STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP595-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 MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PEDRO A. COLON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes the issues as follows:

1. Did the circuit court err when it denied Defendant-Appellant Pierre Deshawn Johnson's postconviction motion for sentence modification, which was based upon the alleged new factor that the victim did not wear a seatbelt?

The circuit court denied sentence modification, concluding that it was not warranted.

This Court should answer no.

2. Does the State breach a plea agreement by arguing that the defendant is not entitled to sentence modification when the court had sentenced the defendant to a term of imprisonment that exceeded what the State was permitted to recommend pursuant to the plea agreement?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Defendant-Appellant Pierre Deshawn Johnson raised one issue in his postconviction motion: whether the victim's failure to wear a seatbelt was a new factor warranting sentence modification. In response to the State's argument that it was not, Johnson raised a second issue in his reply brief: whether the State breached the plea agreement by endorsing the circuit court's sentence, which was in excess of what the State was permitted to recommend pursuant to the plea agreement.

The circuit court properly concluded that Johnson was not entitled to relief on either issue. With regard to sentence modification, the court concluded that the alleged new factor did not warrant modification. With regard to the alleged breach of the plea agreement, the court concluded Johnson's argument was without merit. This Court should affirm.

STATEMENT OF THE CASE

On February 13, 2016, three Milwaukee police officers were on patrol in a marked squad car when they observed a Ford Crown Victoria with excessive window tint at the intersection of North 26th Street and West Kilbourn Avenue. (R. 1:2.) The officers made a U-turn at the intersection for the purpose of conducting a traffic stop. (R. 1:2.) Upon making the U-turn, the officers saw the vehicle turn onto North 25th Street and accelerate to a high rate of speed. (R. 1:2.) The vehicle did not stop at a stop sign, entered the intersection of North 25th Street and West State Street, and struck a Cadillac Escalade. (R. 1:2.) A crash reconstruction estimated that the Crown Victoria was traveling at 66 mph when it entered the intersection. (R. 1:3.) The posted speed limit was 25 mph. (R. 1:3.)

One of the officers, Rolando Franco, approached the Escalade and spoke to the driver. (R. 1:2.) The driver told Franco that his girlfriend was in the car with him. (R. 1:2.) Franco did not see anyone else in the car, and he soon saw a woman lying in the street. (R. 1:2.) Another officer approached the woman, found her unresponsive, and rendered aid until help arrived. (R. 1:2.) The woman was transported to Froedtert Hospital, where it was determined that she suffered numerous significant injuries, including severe brain trauma. (R. 1:3.)

Officer Franco then approached the Crown Victoria and found Johnson inside. (R.1:2.) Johnson was removed and transported to Froedtert Hospital. (R. 1:2.)

Officer Michael Hansen responded to the hospital to continue the investigation of the crash. (R. 1:3.) Hansen spoke with Johnson, who admitted to smoking marijuana prior to the crash. (R. 1:3.)

Johnson was charged with one count of second-degree reckless injury; one count of knowingly operating a vehicle while suspended, causing great bodily harm; and one count of injury by intoxicated use of a vehicle, with a detectable amount of controlled substance, causing great bodily harm. (R. 7.) The State and Johnson entered into a plea agreement wherein the State would dismiss the count of second-degree reckless injury in exchange for a guilty plea on the remaining two counts. (R. 48:6–7.) Pursuant to the plea agreement, the State would recommend a global sentence of five years' initial confinement and five years' extended supervision. (R. 48:6–7.)

At the sentencing hearing, the State honored that agreement. (R. 49:5.) The court ultimately sentenced Johnson to six years' initial confinement followed by five years' extended supervision. (R. 49:31.)

In fashioning Johnson's sentence, the court considered the "seriousness of the offense, the character of you as a [d]efendant, and the need to protect the public." (R. 49:27.) Regarding the seriousness of the offense, it noted that Johnson, under the influence of marijuana, sped at over 60 mph through a stop sign while operating without a license and, in doing so, he severely injured the woman who was ejected from the Escalade. (R. 49:27–28.) The court also noted that the victim was torn from the community, which affected numerous people who depended on her. (R. 49:28–30.) Regarding Johnson's character, the court noted that Johnson had some positive character attributes but, in this situation, he acted horribly. (R. 49:30–31.) Finally, in evaluating the need to protect the public, the court addressed that Johnson was over thirty-years-old, which

made his behavior even more unacceptable, and it evinced the need to remove him from the public realm. (R. 49:31.)

