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**07-27-2018**  
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**OF WISCONSIN**

Case No. 2018AP412-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

DUSTIN M. YANDA,  
Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF  
CONVICTION AND AN ORDER DENYING A MOTION  
FOR SENTENCE MODIFICATION, ENTERED IN  
THE CIRCUIT COURT FOR BROWN COUNTY,  
THE HONORABLE MARC A. HAMMER. PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## **STATEMENT OF ISSUES**

Dustin M. Yanda moved for modification of his sentence on the ground that the sentencing court made him eligible for the Challenge Incarceration Program and the Substance Abuse Program even though his conviction for injury by intoxicated use of a motor vehicle made him statutorily ineligible for the programs. The circuit court denied Yanda's motion, concluding that his ineligibility for the programs does not warrant sentence modification. Did the circuit court misapply the new factor test because it also considered whether Yanda's ineligibility for the programs frustrated the purpose of the sentence?

The circuit court did not answer.

This Court should answer "no," and affirm the circuit court order denying Yanda's motion for sentence modification.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

## **INTRODUCTION**

When it sentenced Yanda, the circuit court imposed a sentence longer than the parties jointly recommended, and made him eligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP). But Yanda's conviction for injury by intoxicated use of a motor vehicle made him statutorily ineligible for the programs. Yanda sought sentence modification, asserting that his ineligibility for the programs is a new factor warranting sentence modification. The circuit court denied Yanda's motion, and explained that its primary considerations in imposing sentence were Yanda's dangerous behavior and his criminal record. The court also mentioned that Yanda's statutory

ineligibility for the programs did not frustrate the purpose of the sentence.

On appeal, Yanda asserts that the circuit court misapplied the new factor test by considering whether his ineligibility for the programs frustrated the purpose of the sentence. He seeks remand to the circuit court for it to determine again whether he has shown a new factor warranting sentence modification.

Remand is unnecessary and unwarranted because the circuit court applied the correct legal standard in denying Yanda's motion. The court explained that it did not condition the sentence on eligibility for the CIP or SAP, and that his ineligibility for those programs did not warrant sentence modification. It then added that Yanda's ineligibility did not frustrate the purpose of the sentence. Yanda seems to argue that by considering whether Yanda's ineligibility for the programs frustrated the purpose of the sentence, the court acted contrary to *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. But *Harbor* only provides that frustration of the purpose of the sentence is not a separate criterion that a defendant must satisfy in order to be entitled to sentence modification. It does not prohibit a court from considering whether a fact frustrates the purpose of the sentence. The court properly denied Yanda's motion, and this Court should affirm.

## **STATEMENT OF THE CASE AND FACTS**

Yanda and his friend were operating motorcycles when they collided, throwing both riders from their motorcycles. (R. 2:3–4.) Yanda's friend broke his leg and ankle, and his lung collapsed. (R. 2:4.) Yanda broke his finger and suffered facial and head trauma. (R. 2:3.) Yanda's blood was drawn, and analysis of his blood indicated a blood alcohol concentration of 0.199. (R. 2:3, 5.)

The State charged Yanda with five crimes: causing injury by intoxicated use of a motor vehicle; causing injury by operation of a motor vehicle with a prohibited alcohol concentration; causing great bodily harm by operating a motor vehicle with a revoked operating privilege; operating a motor vehicle while under the influence of an intoxicant as a fourth offense; and operating a motor vehicle with a prohibited alcohol concentration as a fourth offense. (R. 2:1–2.)<sup>1</sup>

The State and Yanda reached a plea agreement under which Yanda pled no contest to causing injury by intoxicated use of a motor vehicle, and the remaining four charges were dismissed. (R. 59:2–3.) Yanda faced a maximum sentence of 12 years and six months of imprisonment, including seven years and six months of initial confinement. (R. 2:1; 59:5.) The parties jointly recommended a sentence of 14 months of initial confinement and 24 months of extended supervision. (R. 59:7.)

The circuit court, the Honorable Marc A. Hammer, accepted Yanda’s plea, and imposed sentence. (R. 59:6, 16.) The court noted that Yanda had committed a “fairly high level felony offense.” (R. 59:13.) It observed that Yanda’s character was of “significant concern.” (R. 59:14.) It noted that Yanda had a “fairly significant criminal record,” and that when he committed his current offense, his operating privilege was revoked and he had an interlock ignition device restriction. (R. 59:14.) The court also noted that Yanda could not legally drive with a blood alcohol concentration above .02. (R. 59:15.) The court also noted that Yanda drove drunk again after he committed this offense. (R. 59:15.)

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<sup>1</sup> The injury by use of a motor vehicle with a prohibited alcohol concentration, causing great bodily harm after revocation, and OWI charges were read in at sentencing. The operating with a prohibited alcohol concentration charges was dismissed outright. (R. 29.)

