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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001654-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REBECCA SUE FERRARO,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Motion for Postconviction Relief, Entered in the Waukesha County Circuit Court, the Honorable Maria S. Lazar and the Honorable J. Arthur Melvin, III, presiding

BRIEF OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

Rebecca Ferraro pled no contest to her third offense of operating a motor vehicle while intoxicated and was sentenced to eight months and ten days of incarceration. At sentencing, the circuit court relied on the OWI Sentencing Guidelines and noted that Ms. Ferraro's preliminary breathalyzer test showed her blood alcohol content was .213. The OWI Sentencing Guidelines recommend a sentence between seven months and one year of incarceration for an offender convicted of a third offense with a blood alcohol content between .20 and .249.

Four days after the sentencing hearing, the Wisconsin Department of Justice's crime laboratory disclosed Ms. Ferraro's blood test, which showed her blood alcohol content was .167. The Sentencing Guidelines recommend a sentence between sixty days to six months of incarceration for an offender convicted of a third offense with a blood alcohol content between .02 to .169.

1. Was the lower blood test result a new factor that justified modifying Ms. Ferraro's sentence?

2. Did the postconviction court erroneously exercise its discretion when it denied Ms. Ferraro's postconviction motion to modify her sentence because she "asked for a speedy disposition" where the record does not indicate Ms. Ferraro asked to or received any

consideration for resolving her case before the blood test results were disclosed?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Ms. Ferraro does not request oral argument because the issue concerns established law applied to the facts of this case.

Ms. Ferraro requests publication because this case concerns unique issues of law or fact significantly different from that in published opinions.

STATEMENT OF FACTS

A. Criminal Complaint

A criminal complaint filed in the Waukesha County Circuit Court on January 30, 2020, charged Ms. Ferraro with operating a motor vehicle under the influence of an intoxicant--fourth offense, contrary to Wis. Stat. §§ 346.63(1)(a), 939.50(3)(h), and 343.301(1g); and felony bail jumping, contrary to Wis. Stat. §§ 946.49(1)(b) and 939.50(3)(h).¹ (R. 3:1-2).

¹ Ms. Ferraro was released on bond in 2019 from a Rock County Circuit Court case charging her with operating a vehicle while intoxicated with a minor passenger. A condition of her bond prohibited her from committing any crime, which was in effect on January 28, 2020. (R. 3:3).

The complaint alleged that, on January 28, 2020, Delafield Police Officer Joseph Walker responded to a report that a female diner left a restaurant in Delafield without paying her bill. (R. 3:2). An employee of the restaurant told police the diner drove a white Jeep Cherokee with an Illinois license plate and was staying at LaQuinta Hotel in Delafield. (R. 3:2).

Officer Walker proceeded to LaQuinta, where he saw a white Jeep Cherokee with an Illinois license plate and a female sitting in the driver's seat. (R. 3:2). Officer Walker confirmed with the driver, who was identified as Ms. Ferraro, that she had been to the restaurant. (R. 3:2).

Officer Walker reported that Ms. Ferraro slurred her speech and her breath smelled of alcohol. (R. 3:2). He asked Ms. Ferraro if she drove from the restaurant to the motel; she said yes. He also asked how much alcohol she drank; she said: "only at the restaurant." (R. 3:2).

Officer Walker directed Ms. Ferraro to perform field sobriety tests. Her performance on the tests suggested she was impaired and a preliminary breathalyzer test measured her blood alcohol level as .213. (R. 3:2-3).

Ms. Ferraro was arrested for operating under the influence of an intoxicant. (R. 3:3). When she did not consent to a blood draw, Officer Walker applied for a search warrant to withdraw blood and obtained the blood test shortly thereafter. The blood was sent to the

Wisconsin Department of Justice's crime laboratory for analysis. (R. 3:3).

B. Guilty Plea and Sentencing

A plea and sentencing hearing was held on February 20, 2020, before the Honorable Maria S. Lazar. Pursuant to a plea agreement, Ms. Ferraro pled no contest to an amended information charging her with operating a motor vehicle under the influence of an intoxicant--third offense,² contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)3, and 343.301(1g). (R. 63:2). The State dismissed and read in the bail jumping charge. (R. 63:3). The prosecutor told the circuit court: “[W]e’re resolving this case today because the defendant is resolving this case prior to resolving her pending OWI case in Rock County.” (R. 63:2-3). At the time of the plea and sentencing, the result of Ms. Ferraro’s blood test had not been returned from the crime lab.