Johnson subsequently filed a motion for postconviction relief, alleging that the victim's failure to wear a seatbelt was a new factor entitling him to sentence modification. (R. 33.) He argued that the fact the victim was not wearing a seatbelt was a "significant intervening factor" that diminished his culpability. (R. 33:4–6.) He asked that the court reduce his sentence to two years' initial confinement and five years' extended supervision. (R. 33:6.)

The State disagreed and argued that the victim's failure to wear a seatbelt did not diminish Johnson's culpability, relying on *State v. Turk*, 154 Wis. 2d 294, 295, 453 N.W.2d 163 (Ct. App. 1990). (R. 36:2.) The State also argued that, even if the victim's failure to wear a seatbelt was a new factor, it did not warrant sentence modification because it was outweighed by the "seriousness of the defendant's actions." (R. 36:3.)

In his reply brief, Johnson claimed the State's argument refuting his new factor claim endorsed the court's sentence, and that breached the plea agreement because the court's sentence was longer than what the State was allowed to recommend. (R. 39:3.)

The circuit court denied Johnson's request for relief. (R. 40.) The court expressly concluded 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." (R. 40.) The court also found that the rationale underlying *Turk* was applicable to this case, and the victim's failure to wear a seatbelt was not a new factor. (R. 40.) As for Johnson's breach of the plea agreement

claim, the court declined to address Johnson's argument, finding his claim "completely without merit." (R. 40.)

Johnson appeals.

STANDARDS OF REVIEW

Sentence Modification

"Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law." *State v. Harbor,* 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. This Court reviews questions of law de novo. *Id*. Whether a new factor justifies sentence modification is reviewed under the erroneous exercise of discretion standard. *Id*.

Breach of a Plea Agreement

The terms of a plea agreement and the State's conduct that allegedly breached the agreement are questions of fact reviewed under the clearly erroneous standard. *State v. Bokenyi*, 2014 WI 61, ¶ 37, 355 Wis. 2d 28, 848 N.W.2d 759. Whether the breach was material and substantial, warranting remedy, is a question of law reviewed de novo. *Id.* ¶ 38.

ARGUMENT

I. The victim's failure to wear a seatbelt is not a new factor that warrants sentence modification.

A. Legal principles

"Wisconsin circuit courts have inherent authority to modify criminal sentences . . . [but] cannot base a sentence modification on reflection and second thoughts alone." *Harbor*, 333 Wis. 2d 53, ¶ 35. A circuit court can, however, modify a defendant's sentence based "upon the defendant's showing of a 'new factor.'" *Harbor*, 333 Wis. 2d 53, ¶ 35.

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." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

"The existence of a new factor does not automatically entitle the defendant to sentence modification." *Harbor*, 333 Wis. 2d 53, ¶ 37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." *Id.* (citation omitted).

Thus, a "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. "[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law." *Id.*

B. The circuit court properly concluded that the victim's failure to wear a seatbelt did not warrant sentence modification.

Here, the circuit court concluded: "The 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." (R. 40.) Thus, the court exercised its discretion and concluded that the fact that the victim was not wearing a seatbelt would not justify sentence modification. The defendant's "criminally reckless behavior" was independent of any decision made by the victim, and the

court was clear that the victim's failure to wear a seatbelt did not justify a lower sentence.

Johnson asserts that the court's decision amounts to error because the court "was required to decide" whether Johnson presented a new factor. (Johnson's Br. 7.) Johnson is simply wrong. "[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law." *Harbor*, 333 Wis. 2d 53, ¶ 38.

Johnson also faults the court for relying on *Turk*, 154 Wis. 2d 294, for a cursory conclusion that a failure to wear a seatbelt is not a new factor. (Johnson's Br. 6–8.) Johnson misses the point. The court determined that the factor presented did not warrant sentence modification. The court was permitted to do so, *Harbor*, 333 Wis. 2d 53, ¶ 38, and this Court's analysis should end there. *See State v. Blalock*, 150 Wis. 2d 688, 703, 422 N.W.2d 514 (Ct. App. 1989) (appellate courts should decide the issues presented on the narrowest grounds possible).

Moreover, the circuit court's reliance on the rationale in *Turk* as an analogous case did not amount to error. In *Turk*, the defendant appealed his conviction for causing great bodily harm by the intoxicated use of a vehicle. *Turk*, 154 Wis. 2d at 294–95. The defendant was driving a car that contained three passengers, none of whom wore a seatbelt. *Id.* at 295. The defendant failed to navigate a curve in the road and hit a utility pole, resulting in injuries to the passengers. *Id.* at 295. This Court upheld the decision of the circuit court to exclude expert testimony that the injuries would have occurred even if the defendant had not been intoxicated because the injured parties were not wearing seatbelts. *Turk*, 154 Wis. 2d at 295. This Court reasoned that "[a]n intervening cause is a new and independent force which breaks the causal connection between the original act

or omission and the injury. . . . The fact that the victim did not take precautionary steps which may have prevented his eventual demise is not an intervening cause." *Turk*, 154 Wis. 2d at 296 (quoting *State v. Nester*, 336 S.E.2d 187, 189 (W.Va. 1985)).

