

FILED
07-14-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP1654-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

REBECCA SUE FERRARO,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Rebecca Sue Ferraro seeks review of the court of appeals' decision that affirmed her judgment of conviction for third-offense operating a motor vehicle while intoxicated ("OWI") and the order denying postconviction relief. *State v. Ferraro*, No. 2021AP1654-CR, 2022 WL 2062727 (Wis. Ct. App. June 8, 2022) (unpublished). (Pet-App. 3–12.) She insists review is warranted to cure a conflict between the court of appeals' decision and *State v. Smet*, 186 Wis. 2d 24, 519 N.W.2d 697 (Ct. App. 1994). (Ferraro's Pet. 4.)

This Court should decline review for four reasons. First, there is no conflict to resolve as the court of appeals employed the correct standard of review and legal principles when it held that Ferraro failed to establish the existence of a new sentencing factor. Second, even if this Court concludes Ferraro had established a new sentencing factor, that decision would ultimately prove irrelevant as Ferraro still failed to show that the circuit court erroneously exercised its discretion when it declined to modify her sentence. Third, the underlying court of appeals' decision is unpublished, and there already exists a well-established body of caselaw governing sentence modification requests. Fourth, as a practical matter, Ferraro should receive no relief from her alleged, invited error.

BACKGROUND

As the court of appeals recounted, police arrested Ferraro for fourth-offense OWI after she was found behind the wheel of a parked vehicle after failing to pay for her meal at a nearby restaurant. (Pet-App. 4.) She failed the ensuing field sobriety tests and submitted to a preliminary breath test yielding a result of .213. (Pet-App. 4.) At the time, she was also on bond for a separate OWI offense. (Pet-App. 5.) She was subsequently charged with fourth-offense OWI and felony bail jumping. (Pet-App. 5.)

Following her arraignment, Ferraro, through counsel, requested that her case be scheduled for a plea and sentencing that same week, less than one month after her arrest. (Pet-App. 4–5.) Ferraro ultimately agreed to plead no contest to an amended charge of third-offense OWI with the remaining bail jumping charge to be dismissed and read-in for sentencing. (Pet-App. 6.) When asked if there was any reason the court should not proceed to sentencing that same day, Ferraro answered, “No, your Honor.” (Pet-App. 6.) By that time, Ferraro’s post-arrest blood test results were not yet reported. (Pet-App. 8 n.5.)

Following the parties’ sentencing arguments and Ferraro’s allocation, the circuit court explained that it had “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.” (Pet-App. 8.) The court identified as “one big mitigating factor” the fact that Ferraro had driven only a short distance before her arrest. (Pet-App. 8.) The court also described “one big aggravating factor, aside from the BAC of .213,” was that Ferraro was out on bond for another pending OWI charge and was not supposed to be driving or drinking, let alone “drinking and driving.” (Pet-App. 8.) The court ultimately imposed a sentence encompassing a base fine of \$1800, a 250-day jail confinement, a 36-month driver’s license revocation, and a 36-month ignition interlock device requirement. (Pet-App. 8–9.)

Four days later, Ferraro’s blood test results were reported, revealing that her blood alcohol concentration (“BAC”) at the time of the blood draw was .167. (Pet-App. 9.) Ferraro moved to modify her sentence, arguing that the lower BAC result constituted a new factor warranting sentence modification. (Pet-App. 9.) The circuit court denied Ferraro’s request, holding that (1) the test result was not a new factor, and (2) even if it was a new factor, the result did not warrant sentence modification. (Pet-App. 9.)

The court of appeals affirmed. (Pet-App. 4–12.) After recounting the factual history of Ferraro’s case, the court identified the established two-step inquiry governing sentence modification requests based upon a new factor. (Pet-App. 9.) The court recognized a “new factor” as

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.

(Pet-App. 9 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).) The court also recognized that the existence of a new factor does not automatically entitle a defendant to sentence modification, and the decision to modify a sentence based on a new factor is left to the circuit court’s discretion. (Pet-App. 10 (citing *State v. Harbor*, 2011 WI 28, ¶ 37, 333 Wis. 2d 53, 797 N.W.2d 828).)

