STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP001799-CR

Waukesha County Circuit Court Case No. 2015CF001431

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN A. HODGKINS

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT-APPELLANT POST-CONVICTION MOTION FOR WAUKESHA COUNTY, THE HONORABLE LEE S. DREYFUS, JR., PRESIDING

Brief and Appendix of the Plaintiff-Respondent

Submitted by:

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STATEMENT OF THE ISSUES

1. Did the Trial Court abuse its discretion by denying defendant's post-conviction motion to amend the judgment of conviction to stay the DNA sample and surcharge in the underlying criminal matter?

2. Did the Trial Court abuse its discretion by denying defendant's post-conviction motion to modify sentence to reduce the length of sentence?

STATEMENT ON ORAL ARGUMENT

The State submits that oral argument is unnecessary because the issues can be set forth fully in written briefs.

STATEMENT ON PUBLICATION

Publication is unnecessary as the issues presented relate to the application of existing law to the facts of the record. Also, under Wis. Stat. § (Rule) 752.31 this is a one-judge appeal and therefore, publication would not be appropriate. *See* Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE AND FACTS

Procedural status of the case

Appellant Shawn A. Hodgkins appeals his conviction, after being found guilty of three misdemeanors on January 19, 2017. Following his conviction, the defendant was then sentenced on February 8, 2016, by the Honorable Judge Lee S. Dreyfus, presiding. Subsequently, counsel on behalf of the defendant filed a motion to reduce sentence and to amend the judgment of conviction. The motion was thereby denied by the trial court on February 16, 2017.

Following the denial of the defendant's post-conviction motion, counsel for the defendant, after reviewing the transcripts of all hearings, interviewing the defendant, reviewing the court file, and investigating all of the issues raised by all of the above sources, determined that there was no merit to any possible appeal and thus filed a no merit brief. Following the filing of the no merit brief, the defendant proceeded pro se, in filing this appeal.

Statement of the facts

On November 3, 2015, Mr. Shawn Hodgkins was charged in a criminal complaint (15CF1431) alleging two counts of

strangulation, three counts of battery, two counts of disorderly conduct, two counts of criminal damage to property, and one count of resisting arrest, all charged with a repeater penalty enhancer contrary to Sections, 940.235, 947.01, 943.01, 946.41, 940.19, 968.075, Wis. Stats.

During the pendency of this case, Mr. Hodgkins was taken into custody as he was on extended supervision for an unrelated case (04CF1254) at the time these crimes were alleged to have been committed. Ultimately, Mr. Hodgkins entered a plea of guilty to counts 2,4, and 9, which were two counts of battery and one count of resisting. Mr. Hodgkins was sentenced on February 8, 2016, and received eighteen months of initial confinement followed by six months of extended supervision on the one count of misdemeanor battery. On the remaining two counts, Mr. Hodgkins received one year of initial confinement followed by one year of extended supervision, imposed and stayed for two years of probation. On the remaining two counts, the sentences were consecutive to each other and consecutive to any other sentence. As a condition of probation, the Court ordered that Mr. Hodgkins pay court costs as well as the

DNA sample and surcharge, which amounted to nine hundred twenty-nine dollars, but ordered that it be paid as a condition of probation.

Counsel on behalf of the defendant, filed a motion to reduce sentence, was heard on February 16, 2017, and was denied by the trial court that same day. The defendant then requested, by virtue of his counsel, that the Court of Appeals review his judgment of conviction. Counsel for the defendant subsequently filed a no merit brief, and the defendant proceeded with this appeal pro se.

STANDARD OF REVIEW

The standard of review for the Court of Appeals to overturn the decision of the trial court, would be an abuse of discretion. Under State v. Toliver, the Court indicated, "whether a new factor exists presents a question of law which this Court reviews de novo. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification." State v. Toliver, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994).

ARGUMENT

I. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING DEFENDANTS REQUEST TO AMEND THE JUDGMENT OF CONVICTION TO IMPOSE AND STAY THE DNA SURCHARGE, VICTIM WITNESS SURCHARGE AND COURT COSTS.

In this case, Mr. Hodgkins had previously indicated to his counsel that the court costs and surcharges had been paid in full. Thus, the department of corrections was no longer garnishing one hundred percent of the defendant's prison accounts and wages for the DNA surcharge and Court Costs as it pertained to the underlying criminal matter. Upon the filing of this brief, the State did contact the Green Bay Correctional Facility, where the defendant is being detained, to confirm the sentiments of defendant's prior counsel. The State was informed that as of August 28, 2017, all debts relating the underlying criminal matter had been settled and there was in fact, no further garnishing of the defendant's prison accounts and wages. Thus, this issue at this time is moot.

II. DID THE COURT ERRONEOUSLY EXERCISE ITS DISCRETION IN DENYING DEFENDANTS REQUEST FOR SENTENCE REDUCTION BASED UPON THE VICTIM'S REQUEST THAT THE DEFENDANT BE RELEASED EARLY TO HELP SUPPORT THEIR FAMILY.

The defendant contends that the trial court made an erroneous decision by denying his post-conviction motion. The defendant argues that the victim in the underlying criminal matter, Chelsea Polster, wrote a letter asking that the Court reduce the defendant's sentence to allow him an opportunity to co-parent their child and to provide financial support. Ultimately, the defendant's argument is that, given Wisconsin law, the letter from Ms. Polster, after the defendant's sentencing, is a "new factor," warranting sentence modification, to which the State would disagree.

It is well established law, that in order to be successful in a request for sentence modification, the defendant must show that there is a "new factor," that was "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, ¶ 57, citing State v. Rosado, Wis.2d, 280, 288.

As it pertains to the case at issue, the Court, in deciding the post-conviction motion noted that it was aware at the time of the original sentence that the victim in this case, Ms. Polster, was pregnant. (App. 168). In its denial of the defendant's post-conviction motion, the Court also noted that Ms. Polster's letter, requesting that the defendant's sentence be modified to allow for his early release from prison in an effort to be there for the child, did not constitute a new fact but instead, was simply a change of heart.

The standard for the Court of Appeals to overturn the decision of the trial court would be an abuse of discretion. Under State v. Toliver, the Court indicated, "whether a new factor exists presents a question of law which this court reviews de novo. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification." State v. Toliver, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). As it pertains to the case at issue, the Court was reasonable in its determination that the victim's decision to make a statement about the defendant's length of imprisonment after the original sentencing, coupled with the fact that the defendant's child

had been born, was not a new factor, as the Court knew at the time of sentencing that the victim was pregnant.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the trial court, denying Mr. Hodgkins motion.

Dated this 3rd day of April, 2018

Respectfully submitted,

_____

Susan L. Opper
Attorney for the Plaintiff-Respondent
State Bar No. 1017918

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8 pages, excluding the appendix.

Dated this 3rd day of April 2018

Respectfully submitted,

_____

Susan L. Opper
Attorney for the Plaintiff-Respondent
State Bar No. 1017918

CERTIFICATION 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 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 3rd day of April 2018

Respectfully submitted,

_____

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