STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP412-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUSTIN M. YANDA,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Circuit Court for Brown County, the Honorable Marc A. Hammer, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

In denying Mr. Yanda's postconviction motion, did the circuit court err as a matter of law by misapplying the "new factor" test?

The circuit court denied the sentence modification motion, holding "I am not satisfied that based on the fact that he was ultimately ineligible for these programs that it frustrated the purpose, the primary purpose of the Court's sentence." (60:10-11; App. 108-109).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issue raised involves the application of established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

Mr. Yanda and a friend were riding their motorcycles when the motorcycles collided. (2:3). As a result of this accident, Mr. Yanda suffered head trauma and was in a coma for over a week. (2:3; 56:19). Mr. Yanda's friend had a broken leg and ankle. (2:3-4). A blood draw revealed that Mr. Yanda's BAC at the time of the accident was .199 while his friend had a .02 BAC. (2:4-5).

The state filed a complaint charging Mr. Yanda with injury by intoxicated use of a vehicle in violation of Wis. Stat. § 940.25(1)(a); injury by use of a vehicle with prohibited alcohol concentration in violation of Wis. Stat.

§ 940.25(1)(b); operating a motor vehicle while revoked – causing great bodily harm in violation of Wis. Stat. § 343.44(1)(b) and (2)(ar)3; operating a motor vehicle while intoxicated, 4th offense in violation of Wis. Stat. § 346.63(1)(a); and operating with prohibited alcohol concentration, 4th offense in violation of Wis. Stat. § 343.63(1)(b). (2).

On March 30, 2017, Mr. Yanda entered a no-contest plea to injury by intoxicated use of a motor vehicle. (59:2). The parties presented a joint recommendation for 14 months initial confinement and 24 months extended supervision. (59:7, 12). The court rejected that joint recommendation, instead imposing 4 years initial confinement and 4 years extended supervision. (29). The court also made Mr. Yanda eligible for the Challenge Incarceration Program and the Earned Release Program. (59:16).

Mr. Yanda filed a motion for sentence modification based on a new factor on December 15, 2017. (37). In that motion, Mr. Yanda alleged that contrary to what the court assumed at sentencing, he was not statutorily eligible for either early release program. (37:1).

The court denied the motion at a hearing on February 2, 2018. (60:11; 41; App. 103, 109). The court held:

> I would acknowledge I think it more reasonable than not to conclude that the factor presented in the brief and argued is a new factor, that he is statutorily ineligible for these programs, and at the time of sentence, the Court believed he was statutorily eligible.
>
> The question is: Does it justify a sentence modification? Does it frustrate the purpose of the sentence?

(60:6; App. 104).

While recognizing that the sentence modification motion had merit and that "it was appropriate for defense counsel to ask for me to consider that" the court explained that its sentencing goal was not to ultimately reach the joint recommendation. (60:10-11; App. 108-109). It concluded "I am not satisfied that based on the fact that he was ultimately ineligible for these programs that it frustrated the purpose, the primary purpose of the Court's sentence." (60:10-11; App. 108-109).

Mr. Yanda challenges the circuit court's written order denying his postconviction motion on the basis that the court erred as a matter of law.

ARGUMENT

The Circuit Court Erred as a Matter of Law in Denying Mr. Yanda's Motion for Sentence Modification By Misapplying the "New Factor" Test.

A new factor must be "highly relevant to the imposition of sentence." ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. Instead of evaluating whether the information presented by Mr. Yanda was highly relevant to the sentence, the circuit court instead analyzed whether the new factor frustrated the purpose of the sentence. (60:6, 10-11; App. 104, 108-109). Because the circuit court misapplied the law to the facts in Mr. Yanda's case, this court should remand for a new hearing on the postconviction motion where the circuit court can apply the proper standard.

The law regarding new factors and sentence modification is straightforward. Wisconsin courts have the inherent authority to modify a sentence. ***Harbor***, 2011 WI 28,

¶35. A court may modify a sentence based on the defendant's showing of a "new factor." ***Id***. "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***Id.***, ¶36. First, the defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Id.,*** ¶¶36-37. 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." ***Id***., ¶40. Second, "if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id***., ¶37.

Whether a fact or set of facts constitutes a new factor is a question of law reviewed independently. ***Harbor***, 2011 WI 28 at ¶33. The determination of whether a new factor warrants sentence modification is reviewed for an erroneous exercise of discretion. ***Id***. Because Mr. Yanda's case raises the question of whether the court misapplied the new factor law, this case presents a question of law to be reviewed de novo. ***Barber v. Nylund***, 158 Wis. 2d 192, 195, 461 N.W.2d 809 (Ct. App. 1990).