Applying those standards, the court of appeals decided that Ferraro’s blood test results did not meet the definition of a new factor. (Pet-App. 10.) This, the court explained, was because the circuit court knew at the time of sentencing that Ferraro had been driving while intoxicated, had failed field sobriety tests, had admitted to drinking and driving, had submitted to a preliminary breath test of .213, and had violated the conditions of her pending OWI case. (Pet-App. 10.) The court observed that Ferraro’s blood test result only confirmed what the circuit court already knew: that Ferraro was highly intoxicated when she drove. (Pet-App. 10–11.) Additionally, the court noted that the circuit court’s primary sentencing focus was on Ferraro’s commission of the crime while on bond for a pending OWI, which ordered her not to drive at all. (Pet-App. 11.)

Moreover, the court of appeals determined that even if Ferraro’s BAC result constituted a new factor, the circuit court did not erroneously exercise its discretion in declining

to modify her sentence. (Pet-App. 11.) Fueling that decision, the court noted that Ferraro's blood test result was still twice the legal limit, her sentence fell within the statutorily permitted penalties, and that Ferraro was responsible for pushing to resolve her case so quickly, before her blood test results were reported. (Pet-App. 11.)

Ferraro petitioned for review.

DISCUSSION

This Court should decline further review.

There are four reasons why this Court should deny Ferraro's petition for review.

First and foremost, Ferraro's petition does not meet this Court's criteria for review. This Court grants petitions for review "only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). Here, Ferraro contends that review of her case is warranted only under Wis. Stat. § (Rule) 809.62(1r)(d) to correct a conflict between the court of appeals' decision and *Smet*, (Ferraro's Pet. 4), but her entire argument rests on a fundamental misinterpretation of *Smet*.

To be clear, *Smet* does not provide that a defendant is automatically entitled to sentence modification whenever a fact discovered sometime after sentencing would alter where the defendant falls on sentencing guidelines that were considered by the court when crafting the defendant's original sentence. If that were true, this Court would have decided *Smet* quite differently since the sentencing court in that case explicitly considered applicable guidelines before imposing the sentence, the defendant later discovered that a scoring error had impacted his guideline placement, and yet this Court still concluded that this scoring error was not a new factor because "it is readily apparent that the court here

placed little weight upon the guidelines.” *Smet*, 186 Wis. 2d at 34.

The court of appeals’ decision in Ferraro’s case is in full accord with *Smet*. Like in *Smet*, the court of appeals plainly recognized that the circuit court’s sentencing decision for Ferraro was primarily driven by facts unrelated to reviewed guidelines, focusing largely on the fact that she committed the crime while on bond for yet another pending OWI offense, during a time she was ordered not to drive at all. (Pet-App. 11.) The court observed that it was “Ferraro’s decision to drink and drive in violation of the Rock County bond order, together with the fact that Ferraro repeatedly violated OWI law, motivated the sentence imposed.” (Pet-App. 11.)

Seeking to challenge that conclusion, Ferraro clings to her position that the sentencing guidelines were nevertheless highly relevant to her sentence given the ultimate sentence she received. (Ferraro’s Pet. 12–13.) The record belies her argument. To illustrate, Ferraro was assessed a \$1800 fine—the amount the applicable guidelines recommend where mitigating factors are present and the defendant’s blood alcohol concentration falls between .20 and .249. (R. 63:23; Pet-App. 14.)

If Ferraro’s position were correct, and those guidelines were highly relevant to her sentence, one would expect the circuit court to impose periods of jail confinement, driver’s license revocation, and ignition interlock device requirement consistent with that same guideline, but that was not the case. Rather, the court ordered Ferraro to serve 250 days’ jail—just over eight months—which falls in the respective guidelines where mitigating factors are present and the defendant’s blood alcohol concentration exceeds .25 or where aggravating factors are present and the defendant’s blood alcohol concentration falls between .20 and .249. (R. 63:24; Pet-App. 14.) And the court also ordered Ferraro’s driving privileges revoked and required her to maintain an ignition

interlock device each for 36 months, which the guidelines recommended only where aggravated factors were present and the defendant's blood alcohol concentration exceeded .25 or the defendant was found to be "drugged driving," neither of which applied to Ferraro even when considering her elevated preliminary breath test result. (R. 63:23; Pet-App. 14.)

