

**FILED
04-27-2022
CLERK OF WISCONSIN
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

REPLY BRIEF OF
DEFENDANT-APPELLANT

BRIAN P. MULLINS
Assistant State Public Defender
State Bar No. 1026891

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
mullinsb@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
INTRODUCTION	3
ARGUMENT	4
I. Ms. Ferraro’s blood test is a new factor.....	4
II. The postconviction court erroneously exercised its discretion.	6
CONCLUSION.....	10
CERTIFICATION AS TO FORM/LENGTH.....	11

CASES CITED

<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971).....	9
<i>State v. Ziegler</i> , 2006 WI App 49, 289 Wis. 2d 594, 712 N.W.2d 76	7
<i>State v. Harbor</i> , 2011 WI 28, 333 Wis.2d 53, 797 N.W.2d 828	4
<i>State v. Smet</i> , 186 Wis. 2d 24, 519 N.W.2d 697 (Ct. App. 1994)	5

STATUTES CITED

<u>Wisconsin Statutes</u> § 973.13.....	8
--	---

OTHER AUTHORITIES CITED

Wisconsin Third Judicial District OWI/PAC Sentencing Guidelines, Third Offense	passim
--	--------

INTRODUCTION

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 cited 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.

Ms. Ferraro argues that the blood test showing a lower blood-alcohol content is a new factor that is highly relevant to her sentence. She also argues that the postconviction court erroneously exercised 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 received any consideration for

resolving her case before the blood test result was disclosed.

ARGUMENT

I. Ms. Ferraro's blood test is a new factor.

The State concedes that Ms. Ferraro's blood test is "new" because it did not exist at the time of sentencing. (State's Brief at p. 8); *State v. Harbor*, 2011 WI 28, ¶ 40, 333 Wis.2d 53, 797 N.W.2d 828 (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").

Although the State acknowledges it argued at sentencing that Ms. Ferraro's preliminary breath test (PBT) of .213 was an aggravating factor to her sentence, the State contends that the blood test is not "highly relevant" to Ms. Ferraro's sentence because "the trial court in imposing its sentence only mentioned the .213 PBT once." (State's Brief at p. 8). The transcript of the circuit court's sentencing decision is less than four pages. (R. 63:22-25). So the circuit court referring at all to Ms. Ferraro's preliminary breath test is relevant in the context of a condensed sentencing analysis.

More substantively, the circuit court "looked to the Third Judicial District OWI/PAC Sentencing

Guidelines for information and standards.” (R. 63:22). And the Guidelines use a defendant’s blood alcohol content as a primary factor to calculate a suggested sentencing range. Not coincidentally, Ms. Ferraro’s sentence of eight months and ten days of incarceration was consistent with the Guidelines’ recommended sentence for an offender convicted of a third OWI offense with a blood-alcohol content between .20 and .249, which is between seven months and one year of incarceration. WIS. THIRD JUDICIAL DIST. OWI/PAC SENTENCING GUIDELINES, Third Offense (Third Judicial Dist. OWI/PAC Sentencing Guidelines Comm. 2010), *available at* <http://www.wisbar.org>>Directories>CourtRules.

The circuit court’s reliance on the OWI Sentencing Guidelines for an offender with a blood-alcohol content between .20 and .249 is sufficient to establish that the blood test showing her blood-alcohol content was .167 is highly relevant to her 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 State also argues that the blood test is not relevant to Ms. Ferraro’s sentence because she was not charged for operating with a prohibited alcohol concentration but with operating under the influence, which does not include the defendant’s level of intoxication as an element of the offense. Whether a new factor is highly relevant to a sentence, however, is not determined by its relevance to the elements of the

offense but to the circuit court's sentencing factors. As noted above, Ms. Ferraro's level of intoxication was highly relevant to the circuit court's application of the Sentencing Guidelines.