The State agreed to recommend a sentence of twelve months in jail, revoke Ms. Ferraro’s driver’s license for thirty-six months, and require her to install an ignition interlock device. The State did not recommend a specific fine. (R. 63:3).

During the plea colloquy, Ms. Ferraro said she understood the plea agreement and that the court was not bound by the agreement. (R. 63:4). The circuit

² The State determined that Ms. Ferraro had two, not three, prior convictions for operating a vehicle under the influence of an intoxicant. (R. 3:3).

court reviewed the maximum penalties for the offense and affirmed that the “blood alcohol count in this case is .213,” which Ms. Ferraro said she understood. (R. 63:5).

Ms. Ferraro signed a plea questionnaire and waiver of rights form, which listed the trial rights she waived by pleading no contest and that the judge was not bound by any plea agreement. The plea questionnaire listed the maximum penalties for the third offense of operating a vehicle under the influence as one year in jail and a \$2,000 fine, and a mandatory minimum sentence of a \$600 fine and/or forty-five days in jail. (R.24:1). The circuit court reviewed the plea questionnaire with Ms. Ferraro and confirmed that she reviewed and understood its contents before she signed. (R. 63:6). Ms. Ferraro did not object to the circuit court relying on the factual allegations contained in the amended information³ as a factual basis for her plea, and the circuit court accepted Ms. Ferraro’s no-contest plea. (R. 63:11).

The case proceeded to sentencing. The State noted the mitigating factors that Ms. Ferraro drove only .3 miles while under the influence, cooperated with police, and did not drive recklessly. (R. 63:13).

³ The amended information charged Ms. Ferraro with driving under the influence of alcohol as a third offense on January 28, 2020, at 3:58 p.m. in Delafield and listed the applicable penalties. The amended information did not refer to Ms. Ferraro’s blood alcohol content. (R. 23:1-2).

The State argued an aggravating factor was "the defendant's PBT [preliminary breathalyzer test] . . . is a .213. That makes this more aggravated than most third offense OWI's." (R. 63:13). The State also argued an aggravating factor was that Ms. Ferraro was released on bond for a pending OWI case when she was arrested for the instant offense. (R. 63:14).

Defense counsel asked the circuit court to impose a probation sentence of two years. (R. 63:16). Counsel noted that "she does admit that it's likely that, you know, had we gotten all the evidence in this case and what the blood alcohol actually was through the testing, that it's likely that she could have been found guilty, so that's why she's here taking responsibility for that." (R. 63:15-16).

Defense counsel acknowledged that Ms. Ferraro has "an alcohol problem," which she was addressing through treatment. (R. 63:16-17). Counsel noted that if the circuit court imposed a probation sentence, Ms. Ferraro might be eligible to participate in drug court on her pending case in Rock County. (R. 63:17).

Ms. Ferraro addressed the circuit court: "My name is Rebecca Sue Ferraro, and I'm an alcoholic. I did have 233 days sobriety." (R. 63:18). Ms. Ferraro explained that after she was charged in May 2019 with OWI, she attended Alcoholics' Anonymous, obtained a sponsor, and remained sober until the instant offense. (R. 63:18). She said she relapsed when she traveled to Oconomowoc from her home in Green County to start a new job and was under stress because she could

not pay for a hotel. Ms. Ferraro told the court that regardless of the outcome of her case in Rock County, "I am going back to my AODA and back to treatment voluntarily because I thought I had this disease controlled until I got scared and realized that, after relapsing, I don't have it under control." (R. 63:20).

The circuit court explained its sentence by remarking that it considered the parties' statements, "looked to the Third Judicial District OWI/PAC Sentencing Guidelines for information and standards as amended in 2018 and first looks at mitigating and aggravating factors." (R. 63:22). The circuit court determined "that there's one big mitigating factor and there's one big aggravating factor, aside from the BAC of .213." (R. 63:22).

The circuit court considered as an aggravating factor that Ms. Ferraro committed the offense while released on bond for another OWI offense. (R. 63:22). The mitigating factors were that Ms. Ferraro only drove .3 miles, cooperated with police, and did not exhibit any bad driving. (R. 63:22).