Considered together, while the circuit court may have considered the relevant sentencing guidelines before crafting Ferraro's sentence, its selection of penalties that fell within no particular guideline reveals that those guidelines were not highly relevant to the ultimate sentence imposed. Thus, Ferraro's actual BAC result, which at best would have only revealed that she fell in a different guideline recommendation column, was not a new factor. *See Rosado*, 70 Wis. 2d at 288.

Interrelated, the second reason this Court should decline review is that Ferraro's argument fails to account for the remainder of the court of appeals' decision, which would otherwise preclude the relief she seeks. Notably, the court of appeals did not stop after concluding that Ferraro had not established a new sentencing factor; it instead concluded that "[e]ven if the lower BAC qualified as a new factor, the postconviction court did not erroneously exercise its discretion when it concluded the lower result did not justify sentence modification." (Pet-App. 11.)

Ferraro wholly ignores this portion of the court of appeals' decision. She does not suggest, assuming her blood test result constituted a new factor, that the circuit court erroneously exercised its discretion in declining to modify her sentence or that the court of appeals' analysis on that point was flawed. She merely provides her best argument for why her BAC result was a new factor while failing to explain how she would be entitled to sentence modification, even if that were true. (*See Ferraro's Pet.* 12–13.)

The State submits that there is no reason for this Court to grant review to weigh in on a fact-specific issue that will ultimately have no bearing on the relief Ferraro seeks; even if this Court were to conclude that her blood test results constituted a new factor, Ferraro still would not be entitled to sentence modification because the circuit court soundly exercised its discretion when it determined that her specific blood alcohol concentration did not warrant sentence modification. *Harbor*, 333 Wis. 2d 53, ¶ 37.

Third, to the extent that this Court perceives some error by the lower courts, the underlying unpublished decision is not binding on any courts of the state. Wis. Stat. § (Rule) 809.23(3)(a). *Smet*, *Rosado*, and *Harbor* remain good law, and in cases where a circuit court's comments reveal that a defendant's precise blood alcohol concentration or applicable sentencing guidelines were highly relevant to his or her sentence, a defendant may very well convince a circuit court that sentence modification is appropriate. But that's not Ferraro's case; as explained, her actual BAC and applicable sentencing guidelines were not highly relevant to the circuit court's sentencing, and she therefore failed to establish a new factor warranting sentence modification. *See supra* pp. 6–7.

Fourth, as a practical matter, this Court should decline review because Ferraro invited the alleged error that she now criticizes. “Under the doctrine of strategic waiver, also known as invited error, ‘[a] defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal.’” *State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (alteration in original) (citation omitted). As the court of appeals astutely noted, Ferraro was responsible for her quick case disposition, she knew that her blood test results had not been reported by the time of her plea and sentencing hearing, she could have delayed her sentencing to await those results, and yet she

confirmed for the circuit court that there was no reason to postpone her sentencing. (Pet-App. 11.)

At the end of the day, nobody forced Ferraro to enter her plea before her BAC results were reported. She elected to seek a quicker case disposition while risking that she could receive a sentence consistent with her higher breath test result taken within minutes of her arrest and not the results of her blood test taken some time thereafter, after she had partially sobered up. She was not entitled to sentence modification just because she now regrets that decision.

CONCLUSION

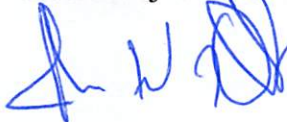
The court of appeals correctly affirmed Ferraro's judgment of conviction and the order denying postconviction relief, and review by this Court is unwarranted.

Dated this 14th day of July 2022.

Respectfully submitted,

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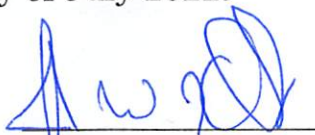
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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this petition or response is 2,257 words.

Dated this 14th day of July 2022.



JOHN W. KELLIS

Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

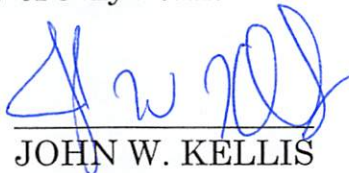
I have submitted an electronic copy of this response, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 14th day of July 2022.



JOHN W. KELLIS

Assistant Attorney General