoked, and his blood-alcohol level was high. The fine will also help achieve deterrence. “[T]he deterrent effect of a fine depends in part upon its impact on the financial resources of the offender.” *Will v. State*, 84 Wis. 2d 397, 404, 267 N.W.2d 357 (1978). Vesper is not a wealthy man, as explained more below. Thus, the fine will help deter him from driving drunk by making it more difficult for him to afford alcohol. This deterrence, in turn, will help protect the community and rehabilitate Vesper.

Vesper's contrary argument is unavailing. He argues that the circuit court misused its discretion because it failed to explain why it was imposing a fine. (Vesper Br. 6–8.) He notes that under *Ramel*, a circuit court must explain why it is imposing a fine. (*Id.* at 6.) But this Court in *Ramel* repeatedly acknowledged that it must search the record for reasons to support a sentence if a circuit court did not give an adequate explanation. *Ramel*, 306 Wis. 2d 654, ¶¶ 9, 18 n.7, 26. The reasons stated above justify the circuit court's discretionary decision to impose a fine here.

C. The record shows that Vesper is able to pay his fine.

This Court must next determine whether Vesper will be able to pay his fine “during the total sentence, that is, any term of probation, imprisonment and extended supervision.” See *Ramel*, 306 Wis. 2d 654, ¶ 15. The circuit court sentenced Vesper to 50 months of initial confinement and five years of extended supervision. (R. 66:28.) It also imposed a \$1,900 fine. (R. 66:30.) Vesper could pay off his fine if he paid only \$17.27 per month during his entire 110-month sentence. He could also pay off his fine during his 60 months of extended supervision by paying only \$31.67 per month.

Three key facts in the record support a finding that Vesper will be able to pay his \$1,900 fine during his sentence. First is Vesper's employment history. According to a Waukesha County report from March 2015, Vesper was employed at Menards at that time. (R. 2:2.) He earned \$11 an hour at Menards, or \$1,760 per month. (R. 2:2.) He had worked there for four months over the prior two years. (R. 2:2.) It appears that Vesper did not work there for a longer time because he had only been released from prison about four-and-a-half months earlier, in October 2014. (R. 25:5; 45:12.) This timing shows that Vesper was able to obtain full-time employment shortly after being released from

prison. He will likely be able to obtain similar employment when he is released from prison. Paying \$31.67 each month during extended supervision would be a small dent in a monthly gross income of about \$1,760.

The second key fact is Vesper's education history: he completed some college. (R. 2:2.) His education level bolsters the conclusion that he will be able to obtain gainful employment when he is released from prison.

The third key fact is that Vesper's wife earns \$3,000 per month. (R. 3:2; *see also* R. 61:2; 62:1.) Vesper had no income shortly after his arrest, so his wife supported their two children (R. 62:3), then ages 12 and 14 (R. 3:1). To be clear, the State does not suggest that Vesper's wife should help pay his fine or support their children by herself so that he can pay his fine. The State instead is arguing that Vesper's wife's income is relevant because it shows that Vesper does not have to support his two children by himself. A monthly gross income of about \$1,760 would allow Vesper to help pay for joint household expenses, including costs related to his children, while also paying off his fine.

Vesper's contrary arguments are unavailing. He argues that the circuit court erred because it was required to determine his ability to pay the fine. (Vesper Br. 7–9.) He relies on *Ramel* and *State v. Kuechler*, 2003 WI App 245, 268 Wis. 2d 192, 673 N.W.2d 335. (Vesper Br. 7–9.) The State agrees that those cases hold that a circuit court must determine a defendant's ability to pay a fine that it imposes. But if a circuit court fails to find that a defendant is able to pay a fine, this Court must search the record to see if it supports such a finding. *Ramel*, 306 Wis. 2d 654, ¶ 26. The record here supports such a finding for the reasons stated above.

