

FILED
07-02-2021
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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP000027-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS M PARKMAN,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 12, THE HONORABLE JUDGE TAYLOR, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication. This court may decide this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. See Wis. Stat. § 809.19(3)(a)2.¹

ARGUMENT

The circuit court properly denied Parkman's motion for sentence modification because Parkman failed to show that Covid-19 was a new factor.

The circuit court correctly found that Parkman did not show that Covid-19 was a new factor as a matter of law. Specifically, the circuit court correctly ruled that Covid-19 was not highly relevant to the imposition of Parkman's sentence. Since the pandemic is not highly relevant to the considerations surrounding Parkman's sentence, this Court should not remand to the circuit court for a determination as to whether Covid-19 justifies modification of the

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2019-20 edition.

sentence. Thus, the State asks the Court to deny Parkman's appeal of the circuit court's decision on Parkman's motion for sentence modification.

To obtain sentence modification, a defendant has to prove that a new factor exists and that the new factor justifies sentence modification. 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 . . . it was unknowingly overlooked by all of the parties.'" *State v. Harbor*, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 797 N.W.2d 828 (*citation omitted*). A circuit court may modify a defendant's sentence upon a showing of a new factor. *See id.*, ¶ 35. The sentence modification analysis is two-pronged. *See id.*, ¶ 36. One prong requires the defendant to show by clear and convincing evidence that a new factor exists. *Id.* Whether a new factor exists is a question of law, and the court reviews the circuit court's determination de novo *Id.*; *State v. Samsa*, 2015 WI App 6, ¶ 14, 359 Wis. 2d 580, 859 N.W.2d 149. The other prong requires the defendant to show

that the new factor justifies sentence modification.² See *Harbor*, ¶ 37. This determination rests in the circuit court's discretion. *Id.*

Because the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence, a court need not address both prongs of the analysis if the defendant fails to prevail on one of them. *Id.*, ¶ 38. "The requirements for sentence modification are meant to 'promote [] the policy of finality of judgments [while at the same time] satisf[y]ing the purpose of sentence modification, which is the correction of unjust sentences.'" *Id.*, ¶ 51 (quoting *State v. Franklin*, 148 Wis. 2d 1, 9, 434 N.W.2d 609 (1989)).

Also, conditions of confinement have no bearing on the issue of sentence modification. Instead, conditions of confinement shall be addressed through "corrective measures directed to changing the conditions of confinement." See, *State v. Klubertanz*, 2006 WI App 71, ¶¶ 41-42, 291 Wis. 2d 751, 713 N.W.2d 116 (suggesting that conditions of confinement were not highly relevant to the circuit court's

² *Harbor* withdrew language from *State v. Michels*, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), and cases following *Michels* that indicated "that an alleged new factor must also frustrate the purpose of the original sentence." *Harbor*, 333 Wis. 2d 53, ¶ 52. The court found that such a requirement is at odds with the purpose underlying sentence modification, i.e., giving a circuit court discretion to modify sentences where appropriate. *Id.*, ¶ 51. However, the circuit court still may, though is not required to, consider whether the new factor frustrates the purpose of the original sentence. See *id.*, ¶¶ 48-52.

sentencing decision); *State v. Krieger*, 163 Wis. 2d 241, 257-59 (Ct. App. 1991) (sentence modification is not the proper remedy for sex offenders who are subject to higher risks of physical, sexual, and psychological abuse in the prison system, corrective measures directed to changing the conditions of confinement are).

The Court should affirm the circuit court's order denying Parkman's motion for sentence modification because Covid-19 is not a new factor. Specifically, the circuit court was correct to find Parkman had not shown how the pandemic would be highly relevant to the imposition of his sentence. Furthermore, sentence modification is not the proper remedy to address the conditions of confinement.