The circuit court sentenced Ms. Ferraro to 250 days in jail with work-release privileges. (R. 63:24). The circuit court also revoked her driver's license for thirty-six months, required her to maintain an ignition interlock device for thirty-six months, and imposed fines and costs totaling \$3,299. (R. 63:23). The Third Judicial District's OWI Sentencing Guidelines for a third offense where the offender's blood alcohol content was between .20 and .249 and aggravating

factors were present suggest a sentence between seven months and one year of incarceration. WIS. THIRD JUDICIAL DIST. OWI/PAC SENTENCING GUIDELINES, Third Offense (THIRD JUDICIAL DIST. OW/PAC SENTENCING GUIDELINES COMM. 2010), *available at* <http://www.wisbar.org.>Directories>CourtRules>.

C. Postconviction Motion

On February 24, 2020, the Delafield Police Department received Ms. Ferraro's blood test results from the Wisconsin Department of Justice's crime lab. The test showed Ms. Ferraro's blood alcohol level for this offense was .167. (R. 97:1).

Ms. Ferraro filed a postconviction motion for sentence modification. (R. 96:1-9). She argued that the blood test results were a new factor that justified modifying her sentence.

On September 3, 2021, the postconviction court, the Honorable J. Arthur Melvin, III, presiding,⁴ denied Ms. Ferraro's motion for sentence modification. (R. 108:1-2).

The postconviction court found the following facts: 1) Ms. Ferraro accepted a plea offer from the State knowing the blood test was still outstanding; 2) she was motivated to resolve her Waukesha case so she could participate in a treatment program in Rock County, where she had a pending OWI case; and 3) all

⁴ The case was transferred from Judge Lazar to Judge Melvin when the Waukesha County Circuit Court rotated judicial assignments.

parties knew the blood test was outstanding when the case proceeded to sentencing. (R. 108:1).

Based on those factual findings, the postconviction court determined that the blood test was not "new" evidence because "the knowledge that the defendant was intoxicated at the time of the offense is only confirmed with the test." (R. 108:2).

The postconviction court further concluded that, if it considered the blood test new evidence, it did not justify modifying Ms. Ferraro's sentence:

The defendant asked for the speedy disposition for her own benefit, so she could get her Rock County case concluded. She knew the blood test was outstanding. The defendant, as well as the State, both knew the PBT was not as accurate as the outstanding blood test, yet, both agreed to conclude the case with the information at hand.

(R. 108:2).

ARGUMENT

I. Ms. Ferraro's blood test result is a new factor that justifies modifying her sentence.

A. Standard of review

This Court reviews de novo whether Ms. Ferraro presents facts that constitute a "new factor." *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis.2d 53, 797 N.W.2d 828. Whether a "new factor" justifies sentence

modification is reviewed for an erroneous exercise of discretion. *Id.*

B. Legal standards

A circuit court has the inherent power to modify a defendant's sentence based on a "new factor." *Id.*, ¶ 35. The defendant bears the burden to demonstrate a new factor by clear and convincing evidence. *Id.*, ¶ 36. A "new factor" is "a fact or set of facts highly relevant to the imposition of the 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.*, ¶ 40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

If the defendant establishes a new factor, the circuit court exercises its discretion to determine "whether that new factor justifies modification of the sentence." *Id.*, ¶ 37. It is not necessary that the new factor "frustrate" the purpose of the original sentence. *Id.*, ¶ 48.

C. Analysis

1. The blood test result is a new factor.

The blood test result provided by the crime laboratory establishing that Ms. Ferraro's blood alcohol content was .167 is a new factor that justifies modifying her sentence. First, the evidence is "new" because it was not disclosed to the Delafield Police

Department until February 24, 2020 -- four days after Ms. Ferraro's sentencing hearing.

Second, the information is highly relevant to Ms. Ferraro's sentence. The State cited Ms. Ferraro's preliminary breathalyzer test measuring .213 as an aggravating factor to the circuit court's sentencing analysis: "[t]hat makes this more aggravated than most third offense OWI's." (R. 63:13). The Court concurred that Ms. Ferraro's blood alcohol level was a primary sentencing factor: "there's one big mitigating factor and there's one big aggravating factor, aside from the BAC of .213." (R. 63:23).

The information is also highly relevant to Ms. Ferraro's sentence because the OWI Sentencing Guidelines are based on a defendant's blood alcohol content to calculate the recommended sentencing range and the circuit court relied on the Guidelines to determine Ms. Ferraro's sentence. *See State v. Smet*, 186 Wis. 2d 24, 34, 519 N.W.2d 697 (Ct. App. 1994) (fact that affects Sentencing Guidelines' suggested sentencing range is a new factor if guidelines were relevant to sentence imposed).