Vesper also argues that he is unable to pay his fine because the circuit court appointed counsel for him and

because the State Public Defender’s Office considers him to be indigent. (Vesper Br. 9.) Vesper’s focus is too narrow. To determine a defendant’s ability to pay a fine, a court considers such factors as the defendant’s employment history and education level. *See Ramel*, 306 Wis. 2d 654, ¶ 27. A court must also consider a defendant’s ability to pay a fine during his entire sentence, including extended supervision. *Id.* ¶ 15. The circuit court here appointed counsel for Vesper in March 2015 because he had no income at that time. (R. 62:3; *see also* R. 3:1.) But before that time, Vesper earned \$1,760 per month. (R. 2:2.) He also completed some college. (R. 2:2.) Indeed, the circuit court recognized Vesper’s future earning potential because it appointed counsel “on a cost reimbursement basis,” telling Vesper that he may have to repay Waukesha County for the attorney. (R. 62:3.) To be sure, a defendant’s indigency supports the conclusion that he may be unable to pay a fine. *See Ramel*, 306 Wis. 2d 654, ¶ 27. But indigency is not dispositive. *See State v. Milashoski*, 163 Wis. 2d 72, 88–89, 471 N.W.2d 42 (1991) (concluding that Milashoski was able to pay a \$15,000 fine despite his indigency and relying heavily on his employment history and prospects). Vesper’s employment history, education level, and spousal support for joint expenses show that he will be able to pay his \$1,900 fine during his 110-month sentence.

In sum, the circuit court properly exercised its discretion in imposing a \$1,900 fine on Vesper.

II. The circuit court properly denied Vesper’s motion to modify his prison sentence.

A. Controlling legal principles.

“Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences.” *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court “may base a sentence

modification upon the defendant's showing of a 'new factor.'" *Id.* (citation omitted). "A new factor is a set of facts highly relevant to sentencing, but not known, or not in existence, at the time of sentencing." *State v. Norton*, 2001 WI App 245, ¶ 13, 248 Wis. 2d 162, 635 N.W.2d 656.

"The defendant bears the burden of demonstrating by clear and convincing evidence that a new factor exists." *State v. Ninham*, 2011 WI 33, ¶ 89, 333 Wis. 2d 335, 797 N.W.2d 451 (citation omitted). "Whether a new factor exists is a question of law that this court reviews independently." *Id.* ¶ 90 (citation omitted). "[R]evocation of probation in another case does not ordinarily present a new factor" *Norton*, 248 Wis. 2d 162, ¶ 10.

If a new factor exists, a circuit court still has discretion to deny sentence modification. *Ninham*, 333 Wis. 2d 335, ¶ 89. If a new factor exists, this Court's review is limited to determining whether the circuit court properly used its discretion in denying sentence modification. *Id.* ¶ 90. "[T]o prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *Harbor*, 333 Wis. 2d 53, ¶ 38 (citation omitted).

B. Vesper's revocation in a different case is not a new factor that could warrant sentence modification.

In May 2015, the circuit court sentenced Vesper to 50 months of initial confinement and four years of extended supervision in this case (case number 2015CF283). (R. 66:28.) In July 2015, the Department of Administration revoked his extended supervision in case number 2013CF1205 and ordered him to be reconfined for four years and four days. (R. 25:5; 45:12.)

The reconfinement order is not a new factor for sentence modification purposes because it was not highly

relevant to Vesper's sentence in this case. Just before imposing sentence, the circuit court mentioned three times that Vesper was on extended supervision when he drove drunk in this case. (R. 66:26–27.) In particular, the court said that Vesper was “in violation of [his] extended supervision” when he drove drunk. (R. 66:27.) These facts show that the court was aware of the possibility that Vesper's extended supervision might get revoked. Yet the court did not suggest that the length of a possible reconfinement sentence was relevant to his sentence in this case. The court instead ordered Vesper's sentence to run “consecutive to whatever [Vesper is] serving.” (R. 66:28.) Under these facts, Vesper's potential reconfinement sentence was not highly relevant to his sentence in this case.

Norton provides a helpful contrast. In *Norton*, this Court declared that “revocation of probation in another case does not ordinarily present a new factor,” but Norton's case was “an exception to the general rule.” *Norton*, 248 Wis. 2d 162, ¶ 10. Norton committed a theft while he was on probation for a prior theft. *Id.* ¶¶ 2–3. At the sentencing hearing on the new theft, Norton's probation agent told the circuit court that Norton's probation would not be revoked even though he had reoffended. *Id.* ¶ 4. The court gave Norton a sentence that would run consecutive to any other sentence. *Id.* ¶ 5. Despite the probation agent's contrary assurance, Norton's probation was revoked several weeks later, and he received a nine-month sentence as a result. *Id.*

This Court concluded that Norton's revocation was a new factor justifying sentence modification. *Id.* ¶ 13. This Court reasoned that the circuit court had incorrectly believed that Norton's probation would not be revoked when it sentenced him. *Id.* ¶¶ 13–16. It further reasoned that the circuit court had relied on that misinformation. *Id.* The circuit court specifically imposed a 42-month sentence

because the court thought that Norton needed that much confinement time to become drug-free. *Id.* ¶ 15.