The court concluded that the joint recommendation did not address the sentencing factors, so it imposed a sentence in excess of the recommendation. (R. 59:16.) The court imposed four years of initial confinement and four years of extended supervision. (R. 59:16.) The court also made Yanda eligible for the CIP and the SAP, stating, “My goal is that you participate in those programs because I think you desperately need those programs before you can return to our community.” (R. 59:16.)<sup>2</sup>

Yanda moved for sentence modification, pointing out that because he was convicted of a crime in Chapter 940, he is statutorily ineligible for the CIP and SAP. (R. 37.)<sup>3</sup> He asserted that his alcohol abuse was the focus of the parties’ sentencing arguments, and that his ineligibility for the CIP and SAP is a new factor warranting sentence modification. (R. 37:2.) He sought sentence modification “so he can obtain treatment while on extended supervision.” (R. 37:3.)

The circuit court denied Yanda’s motion, concluding that even if Yanda’s ineligibility for the CIP and SAP was a new factor, it did not warrant sentence modification. (R. 41; 60:11.) The court noted that neither party made a recommendation regarding the CIP or SAP. (R. 60:8.) The court explained the factors it considered at sentencing, and stated that the “principle concerns of the Court were the extremely dangerous behavior that the defendant had engaged in and continued to engage in by allegation his abysmal criminal record and the actions that caused injury to an identifiable victim.” (R. 60:10.) The court concluded that Yanda’s ineligibility for the CIP and SAP did not frustrate the

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<sup>2</sup> The court referred to the CIP and the ERP. The SAP was formerly known as the Earned Release Program (ERP).

<sup>3</sup> Wisconsin Stat. §§ 302.045(2)(c) and 302.05(3)(a)1., provide that a person convicted of a crime in Chapter 940 is ineligible for either program.

primary purpose of the sentence, and that it “was not a factor that would justify sentence modification.” (R. 60:11.)

Yanda now appeals.

## STANDARD OF REVIEW

Whether facts presented constitute a new factor is a question of law, reviewed independently. *Harbor*, 333 Wis. 2d 53, ¶ 33. “The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court,” and is reviewed “for erroneous exercise of discretion.” *Id.*

## ARGUMENT

**The circuit court properly denied Yanda’s motion for sentence modification.**

### **A. Applicable legal principles**

A circuit court may modify a defendant’s sentence upon a showing of a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 35. A new factor consists 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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

A defendant seeking sentence modification “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. A defendant who asserts that a new factor warrants sentence modification “has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* ¶ 36 (citing *State v. Franklin*, 148 Wis. 2d 1, 8–9, 434 N.W.2d 609 (1989)).



In order to demonstrate that a fact is a new factor warranting sentence modification, “frustration of the purpose of the sentence is not an independent requirement” that a defendant must satisfy. *Id.* ¶ 48. As the Supreme Court of Wisconsin explained in *Harbor*, when a fact does frustrate the purpose of the sentence, which includes “the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others,” it is likely that the fact is a new factor. *Id.* ¶ 49. But a fact may be a new factor even if it does not frustrate the purpose of the sentence. *Id.* ¶ 50. The supreme court reasoned that “[a] circuit court might conclude that its entire approach to sentencing would have been different had it been aware of a fact that is ‘highly relevant to the imposition of sentence.’” *Id.* It added that “the court may not be able to conclude that the new fact, which would have changed its entire approach to sentencing, necessarily frustrates the purpose of the original sentence it imposed.” *Id.*

**B. The circuit court properly concluded that even if Yanda’s ineligibility for the CIP and SAP is a new factor, it does not warrant sentence modification.**

The circuit court concluded that that it is “more reasonable than not” that Yanda’s statutory ineligibility for the CIP and SAP is a new factor. (R. 60:6.) But the court concluded Yanda’s ineligibility does not justify sentence modification. (R. 60:11.)

The State does not dispute that Yanda’s statutory ineligibility for the CIP and SAP is a new factor. The court assumed that Yanda was statutorily eligible for the programs, and there is nothing in the record suggesting that either the State or the defense realized that Yanda was ineligible. But the circuit court correctly concluded that Yanda’s ineligibility does not warrant sentence modification.

On appeal, Yanda does not argue that the circuit court was incorrect in concluding that his ineligibility for the CIP and SAP does not warrant sentence modification. Instead, he argues that the court reached that conclusion through a misapplication of the new factor tests. (Yanda’s Br. 3.) Yanda seems to argue that by considering whether Yanda’s ineligibility for the programs frustrated the purpose of the sentence, the court acted contrary to *Harbor*. (Yanda’s Br. 6.) But *Harbor* only prohibits a court from making frustration of the purpose of the sentence a separate criterion or “independent requirement” that a defendant must satisfy in order to be entitled to sentence modification. *Harbor*, 333 Wis. 2d 53, ¶ 48. It does not prohibit a court from considering whether a fact frustrates the purpose of the sentence when it is considering whether the fact warrants sentence modification.

Yanda asserts that the court erred by applying the “frustrates the purpose” analysis in determining whether he demonstrated a new factor warranting sentence modification. He argues that it is possible that the court applied the “frustrates the purpose” analysis in determining the first criterion under the new factor test—that his ineligibility for the CIP and SAP is a new factor. (Yanda’s Br. 6.)

