STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP000595-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PIERRE DESHAWN JOHNSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Entered in the Milwaukee County Circuit Court,
the Honorable Pedro A. Colon Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err in denying Mr. Johnson's motion for modification of his sentence by relying on ***State v. Turk***, 154 Wis. 2d 294, 453 N.W.2d 163 (Ct. App. 1990)?

   The circuit court answered "no."

2. Did the State breach the plea agreement in its response to the postconviction motion by taking an inconsistent position on the appropriate sentence for Mr. Johnson?

   Without going into detail, the circuit court concluded that this argument was without merit, declining to address the issue in detail.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Johnson welcomes oral argument if the court would find it helpful to deciding the issue. Publication is appropriate in this case as the holding on these issues will clarify the law regarding sentencing in operating under the influence charges, and will also determine whether the State can take a position contrary to the plea agreement in postconviction litigation.

STATEMENT OF FACTS

The Car Accident

On Saturday, February 13, 2016, Mr. Johnson was driving alone in his vehicle near the 2500 block of West State Street in the City of Milwaukee. He noticed a squad car

following him, though it did not have its lights or siren activated. (49:23) As Mr. Johnson drove through the neighborhood streets, he watched in the rearview mirror as the police followed him. (49:23). Seconds later, while distracted and looking behind him, Mr. Johnson drove through a stop sign and into traffic on St. Paul Avenue, colliding with a Cadillac Escalade containing two occupants. (1).

The police, who were close behind, quickly reached the scene of the crash. The driver of the Escalade remained in the vehicle and reported that he was fine and not injured, but asked about his girlfriend, who was not wearing her seatbelt and had been ejected from the vehicle. (33:11, 14). The female passenger was found in the roadway, unresponsive but breathing. (1:2-3). Both on scene and later in police custody, Mr. Johnson readily admitted to smoking marijuana prior to the crash. (1:3).

Criminal Charges, Plea & Sentencing

Mr. Johnson was charged with the following three criminal counts:

> Count One: Second-degree reckless injury, contrary to Wis. Stat. § 940.23(2)(a);
>
> Count Two: Knowingly operating while suspended, causing great bodily harm, contrary to Wis. Stat. § 343.33(1)(a);
>
> Count Three: Injury by operation of a vehicle while under the influence of a restricted controlled substance, contrary to Wis. Stat. § 940.25(1)(am).

(1). In exchange for dismissal of count one and for the State's global recommendation of five years initial confinement and

five years extended supervision, Mr. Johnson entered a plea to counts two and three and the matter proceeded to sentencing. (48, 49).

At the sentencing hearing, the court focused on the severity of the injury to the victim and how her injury impacted her family. (49:28-30). This echoed similar remarks made by the State at sentencing. (49:9-11). The court ultimately exceeded the State's recommendation and imposed a total sentence of six years initial confinement and five years extended supervision. (49:31-32). One key fact that the court did not know when it sentenced Mr. Johnson is that the injured party was not wearing her seatbelt during the crash. (49).

Postconviction Proceedings

Following the sentencing hearing, Mr. Johnson's trial attorney filed a notice of intent to pursue postconviction relief. Undersigned counsel was appointed and submitted a postconviction motion on behalf of Mr. Johnson. (33). The postconviction motion alleged that the victim's failure to wear her seatbelt presented a new factor that the court was unaware of at the time of sentencing. This information, he argued, warranted a modification of his sentence. (33).

Next, in response to the State's direct advocacy for the sentence imposed by the circuit court in its response to the postconviction motion, Mr. Johnson asked the court to disregard this portion of the State's argument, alleging that a postconviction endorsement of the appropriateness of a sentence imposed constituted a breach of the plea agreement. (39:3). This is because in exchange for a plea, the State promised Mr. Johnson it would recommend to the court a prison term of five years initial confinement and five years of extended supervision. (39:3; 48:6). Mr. Johnson received an

additional year of initial confinement from the court, and therefore, he argued, any endorsement of that sentence by State was in violation of the plea bargain. (20).

In a one page decision, the circuit court denied Mr. Johnson's postconviction motion. The circuit court agreed with the State and concluded that the holding in ***Turk*** established that the status of a victim's seat belt was not a relevant sentencing factor. (40). Regarding Mr. Johnson's assertion that the State was in breach of the plea agreement, the circuit court wrote that the defendant's argument was without merit and "a novel view of the law." (40).

ARGUMENT

I. The circuit court erred in denying Mr. Johnson's motion for a modification of his sentence.

When ordering sentence in this case, the court was unaware that the woman injured in the crash caused by Mr. Johnson was not wearing her seatbelt. In his postconviction motion, Mr. Johnson alleged that this information was unknowingly overlooked by the parties, was highly relevant to the sentencing decision in this matter, and warranted a modification of his sentence.