Vesper's case is very different from *Norton*. Unlike in *Norton*, nobody here told the circuit court that Vesper's extended supervision would not be revoked. And the circuit court here, unlike in *Vesper*, did not impose a specific sentence in reliance on an incorrect assumption that Vesper's extended supervision would not be revoked. Vesper's case thus falls into the general rule that "revocation of probation in another case does not ordinarily present a new factor." *Norton*, 248 Wis. 2d 162, ¶ 10.

In short, revocation of Vesper's extended supervision in a different case is not a new factor here for sentence modification purposes. The possibility of revocation was not highly relevant to his sentence in this case.

C. The denial of Vesper's duplicate sentence credit is not a new factor that could warrant sentence modification.

The circuit court granted Vesper 76 days of sentence credit at the sentencing hearing. (R. 66:31.) The court later removed that sentence credit because it was duplicative of the sentence credit that Vesper was granted in a related case, case number 2013CF1205. (R. 25; 27; 28; 29:3.)

The removal of Vesper's duplicate sentence credit is not a new factor for sentence modification purposes. The issue of sentence credit was not relevant to his sentence in this case. Nobody mentioned sentence credit until the very end of the sentencing hearing. (R. 66:31.) Defense counsel said that Vesper was entitled to 76 days of sentence credit. (R. 66:31.) The prosecutor agreed, so the circuit court ordered 76 days of sentence credit. (R. 66:31.) The court had already imposed its sentence by that point. (R. 66:28–30.) The court did not indicate that the issue of sentence credit had any bearing on its sentence. The court simply ordered

the amount of sentence credit to which the parties agreed. (R. 66:31.) Further, Vesper is still going to receive 76 days of sentence credit. It will not apply in this case because it has been granted in case number 2013CF1205 instead. (R. 25.) Under these facts, the amount of sentence credit to which Vesper was entitled was not highly relevant to sentencing and thus is not a new factor.

State v. Armstrong provides a helpful contrast. In *Armstrong*, the parties at the sentencing hearing thought that Armstrong was entitled to two years of sentence credit but he really was entitled to only eight months. *State v. Armstrong*, 2014 WI App 59, ¶ 13, 354 Wis. 2d 111, 847 N.W.2d 860. This Court determined “that the amount of sentence credit to which Armstrong was entitled was a factor ‘highly relevant to the imposition of [the] sentence.’” *Id.* ¶ 16 (alteration in original) (citation omitted). This Court reasoned that “[t]hroughout the sentencing hearing, the circuit court pointedly and repeatedly drew attention to the amount of sentence credit to which Armstrong would be entitled, and made clear why the topic was important to the court.” *Id.* This Court found it “obvious that the [circuit] court decided to factor into the sentencing determination the amount of sentence credit, in order to avoid imposing a period of incarceration that was longer than necessary.” *Id.* ¶ 17 (citation omitted). This Court thus concluded that the amount of sentence credit to which Armstrong was entitled was a new factor, so it remanded for the circuit court to determine whether the new factor warranted sentence modification. *Id.* ¶ 18.

Vesper’s case stands in stark contrast to *Armstrong*. Unlike in *Armstrong*, nobody here mentioned sentence credit until the very end of the hearing when defense counsel said that Vesper was entitled to 76 days of sentence credit. (R. 66:31.) Unlike in *Armstrong*, the circuit court here did not repeatedly refer to sentence credit, make clear that the issue

was important to the court, or obviously factor sentence credit into its sentencing decision. Thus, the issue of sentence credit is not a new factor here because it was not highly relevant to Vesper's sentence. Indeed, it was not relevant at all.

In short, the denial of Vesper's duplicate sentence credit is not a new factor for sentence modification purposes.

CONCLUSION

The State respectfully requests that this Court affirm Vesper's judgment of conviction and the circuit court's order denying his postconviction motion.

Dated: July 26, 2017.

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 4193 words.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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: July 26, 2017.

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