Here, Johnson presented his new factor argument similar to the intervening cause argument in *Turk*. (R. 33:4–6.) He expressly argued that the fact that the victim was not wearing a seatbelt was a "significant *intervening* factor" that diminished his culpability. (R. 33:4–6 (emphasis added).) The circuit court found persuasive the State's argument that the victim not wearing a seatbelt, like in *Turk*, does not diminish the defendant's culpability because it is not an intervening cause. (R. 36:2; 40.) Stated another way, a victim's failure to wear a seatbelt is not a new factor because it is not highly relevant to the defendant's culpability.

The question in the new factor analysis is not whether the court found the victim's injuries relevant to the sentence it imposed, but whether the fact that the victim was not wearing a seatbelt was *highly relevant* to the imposition of sentence. *Rosado*, 70 Wis. 2d at 288. The court concluded it was not highly relevant because the victim's failure to wear a seatbelt did not diminish Johnson's culpability. (R. 40.) While the victim's injuries *may* have been less severe if she had worn a seatbelt, her failure to do so did not reduce Johnson's culpability for his own actions. Thus, the circuit court did not err in concluding that the victim's failure to wear a seatbelt was not a new factor.

II. The State did not breach the plea agreement by opposing Johnson's motion for sentence modification.

A. Legal principles

"Once a plea agreement has been reached and a plea made, a defendant's due process rights require the bargain be fulfilled." *Bokenyi*, 355 Wis. 2d 28, ¶ 39 (citation omitted). A breach of a plea agreement, however, only warrants a remedy if the breach is material and substantial. *Bokenyi*, 355 Wis. 2d 28, ¶ 40. "A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." *Id*. (citation omitted).

B. The plea agreement did not prohibit the State from opposing Johnson's motion for sentence modification.

Here, there was no breach of the plea agreement, let alone a material and substantial one. Johnson bargained for the dismissal of the second-degree reckless injury count and the State's recommendation of five years' initial confinement and five years' extended supervision in exchange for his guilty plea to the other two counts. (R. 48:6–7.) That agreement was honored, and each party received the benefit of its bargain. There was no agreement that the State would not oppose a postconviction motion requesting sentence modification if the court sentenced Johnson to a term that exceeded the agreed upon recommendation.

Once the State made its recommendation and the court imposed a higher sentence—which the defendant was aware the court could do—the State was not prohibited from opposing a motion for sentence modification. But that is exactly the thrust of Johnson's argument. Johnson contends the State breached its plea agreement by arguing against sentence modification and "endors[ing]" the circuit court's

sentence, which was higher than what the State was permitted to recommend pursuant to the plea agreement. (Johnson's Br. 8–9.) Johnson's claim is without merit.

The plea agreement did not bar the State from opposing a motion for sentence modification and, despite his claims of the State's impropriety, Johnson fails to cite any legal authority that supports his position. Rather, he cites to *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733, which is not on point.

In *Williams*, the supreme court found that the State breached the plea agreement because some of the prosecutor's statements *at the sentencing hearing* implied disagreement with the sentencing recommendation. *Williams*, 249 Wis. 2d 492, ¶ 50. The case at hand involves different circumstances. This case involves arguments the State made in a response to a postconviction motion for relief—a proceeding which, by its nature, occurred *after* the court made it sentencing determination. (*See* R. 36.) And, unlike in *Williams*, there is no meritorious argument that the State's postconviction arguments implied disagreement with the sentencing recommendation. Rather, the State was disagreeing with Johnson's postconviction argument that his sentence should be reduced to two years' initial confinement and five years' extended supervision. (R. 33:6.)

Williams is not on point, and Johnson cites to no authority to support his contention that the State breached the plea agreement by opposing his motion for sentence modification. This Court need not consider arguments unsupported by references to legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Nonetheless, the facts of this case support the conclusion that the State did not breach the terms of the plea agreement.

CONCLUSION

This Court should affirm Johnson's conviction and the order denying postconviction relief.

Dated this 13th day of August, 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 2,711 words.

Dated this 13th day of August, 2018.

_____
TIFFANY M. WINTER
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 this 13th day of August, 2018.

_____
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