The circuit court disagreed and concluded that the fact that the victim was not wearing her seatbelt had no bearing on the sentence. (40). It remarked that "[t]he fact that the victim was not wearing a seatbelt does not render the defendant's criminally reckless behavior less serious and does not entitle him to some type of credit for having the fortune to find a victim who was more vulnerable so he could receive a lesser sentence." (40). The circuit court wrote that it was adopting the rationale set forth by the State in its response brief and by

the Court of Appeals in ***State v. Turk*** to support its decision. (40).

The court's decision in this matter was made in error, as the ***Turk*** holding does not speak to what is and is not a relevant sentencing factor, and by relying on this case alone, the court failed to consider the appropriate analysis controlling post-conviction sentence modifications.

A. Legal principles and standard of review.

"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. A circuit court may grant a request for a sentence modification based "upon the defendant's showing of a new factor." ***Id.*** 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 the 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.*** at ¶ 40.

If a defendant successfully establishes that there is a new factor the court did not consider at sentencing, the circuit court must exercise its discretion and decide whether the new factor justifies modification of the individual's sentence. *See, e.g.*, ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.1d 399, 401 (1983).

Whether a fact or set of facts is a new factor which may warrant modification of a sentence is a question of law that the court reviews *de novo*. ***Hegwood***, 113 Wis. 2d 544, 546. The reviewing court need not give deference to the trial court's discretion. ***Id.***

B. The circuit court erred in concluding that information establishing the victim was not wearing her seatbelt at the time of the crash was not a new factor.

In denying Mr. Johnson's postconviction motion seeking a sentence modification, the circuit court concluded that the victim's failure to wear her seatbelt was not a relevant consideration for the purpose of sentencing and thus was not a new factor as a matter of law. (40). The circuit court's reasoning hinged upon ***Turk***. This, Mr. Johnson contends, is problematic.

In ***Turk***, the Court of Appeals was considering a very different legal question than that which was presented in Mr. Johnson's postconviction motion. 154 Wis. 2d 294, 295. There, the defendant sought to use evidence showing the victims were not wearing seatbelts in an effort to support the statutory affirmative defense found in Wis. Stat. § 940.25(2).[1] The trial court denied Mr. Turk's request to present expert testimony which he claimed would establish that the victims' failure to wear seatbelts resulted in injuries that would have not have occurred had they been properly belted. ***Id.*** The Court of Appeals ruled against Mr. Turk and agreed with the trial court. The court held that the affirmative defense language requires a defendant to establish the existence of an intervening cause between the intoxicated driving and victim's injury. ***Id*** at 296. A victim's failure to wear a

[1] This section provides that a driver "has a defense if it appears by a preponderance of the evidence that the great bodily harm would have occurred even if the actor had not been under the influence of an intoxicant." ***Id***.; Wis. Stat. § 940.25(2).

seatbelt, the court concluded, was not an intervening cause. ***Id.***

By relying on this holding in denying Mr. Johnson's sentence modification, the circuit court erred. ***Turk*** does not stand for the principle that the victim's safety restraint status at the time of the crash is always irrelevant in a prosecution. Rather, the holding concluded it was irrelevant the statutorily-provided affirmative defense to conviction. ***Id.*** To conclude otherwise ignores the context of the ***Turk*** and runs contrary to established sentencing law, which allows almost any fact or set of facts surrounding a crime or criminal defendant to be considered as an appropriate sentencing factor. Simply put, what is relevant and material to the question of guilt or innocence is very different than what is ripe for consideration at a sentencing hearing. [2]

Because the circuit court relied only upon the holding of ***Turk*** in support of its denial of the sentence modification, the written denial falls short. The circuit court was required to decide (1) whether Mr. Johnson presented a fact not known to the court at the time of the original sentencing, and (2) if so, would this new factor have changed the way the court viewed the case and the sentence imposed. *See* ***Harbor***, 2011 WI 28, ¶ 35; *See*, *e.g.*, ***Hegwood***, 113 Wis. 2d 544, 546. The circuit court did not engage in the proper analysis here. As a result,

[2] The same holds true in requests for sentence modification, as appellate court have granted relief based on a variety of factors that are irrelevant to a defendant's guilt or innocence. *See, e.g.,* ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101 (post-sentencing assistance to law enforcement may constitute a new factor for purposes of sentence modification); ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656 (new information regarding a defendant's probation revocation may constitute a new factor).

Mr. Johnson asks this court to clarify the applicability of ***Turk*** and to remand this case back to the circuit court for proper consideration of the sentence modification analysis presented. *See* ***Harbor***, 2011 WI 28, ¶ 35.

II. The State breached the plea agreement when directly advocating for the sentence imposed by the circuit court, which was in excess of what the State promised to recommend as part of the plea agreement.