The postconviction court concluded that, although the blood test was "new" because it was not available at the time of sentencing, the information was not "highly relevant" to Ms. Ferraro's sentence because "the knowledge that the defendant was intoxicated at the time of the offense is only confirmed with the test." (R. 108:2).

The postconviction court erred because it did not recognize that the OWI Sentencing Guidelines use blood alcohol content to assess the severity of the offense. The guidelines provide four categories of OWI offenses and suggest greater penalties depending on whether the defendant's blood alcohol content was .02 to .169, .17 to .199, .20 to .249, or .25 and above.

Further, the postconviction court overlooked that the State referred to Ms. Ferraro's preliminary breathalyzer test result of .213 as a factor that "makes this more aggravated than most third offense OWI's." (R. 63:13). While the lower blood alcohol content was not relevant to the sufficiency of evidence to support Ms. Ferraro's conviction, it was highly relevant to her sentence given the prosecutor's reference to blood alcohol content as an aggravating factor, the circuit court's reference to her blood alcohol content, and the circuit court's reliance on the OWI Sentencing Guidelines – which are designed to promote a sentence based on the defendant's blood alcohol content.

The postconviction court considered this case "analogous" to *Harbor* because both cases raised mitigating evidence as new factors. The postconviction court concluded: "Like the *Harbor* court, this court is not persuaded the level of intoxication is enough to constitute new information." (R. 108:2).

In *Harbor*, the defendant filed a postconviction motion arguing that previously unknown information about her mental health, her addiction issues, and her

traumatic childhood were new factors justifying sentence modification. 2011 WI 28, ¶ 1. The Supreme Court affirmed the court of appeals' opinion affirming the circuit court's order denying postconviction relief. *Id.*, ¶ 2. The Supreme Court concluded that the defendant's mental health was not "new" because the sentencing court was aware the defendant suffered from mental illness. *Id.*, ¶ 58. The Supreme Court also determined that the postconviction court did not erroneously exercise its discretion when it concluded that the defendant's addiction issues were aggravating factors that did not justify sentence modification and that her traumatic childhood was not relevant to offenses she committed at age 35. *Id.*, ¶¶ 62-64.

Ms. Ferraro's case is distinguished from *Harbor* because the blood test result that established a lower blood alcohol content than the preliminary breathalyzer test, unlike the defendant's mental health in *Harbor*, was not known to the sentencing court. Further, the blood test rendered Ms. Ferraro's blood alcohol content less aggravating and was therefore relevant to the sentencing factors.

2. The blood test justifies modifying Ms. Ferraro's sentence.

The blood test result demonstrating that Ms. Ferraro's blood alcohol content was .167 justifies modifying her sentence because the circuit court relied on the OWI Sentencing Guidelines and her sentence was consistent with the Guidelines' recommended

term of incarceration for a third offender with a blood alcohol content between .20 and .249.

The circuit court “looked to the Third Judicial District OWI/PAC Sentencing Guidelines for information and standards” to determine Ms. Ferraro's sentence. (R. 63:22). The Guidelines for a third offense with mitigating factors when the defendant's blood alcohol content is between .20 and .249 suggest a jail sentence of three to seven months; the Guidelines suggest a jail sentence between seven and twelve months for a case with aggravating factors with the same blood alcohol content. Ms. Ferraro's sentence was eight months and ten days, which is approximately twenty percent longer than the minimum suggested sentence for an aggravated case. The sentence implies that the circuit court considered Ms. Ferraro's case aggravated, but with sufficient mitigating factors that justified a sentence at the lower end of the aggravated sentencing range.

The guidelines for a third offense with aggravating factors when the defendant's blood alcohol content was between .02 and .169, on the other hand, suggest a jail sentence between two to six months. Applying the circuit court's assessment of the aggravating and mitigating factors -- which resulted in a sentence twenty percent longer than the suggested minimum sentence -- produces a sentence of 72 days using the guidelines for an aggravated case

where the defendant's blood alcohol level was .02 to .169.⁵

3. The postconviction court erroneously exercised its discretion.

The postconviction court determined that, if the blood test result was a new factor, it did not justify modifying Ms. Ferraro's sentence because she "asked for the speedy disposition for her own benefit, so she could get her Rock County case concluded." (R. 108:2). Although Ms. Ferraro "knew the PBT was not as accurate as the outstanding blood test," the court found, she "agreed to conclude the case with the information at hand." (R. 108:2). The postconviction court therefore concluded that the parties' interest in finality would not be served by sentence modification.

