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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1654

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REBECCA SUE FERRARO,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE 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.

Is a fact that was unknown to the parties at sentencing and adjusts the recommended sentence under the OWI Sentencing Guidelines a new factor?

The court of appeals answered no.

CRITERIA FOR REVIEW

This Court should grant review pursuant to Wis. Stat. § 809.62(1r)(d) because the court of appeals' decision is in conflict with the court of appeals' controlling opinion in *State v. Smet*, 186 Wis. 2d 24, 519 N.W.2d 697 (Ct. App. 1994), which held that any fact affecting the Sentencing Guidelines' suggested sentencing range is a new factor if the guidelines were "highly relevant to the imposition of sentence."

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).

The complaint alleged that, on January 28, 2020, a Delafield police officer was dispatched to the La Quinta Hotel after an employee from a nearby restaurant reported that a diner left without paying her bill, drove away in a Jeep Cherokee, and was staying at LaQuinta. (R. 3:2). The officer encountered

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).

Ms. Ferraro in the driver's seat of a Jeep Cherokee at the LaQuinta Hotel's parking lot. (R. 3:2). The officer reported that Ms. Ferraro slurred her speech and her breath smelled of alcohol. (R. 3:2). Ms. Ferraro confirmed she had been drinking and was ordered to perform field sobriety tests, which suggested she was impaired. 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, the officer obtained a search warrant to withdraw blood. Ms. Ferraro's blood was sent to the Wisconsin Department of Justice's crime laboratory for analysis. (R. 3:3).

B. Guilty Plea and Sentencing

Plea and sentencing hearings were 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). At the time of the plea and sentencing, the result of Ms. Ferraro's blood test had not been received from the crime lab.

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).

During the plea colloquy, the circuit court affirmed that the “blood alcohol count in this case is .213,” which Ms. Ferraro said she understood. (R. 63:5). 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). 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 in Rock County when she was arrested for the instant offense. (R. 63:14).

Defense counsel asked the circuit court to impose probation for two years. (R. 63:16). Counsel noted that Ms. Ferraro “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

³ The amended information charged Ms. Ferraro with driving under the influence of alcohol as a third offense. The amended information did not refer to Ms. Ferraro’s blood alcohol content. (R. 23:1-2).

acknowledged that Ms. Ferraro has "an alcohol problem," which she was addressing through treatment. (R. 63:16-17).

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 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. 2018), *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 was .167. (R. 97:1).

Ms. Ferraro filed a postconviction motion for sentence modification. (R. 96:1-9). She argued that the blood test result was a new factor that justified modifying her sentence. Ms. Ferraro noted the blood test was new because it was disclosed after she was sentenced. (R. 96:6). She argued the test was highly relevant to her sentence because the OWI Sentencing Guidelines are based on a defendant's blood alcohol level, and the circuit court relied on the guidelines when it imposed Ms. Ferraro's sentence. (R. 96:6).

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 that: 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 parties

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

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 because the parties "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).

D. Court of Appeals

Ms. Ferraro asked the court of appeals to reverse the circuit court's order denying her postconviction motion and to remand to the circuit court for further proceedings.

On June 8, 2022, the court of appeals affirmed the judgment of conviction and order denying postconviction relief in an unpublished opinion. *State v. Ferraro*, No. 2021AP1654-CR, slip op. (Wis. Ct. App. June 8, 2022).⁵ The court of appeals determined that the blood test was not highly relevant to Ms. Ferraro's sentence because the circuit court knew: 1) that Ms. Ferraro drove while intoxicated; 2) her PBT was .213; 3) she admitted she drank and drove; 4) she failed field

⁵ The appeal was decided by one judge pursuant to Wis. Stat. § 752.31(2)(f).

sobriety tests; and 5) she violated the bond conditions set in her pending Rock County OWI case. Slip op. at p. 8. The court of appeals observed that, although the blood test showed a lower alcohol concentration, “it was still more than two times the legal limit.” *Id.* The court of appeals concluded that the circuit court’s sentence was motivated by Ms. Ferraro violating the condition of her Rock County bond and her prior convictions for OWI. *Id.* at p. 9.

The court of appeals also held that, if the blood test was a new factor, the postconviction court did not erroneously exercise its discretion when it concluded that sentence modification was not warranted. The court of appeals explained that Ms. Ferraro sought to resolve the case quickly even though she knew the blood test was outstanding. *Id.*

ARGUMENT

I. The court of appeals’ decision is in conflict with the court of appeals’ controlling opinion in *State v. Smet*.

- A. A sentencing factor that was unknown to the parties at sentencing and adjusts the recommended sentence under the OWI Sentencing Guidelines is highly relevant to the defendant’s sentence.

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)).

A fact that adjusts the Sentencing Guidelines' suggested sentencing range is a new factor if the guidelines were “highly relevant to the imposition of sentence.” *State v. Smet*, 186 Wis. 2d 24, 34, 519 N.W.2d 697 (Ct. App. 1994).

B. The OWI Sentencing Guidelines were highly relevant to Ms. Ferraro's sentence.

The Third District's OWI Sentencing Guidelines use blood alcohol content to assess the severity of the offense. The guidelines for a third offense 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. The Guidelines then provide a recommended sentencing range depending on whether mitigating or aggravating factors were present.

The Guidelines' recommended jail sentence for a third offense with aggravating factors when the defendant's blood alcohol content is between .20 and .249 is seven to twelve months. The recommended jail sentence for a third offense with mitigating factors when the defendant's blood alcohol content is .20 to .249 is three to seven months.

The Guidelines recommended jail sentence for a third offense with aggravating factors when the defendant's blood alcohol content is between .02 and .169 is sixty days to six months. The recommended jail sentence for a third offense with mitigating factors when the defendant's blood alcohol content is between .02 and .169 is forty-five days to five months.

In determining Ms. Ferraro's sentence, the circuit court "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's reliance on the Guidelines was borne out by Ms. Ferraro's sentence.

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). Ms. Ferraro's sentence was eight months and ten days, which was consistent with the Guidelines' recommended sentence for a third offense with a mix of aggravating and mitigating factors when the defendant's blood alcohol content was between .20 and .249 and establishes that the Guidelines were highly relevant to the circuit court's imposition of sentence.

The court of appeals concluded that the blood test was not highly relevant to Ms. Ferraro's sentence because, although it showed a lower alcohol concentration, "it was still more than two times the

legal limit.” Slip op. at p. 9. The court of appeals did not recognize that the lower alcohol concentration adjusted the Guidelines’ recommended sentencing range. Because the Guidelines were highly relevant to Ms. Ferraro’s sentence and the revised blood alcohol concentration adjusted the recommended sentencing range under the Guidelines, the court of appeals’ decision is in conflict with the court of appeals controlling opinion in *Smet*.

CONCLUSION

Ms. Ferraro asks this Court to grant her petition for review.

Dated this 5th day of July, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,341 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 5th day of July, 2022.

Signed:

BRIAN P. MULLINS
Assistant State Public Defender