Finally, the State argues that "a close review of the Guidelines shows that the sentence imposed by the trial court does not align with the Defendant-Appellant's PBT result of .213." The State's characterization does not bear scrutiny.

For a three-time OWI offender with a PBT between .20 and .240 and aggravating factors present, the Guidelines suggest a sentence of incarceration between seven months and one year; Ms. Ferraro's sentence was eight months. For the same offender, the Guidelines suggest revoking the defendant's driver's license for 30 months, imposing an \$1,800 fine, and requiring the offender to install an ignition interlock device. Ms. Ferraro's license was revoked for 33 months, her fine was \$1,950 and she is required to install an ignition interlock device. The minimal upward variance to Ms. Ferraro's license revocation and fine compared to the penalties suggested by the Guidelines does not negate that the circuit court acknowledged it "looked to" the Sentencing Guidelines "for information and standards." (R. 63:22).

II. The postconviction court erroneously exercised its discretion.

Ms. Ferraro argues that the postconviction court erroneously exercised its discretion when it determined that, if the blood test 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) Specifically, Ms. Ferraro maintains, the postconviction court relied on facts that were not in the record when it found that she knew the preliminary breathalyzer test was not as accurate as the outstanding blood test and she was motivated to resolve her case so she could participate in drug treatment court in Rock County. *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).

The State cites Ms. Ferraro's pro se letters to the Court while she was incarcerated when she requested release from jail and a "plea deal" as evidence that she was "desperate to resolve this case rapidly so she could be released, as it appears she believed that she could be sentenced to time served." (State's Brief at p. 12). Ms. Ferraro's letters, however, do not demonstrate that she knew the difference between a preliminary breathalyzer test and a blood test, that the blood test had yet to be analyzed, or that her blood-alcohol level was a primary factor for the Sentencing Guidelines' calculation of her recommended sentence.

The State also argues that defense counsel's statements at the sentencing hearing "seem to indicate that [Ms. Ferraro] wanted to resolve this case with a probation sentence in order to then be able to

take advantage of alcohol treatment court in Rock County.” (State’s Brief at p. 13).

As argued in Ms. Ferraro’s opening brief, however, she did not receive any consideration for resolving her case before the parties received the result of her blood test; the plea agreement provided that the State would recommend twelve months in jail and did not include a recommendation by the State to allow Ms. Ferraro to participate in a treatment program. While defense counsel remarked that Ms. Ferraro might be eligible to participate in drug court on her pending case in Rock County if she were sentenced to probation, counsel did not indicate that her ability to participate in drug court on her case in Rock County depended on her first resolving the case in Waukesha County.

The State’s argument that sentence modification is not justified because Ms. Ferraro’s sentence is within the permissible statutory punishment for the offense is a non sequitur. The remedy to correct a sentence that exceeds the statutory maximum is to commute the sentence to the correct maximum sentence, not to modify the sentence based on a new factor. *See* Wis. Stat. § 973.13.

Applying the State’s reasoning, a circuit court would have discretion to deny any request for sentence modification due to a new factor if the original sentence was within the statutory maximum. But properly exercising sentencing discretion encompasses more than imposing a sentence within the statutory

minimum and maximum penalties: “the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971).

The postconviction court erroneously exercised its discretion because it assumed facts that were not in evidence when it determined that sentence modification was not justified because Ms. Ferraro requested a “speedy disposition for her own benefit.” In fact, Ms. Ferraro received no consideration for resolving her case before the blood test was available and her ability to participate in drug court on another case in Rock County did not depend on completing this case.

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 27th day of April, 2022.

Respectfully submitted,

Electronically signed by

Brian P. Mullins

BRIAN P. MULLINS

Assistant State Public Defender

State Bar No. 1026891

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

mullinsb@opd.wi.gov

Attorney for Defendant-Appellant

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 1,549 words.

Dated this 27th day of April, 2022.

Signed:

Electronically signed by

Brian P. Mullins

BRIAN P. MULLINS

Assistant State Public Defender