The postconviction court erroneously exercised its discretion because it relied on facts that were not in the record. *See State v. Ziegler*, 2006 WI App 49, ¶21, 289 Wis. 2d 594, 712 N.W.2d 76 ("[d]iscretion contemplates a process of reasoning, which depends on the facts of record or that are reasonably derived by inference from the record).

⁵ The Third District's OWI Sentencing Guidelines also recommend a fine depending on the applicable blood alcohol content. Ms. Ferraro's fine was \$2286. (R. 28:3). The guidelines for a third offense where the defendant's level of intoxication was between .02 to .169 suggest a fine of \$650.

First, the postconviction court's conclusion that Ms. Ferraro knew the preliminary breathalyzer test was not as accurate as the outstanding blood test was clearly erroneous. Neither Ms. Ferraro's nor defense counsel's statements at the plea and sentencing hearing support an inference that Ms. Ferraro knew the blood test was more accurate than the preliminary breathalyzer test.⁶

⁶ Whether Ms. Ferraro waived the right to ask the postconviction court to modify her sentence based on the blood test from the crime laboratory was addressed when Ms. Ferraro's first postconviction counsel filed a motion to modify her sentence. On July 16, 2020, Judge Lazar found that Ms. Ferraro did not waive this right:

But there was no – and I thought that I had a colloquy with Ms. Ferraro asking if she wanted to still proceed, and I didn't. And I thought there was a statement made by Ms. Ferraro when she spoke and gave a statement to the Court with respect to her position, and she didn't. And I will be perfectly honest that in most cases, even if there's a blood alcohol test result that hasn't come through, I will make sure that there is a statement that the defendant knowingly knows that that result is not there and they still want to proceed. I didn't do that here.

(R. 90:3-4).

Although Judge Lazar's conclusion did bind the subsequent postconviction court because prior counsel's motion to modify Ms. Ferraro's sentence was withdrawn when undersigned counsel was appointed, Judge Lazar's ruling is

Second, the postconviction court's finding that Ms. Ferraro "was motivated to resolve her Waukesha County case, so she could participate in Treatment Court in Rock County" was also clearly erroneous. (R. 108:1).

The record contains two references by the parties referring to Ms. Ferraro's pending case in Rock County and her eligibility for drug court on that case. The State advised the circuit court that the parties resolved the case "because the defendant is resolving this case prior to resolving her pending OWI case in Rock County." (R. 63:2-3). The prosecutor's statement does not support the inference that Ms. Ferraro's ability to participate in a Rock County treatment program depended on resolving the case in Waukesha County or that the treatment program was negotiated by the parties as part of the plea agreement. To the contrary, the plea agreement provided that the State would recommend twelve months in jail, which would have delayed Ms. Ferraro's ability to participate in a treatment program for at least one year if adopted by the sentencing court.

The other reference was when Ms. Ferraro's defense counsel noted at the sentencing hearing that she might be eligible to participate in drug court on her pending case in Rock County if she were sentenced to probation. (R. 63:17). But counsel's remarks did not

persuasive because she engaged in the plea and sentence colloquy with Ms. Ferraro.

suggest that Ms. Ferraro's ability to participate in drug court on her case in Rock County depended on her first resolving the case in Waukesha County.

Finally, the postconviction court's conclusion that Ms. Ferraro "asked for the speedy disposition for her own benefit, so she could get her Rock County case concluded," was clearly erroneous. There is no evidence that Ms. Ferraro asked for a "speedy disposition" or that she received any consideration for resolving her case before the blood test results were disclosed. Further, there is no evidence that resolving the Rock County case depended on first resolving the Waukesha case.

The standards for sentence modification based on a new factor are intended to "promote the policy of finality in judgments while at the same time satisfying the purpose of sentence modification, which is the correction of unjust sentences." *Harbor*, 2011 WI 28, ¶ 51. The postconviction court erroneously exercised its discretion by balancing the competing interests based on clearly erroneous inferences from the record.

CONCLUSION

Rebecca Ferraro asks the Court to reverse the circuit court's order denying her postconviction motion and to remand to the circuit court to modify her sentence.

Dated this 28th day of January, 2022.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,681 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 rules 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 or 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 28th day of January, 2022.

Signed:

Electronically signed by

Brian P. Mullins

BRIAN P. MULLINS

Assistant State Public Defender