Covid-19 is not highly relevant to the circuit court's sentencing decision. Instead, the court focused its sentencing decision on the seriousness of Parkman's crime, the need for punishment and deterrence, Parkman's extensive criminal history, and the need to protect the public. The prevalence of Covid-19 in the county jail or any other condition relating to confinement does not relate to the primary considerations that the sentencing court considered. Therefore, the existence and prevalence of Covid-19, and its potential impact on Parkman in the Dane

County Jail is not highly relevant to the sentence that the court pronounced.

On appeal of the denial of his motion for sentence modification, Parkman argues the circuit court should have held that the danger Covid-19 presents to incarcerated individuals is a new factor. Pet'r's. Br. 6. In support of that position, Parkman states that the new factor analysis does not depend on a link to the factors considered at sentencing to be highly relevant to the sentence. Pet'r's. Br. 13. Instead, Parkman concludes Covid-19 is highly relevant to his sentence because the sentencing court must consider the least amount of confinement required to achieve the court's sentencing objectives, and presumably, the presence of Covid-19 in the jail setting may reduce the court's view of the necessary duration of confinement. Pet'r's. Br. 13-14.

Pairing some mitigating factor with the sentencing court's responsibility to sentence a defendant to the minimum amount of confinement necessary does not make the potentially mitigating factor highly relevant, and Parkman's link of the presence of Covid-19 in the jail to requiring less incarceration is tenuous. The connection falls well short of meeting the clear and convincing

standard that Parkman must overcome in order to show the proposed new factor was highly relevant to the sentence.

Instead of tying the potential new factor to the issues the sentencing court considered at sentencing, Parkman recites statistics about the pandemic, discusses the risk it presents to prisoners, and asserts that he was particularly at risk from Covid-19 because of an underlying health issue. Pet'r's. Br. 6, 8-11. The circuit court was clear about what it considered relevant to Parkman's sentence. At sentencing the court considered the seriousness of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. (52: 15; App. 103.) Within those sentencing considerations, the court provided heightened consideration of the impact on the victim, the relationship between Parkman and the victim, and Parkman's extensive criminal history (52: 15-17; App. 103-05.) Regarding the seriousness of the offense and the impact on the victim, the court stated:

I can't even imagine how bad it would hurt to get pepper-sprayed in the face . . . This is about you trying to control someone with violence, with pepper spray, with something that you're using as a weapon because you want her to do whatever it is you want her to do As far as the severity of these offenses—they are aggravated by

the fact that this was someone Mr. Parkman was or has been or is in a romantic relationship with, who, they have a child together.

(52: 15-16; App. 103-04.) As to Mr. Parkman's character, the court noted that despite defense counsel's statements that Parkman was attempting to "turn things around," Parkman had a "really full record" with nearly a dozen cases since 2012. (52: 17; App. 105.) And finally, in looking to the need to protect the public, the court stated, "And look: As far as protecting the public—if we're not going to protect women in this community by people who are using OC spray to control, who are we protecting?" (52: 17; App. 105.).

This Court need not speculate as to how more knowledge of the potential dangers of Covid-19 would impact sentencing because the sentencing court was explicit about its considerations. There is no connection between the factors the court considered and any of the ramifications of the proliferation of Covid-19.

Also, the defendant presents the court with no information as to any administrative remedies he had sought prior to requesting the sentence modification. Parkman's attempt to distinguish the present case from *Klubertanz* and *Krieger* is not persuasive because regardless of how someone

raises the issue of sentence modification, those cases still stand for the proposition that conditions of confinement are not highly relevant to a sentence and therefore, are not new factors.

Thus, the circuit court correctly found that Parkman failed to establish by clear and convincing evidence that Covid-19 would be highly relevant to the sentence. Since Covid-19 is not highly relevant to the factors the court considered at sentencing, it is not a new factor. Sentence modification is also not the correct vehicle for addressing the considerations of confinement, so this Court should not remand for the circuit court to determine whether Covid-19 justifies sentence modification.

CONCLUSION

The Court should affirm the circuit court's order denying Parkman's motion to modify his sentence.

Dated this 2nd day of July, 2021.



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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 11 pages.

Dated this 2nd day of July, 2021.

Signed,



Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 2nd day of July, 2021.



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