As explained above, the court could properly have considered whether Yanda’s ineligibility for the CIP and SAP frustrated the purpose of the sentence in deciding whether his ineligibility was a new factor. A court is prohibited only from making frustration of the purpose of the sentence an independent requirement a defendant must satisfy. But even if a court could not consider whether a fact frustrates the purpose of the sentence, Yanda would not be entitled to relief. Yanda points to nothing in the record indicating that the court considered whether his ineligibility for the programs frustrated the purpose of the sentence when it determined whether his ineligibility is a new factor. And even if the court

had considered frustration of the purpose of the sentence, it would make no difference because, as Yanda acknowledges, the court at least implicitly concluded that Yanda's ineligibility is a new factor. (Yanda's Br. 5–6.)

Yanda argues that it is also possible that the court applied the “frustrates the purpose” analysis to the second part of the new factor test, “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.” (Yanda's Br. 6–7.)

Again, under *Harbor*, a court is prohibited only from making frustration of the purpose of the sentence an independent requirement that a defendant must satisfy to prevail on a motion for sentence modification. *Harbor*, 333 Wis. 2d 53. ¶ 48. Here, the circuit court's explanation of its decision to deny Yanda's motion for sentence modification demonstrates that the court did not deny the motion on the basis of Yanda's ineligibility not frustrating the purpose of the sentence. Instead, the court properly considered that Yanda's ineligibility did not warrant sentence modification, and added that it also did not frustrate the purpose of the sentence.

After the court stated that it is “more reasonable than not” that Yanda's ineligibility for the CIP and SAP is a new factor, it stated, “The question is: Does it justify a sentence modification? Does it frustrate the purpose of the sentence?” (R. 60:6.) The court said that “in order to determine that,” it had “to look at the basis for the sentence.” (R. 60:6.)

The court reiterated its considerations at sentencing, specifically that this was “a fairly high level felony offense,” that Yanda had a “significant record.” (R. 60:7–8.) It noted that Yanda disregarded the ignition interlock device restriction and the .02 restriction, and that even after the crash that left him and his friend injured, he again drove after drinking (R. 60:8–9.) The court concluded that “there was a

clear need to protect the public,” so it rejected the joint recommendation, (R. 60:9–10.) The court explained that it made Yanda eligible for the CIP and SAP because it concluded that the community would benefit if he underwent treatment in those programs, but that it did not know whether he would benefit. (R. 60:10.)

The court clarified that it did not make Yanda eligible for the CIP and SAP “to in some way ultimately reach the joint recommendation that was presented by counsel,” adding “that clearly wasn’t the concern,” and “it wasn’t the intent of the court.” (R. 60:10.) The court said that if Yanda could benefit from the programs, “that’s fine, and I wouldn’t bar him from participating in the programs, but it was not the motivating factor in deeming him eligible.” (R. 60:11.)

The court said again that its “princip[al] concerns” were Yanda’s “extremely dangerous behavior,” his “abysmal criminal record,” and his “actions that caused injury to an identifiable victim.” (R. 60:10.) The court added that it was “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.” (R. 60:10–11.)

As the bulk of the court’s remarks demonstrate, eligibility for the CIP and SAP was not even an important factor in the court’s sentencing calculus. And for good reason. A person can participate in the CIP or SAP only if the sentencing court makes the person eligible for one or both of the programs. Wis. Stat. §§ 302.045(2)(cm), 304.05(3)(a)2. But a court’s determination of eligibility does not guarantee that a person will be placed into either program. Whether a person is actually enrolled in either program is determined by the Department of Corrections. All the court can do is make a person eligible, leaving enrollment in the hands of the department, or make the person ineligible, precluding the department from enrolling the person in either program.

In *Harbor*, the supreme court stated that the purpose of sentence modification is “the correction of unjust sentences,” and “to allow a circuit court discretion to modify sentences in an appropriate case.” *Harbor*, 333 Wis. 2d 53, ¶ 51.

Here, the circuit court, which imposed sentence, explained why it imposed the sentence and clarified that it did not impose a longer sentence because it made Yanda eligible for the programs. The court imposed the sentence it believed Yanda’s conduct warranted, and it also made him eligible for the CIP and SAP in order to protect the public. As the court concluded, sentence modification because Yanda was statutorily ineligible for the programs was therefore unwarranted. Remand in this case would not be for the court to correct an unjust sentence. It would be only for the court to make the same decision it made, again stating that Yanda’s ineligibility for the CIP and SAP would not have mattered at sentencing, but without mentioning that his ineligibility also did not frustrate the purpose of the sentence.

## **CONCLUSION**

For the reasons explained above, the State respectfully requests that this Court affirm the judgment of conviction and the order denying Yanda's motion for sentence modification.

Dated this 27th day of July, 2018.

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 2,743 words.

Dated this 27th day of July, 2018.

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## **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 this 27th day of July, 2018.

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