A. The alleged plea breach.

In its response brief, the State advocated for a position contrary to that which it bargained for in the plea agreement – to recommend global sentence of five years initial confinement and five years extended supervision. Following its argument on ***Turk***, the State included a second argument, asking the court to exercise its discretion and to deny the sentence modification on the grounds that it was not warranted. (36:2-3). Specifically, the State argued:

> Even if the court finds a new factor exists, it still needs to exercise its discretion to determine if the sentence should be modified. "[I]f a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Harbor***, 2011 WI at ¶ 37 (citing ***Franklin***, 148 Wis.2d at 8, 434 N.W.2d 609.) The court in ***Harbor*** found no abuse of discretion when the trial courts ruled the defendants (sic) drug addiction and troubled childhood did not justify sentence modification. Id. at ¶ 66. 3
>
> Similar to ***Harbor***, this seatbelt fact, even if a new factor does not warrant sentence modification. The fact Ms. Murphy was not wearing a seatbelt does not change the facts that caused her injuries. The defendant smoked marijuana before driving without a license and then sped through a red light to avoid the police. These are the

> events that caused Ms. Murphy's severe injuries not lack of a seatbelt. Even if this is a new factor it pales in comparison to the seriousness of the defendant's actions and therefore the Court should use its discretion and deny the sentence modification.
>
> The fact Ms. Murphy was not wearing a seatbelt does not constitute a new factor. Even if it did, it would not justify a sentence modification. Therefore the court should deny the defendant's motion.

(36:2-3).

Mr. Johnson contends that this argument amounted to an endorsement of the sentence imposed by the court – one that exceeded the State's agreed upon recommendation. The State took care to cite the severity of Mr. Johnson's behavior and the injuries to the victim as justifying the amount of time he received, and in doing so, took a position contrary to the one it promised to in order to obtain Mr. Johnson's plea. (36:2-3). *See* ***State v. Williams***, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733 (The State's adoption of negative information found in the presentence investigation report as its personal belief was a violation of the plea agreement and reciting its own more favorable recommendation could not cure the error.). For these reasons, Mr. Johnson asked the circuit court to not consider this portion of the State's argument when decision Mr. Johnson's postconviction motion. (39:3). The circuit court declined to do so, writing that this was a "novel view of the law."

B. The proposed remedy for the plea breach.

When it is alleged that the State acted in breach of the plea agreement, the typical remedy is a resentencing hearing, but this is not the only remedy. *See* ***State v. Deilke***, 2004 WI 104, ¶ 25, 274 Wis. 2d 595, 682 N.W.2d 945. The appropriate

remedy for a plea breach depends on the totality of circumstances. ***Id.*** Because this alleged plea breach occurred at the postconviction stage and did not affect Mr. Johnson's original sentencing hearing, a resentencing is not an appropriate remedy. Instead, Mr. Johnson asked for the circuit court to decline to consider the State's new position on his sentence, effectively asking the court to invoke the doctrine of judicial estoppel. (39:3).

Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." ***Ryan***, 2012 WI 16 at ¶ 32 (internal citations omitted). While there is not a specific formula indicating when a court should employ judicial estoppel, Wisconsin courts have outlined three factors that must exist for a party to be estopped from presenting conflicting arguments.

> First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue would be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position--a litigant is never bound to a losing argument.

Id. The goal of prohibiting parties from presenting inconsistent arguments is not to punish, but to preserve the integrity of judicial process. ***Id.***

This argument would not be troublesome in many cases, but here, the State agreed to recommend a sentence of five years initial confinement and five years of extended supervision in exchange for Mr. Johnson's plea to the charges. (48:6). At sentencing, the circuit court exceeded that recommendation, ordering six years initial confinement and five years extended supervision. Therefore, this position is inconsistent with the bargain entered into by the State at the

time of the plea, and the first factor in the judicial estoppel analysis has been met.

Next, the aggravating and neutral facts relevant to the severity of Mr. Johnson's sentence are identical, with only new and mitigating information being presented in his postconviction motion. The second factor of the analysis has thus been satisfied.

Finally, the circuit court, in denying Mr. Johnson's sentence modification, stated that it "concurs completely with the State's position in this matter." (40). The court opined that "[t]he fact that the victim was not wearing a seatbelt does not render the defendant's criminally reckless behavior less serious and does not entitle him to some type of credit for having the fortune to find a victim who was more vulnerable so he could receive a lesser sentence." (40). This language clearly echoes the State's argument, where it wrote:

> The fact Ms. Murphy was not wearing a seatbelt does not change the facts that caused her injuries. The defendant smoked marijuana before driving without a license and then sped through a red light to avoid the police. These are the events that caused Ms. Murphy's severe injuries not lack of a seatbelt. [The victim's failure to wear a seatbelt]… pales in comparison to the seriousness of the defendant's actions and therefore the Court should use its discretion and deny the sentence modification.

Because the circuit court adopted the State's argument on this point, the third factor in the estoppel analysis has been satisfied. ***Ryan***, 2012 WI 16 at ¶ 32

For these reasons, Mr. Johnson asks this court to invoke the doctrine of judicial estoppel, and to remand this matter back to the circuit court for proceedings consistent with the court's order.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that this court reverse the judgment and order of the circuit court and remand this matter to the circuit court for further consideration of Mr. Johnson's request for a sentence modification.

Dated this 30th 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 2,880 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 30th 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 § 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 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 30th day of May, 2018.

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