The first step in the new factor test was articulated in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The ***Rosado*** decision held that the defendant must show the new facts were "highly relevant" to the sentence. However, in ***State v. Michels***, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), this court added the additional requirement that the new facts must also "frustrate the purpose" of the sentence. This led to confusion and inconsistencies in the case law.

The Wisconsin Supreme Court addressed this issue in ***Harbor*** and held "the frustration of the purpose of the

original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." ***Harbor***, 2011 WI 28 at ¶48. The court's ruling was clear: "we conclude that the definition set forth in ***Rosado*** is the correct definition of a 'new factor' for purposes of sentence modification. We withdraw any language from ***Michels*** and the cases following ***Michels*** that suggest an additional requirement that an alleged new factor must also frustrate the purpose of the original sentence." ***Id.***, ¶52.

Mr. Yanda alleged a single new factor. He pled to injury by intoxicated use of a motor vehicle and the parties offered a joint recommendation of 14 months initial confinement and 24 months extended supervision. (59:7, 12). The court rejected that joint recommendation, instead imposing 4 years initial confinement and 4 years extended supervision. (29; App. 101). However, the court made Mr. Yanda eligible for two early release programs: Challenge Incarceration and Earned Release. (59:16). The court told Mr. Yanda "my goal is that you participate in these programs…" (59:16). Successful completion of either of these programs would have resulted in Mr. Yanda serving less than the 4 years of initial confinement.

What the circuit court did not know or understand at the time of sentencing was that because Mr. Yanda pled to an offense under Wis. Stat. Chapter 940 (Wis. Stat. § 940.25(1)(a)), he was statutorily ineligible for both the Challenge Incarceration Program and the Earned Release Program. Wis. Stat. §§ 302.045(2)(c) and 302.05(3)(a)1.

On postconviction, Mr. Yanda argued that his statutory ineligibility for these programs was a new factor warranting sentence modification. (37). The court appeared to agree that

the first part of the new factor test was met, stating "I would acknowledge I think it more reasonable than not to conclude that the factor presented in the brief and argued is a new factor, that he is statutorily ineligible for these programs, and at the time of sentence, the Court believed he was statutorily eligible." (60:6; App. 104).

Immediately after the court's statement that it was "more reasonable than not to conclude that the factor presented in the brief and argued is a new factor" the court declared "The question is: Does it justify a sentence modification? Does it frustrate the purpose of the sentence?" (60:6; App. 104). Later, the court repeated its reliance on the "frustrate the purpose" standard, stating "I am not satisfied that based on the fact that he was ultimately ineligible for these programs that it frustrated the purpose, the primary purpose of the Court's sentence." (60:10-11; App. 108-109).

This analysis does not comport with Wisconsin's two-step inquiry for sentence modification. ***Harbor***, 2011 WI 28 at ¶¶36-37. On the one hand, it appears that by stating it was "more reasonable than not to conclude that the factor presented in the brief and argued is a new factor" that Mr. Yanda met his burden on the first part of the test. However, the court then twice inserted an analysis of whether the new information frustrated the purpose of the sentence. (60:6, 11; App. 104, 109). As explained above, the court in ***Harbor*** eliminated the "frustrate the purpose" analysis.

Although it is not clear what test the court applied, there are two possibilities. First, the court improperly applied the "frustrate the purpose" analysis to the first step of the new factor test directly contrary to ***Harbor***. Second, the court applied the "frustrate the purpose" analysis to the second step, believing that in order to determine whether a new factor

justifies modification of the sentence the court must believe the new factor frustrates the purpose of the sentence.

Either way, in denying Mr. Yanda postconviction relief, the circuit court did not apply the proper two-part test for sentence modification set forth in ***Harbor***. The result was a misapplication of that test, and Mr. Yanda is left guessing what might have been had the court applied the correct legal standard to the facts of this case. As a result, a remand is necessary for the court to determine whether the new factor evidence warrants sentence modification.

CONCLUSION

Because the circuit court erred as a matter of law in denying Mr. Yanda's motion for sentence modification, this court should reverse the denial of Mr. Yanda's postconviction motion and remand the case to the circuit court for a determination of whether the new factor evidence warrants sentence modification.

Dated this 14th day of May, 2018.

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 1,672 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 14th day of May, 2018.

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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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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 14th day of May, 2018.

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