

FILED
12-21-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2021AP1755-CR

Appeal No. 2021AP1758-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL LEE MUEHL,
Defendant-Appellant.

On Appeal from the Final Orders Entered
in the Circuit Court for Waushara County,
The Honorable Guy D. Dutcher Presiding

**OPENING BRIEF OF
DEFENDANT-APPELLANT**

Jonathan D. Gunderson
State Bar No. 1121053

GUNDERSON & GUNDERSON, LLP.
111 N. Broadway Suite B.
Green Bay, WI. 54303
920.544.6793
Jon@gglawoffice.com

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ISSUE PRESENTED FOR REVIEW	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
STATEMENT OF THE CASE	4
ARGUMENT	9
I. Because Mr. Muehl's CIP/ERP Ineligibility Constitutes a New Factor Relied Upon by the Circuit Court when Issuing a Minimum Sentence Contingent on Program Completion, the Court Erred by Denying His Sentence Modification Motion.	9
A. Applicable Legal Standards.....	9
i. Sentence Modification New Factor Requirements.	9
ii. Standards of Review.	10
B. The Relevant Issue is Not Whether a New Factor Exists, but Rather Whether the New Factor Warrants Modifying Mr. Muehl's Sentence.	10
C. Because the Circuit Court Denied Mr. Muehl's Sentence Modification Motion Without Demonstrating a Reasoned and Rational Decision It Erred in its Denial.	11
i. The Circuit Court did not Demonstrate a Rational Process when it Issued its Denial.....	12
ii. Sentence Modification Is Warranted Because the New Factor Frustrates the Purpose of the Original Sentence.	14

CONCLUSION	16
RULE 809.19(8)(d) CERTIFICATION	17

TABLE OF AUTHORITIES

<i>Industrial Roofing v. Marquardt</i> , 299 Wis.2d 81, 726 N.W.2d 898, (2007).	11
<i>State v. Harbor</i> , 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.....	9 passim
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.	14-15
<i>State v. Larsen</i> , 141 Wis. 2d 412, 415 N.W.2d 535 (Ct. App. 1987).	11
<i>State v. Lawrence</i> , No. 2013AP796-CR, unpublished slip op., (WI App October 10, 2013).	13
<i>State v. Yanda</i> , No. 2018AP412-CR, unpublished slip op., (WI App June 18, 2019).	10 passim

ISSUE PRESENTED FOR REVIEW

1. Was Mr. Muehl's statutory ineligibility for prison treatment programs a new factor justifying sentence modification when the circuit court expressly conditioned a shorter sentence on successful completion of those treatment programs.

The circuit court answered no. (90; App. 47)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested.

Publication is requested under Wis. Stat. §809.23.

STATEMENT OF THE CASE

This matter arises from Mr. Michael Lee Muehl's sentencing following his revoked probation; his probation was revoked after his arrest for legal offenses tied to his substance use. (28:5-6; App.52-53). The offenses stemmed from a single incident: Mr. Muehl drove while under the influence of alcohol and parked in a conspicuous parking spot because he determined he should not be driving. (28:6; App.53). When law enforcement investigated the out-of-place vehicle, they contacted Mr. Muehl and observed drugs in the vehicle. (28:5-6; App.52-53). This observation eventually led to his arrest and the additional discovery of drug paraphernalia. (28:5-6; App.52-53). Mr. Muehl was arrested for possessing methamphetamine, possessing drug paraphernalia, driving without a valid license, and violating his bond conditions. (28:5; App.52). The Department of Corrections (DOC) thereafter revoked Mr. Muehl's probation on March 1, 2021. (28:5; App.52).

1. *DOC recommends a nine-month incarceration term*

The DOC recommended Mr. Muehl receive a nine-month incarceration term, in total, between both counts. (28:8; App.55). The DOC also included Mr. Muehl as eligible for the Challenge Incarceration Program and Earned Release Program (hereinafter “CIP/ERP”)¹. (28:8; App.55). It did include his prior opportunities for substance abuse treatment, which have not all been successfully completed. (28:8; App.55). The DOC noted that he had not made treatment a priority in the past. (28:8; App.55).

2. Circuit court explains its sentence

The circuit court declined to follow the DOC’s recommendation. (43:10; App. 33). It issued its sentence based on these sentencing factors:

1) Severity of the Offenses

The circuit court acknowledged the severity of the injuries suffered by the victim. (43:9; App. 32). It referenced the photographs of the involved injuries, which the court said indicated a pretty significant level of violence. (43:9; App. 32). It noted the battery offense was appropriately charged but nearly could have been charged as a higher battery. (43:9; App. 32). The court also discussed the other domestic offense which was dismissed and read in. (43:9; App. 32). It was also acknowledged as involving harm, in a significant way, within the domestic context. (43:10; App. 33). The circuit court summarized the offenses as "pretty serious." (43:10; App. 33)

2) Safety of the Public

Immediately after discussing the severity of the offenses, the circuit court included one statement regarding public safety: "The

¹ The CIP and ERP, two early release programs, can reduce a participant’s total amount of initial confinement upon completion. The CIP provides counseling, treatment, exercise and education. Participants must be under forty years of age, have substance abuse issues and meet other conditions. See generally Wis. Stat. § 302.045 (2017-18). The ERP, referred to as “the substance abuse program,” also provides treatment to eligible inmates. See generally Wis. Stat. § 302.05 (2017-18). The court must declare a defendant eligible for the programs at sentencing. See §§ 302.045(2)(cm); 302.05(3)(a)2.

public has a right to expect that there is going to be an appropriate response to that type of criminality." (43:10; App. 33).

3) Defendant's Character

Regarding Mr. Muehl's character, the circuit court first discussed his criminal record, describing it as "incredible, in a negative way." (43:7; App.30). It did note that most of his offenses are dated. (43:7-8; App. 30-31). The court addressed his work history, calling it "probably not particularly significant." (43:8; App. 31). It tied this conclusion to Mr. Muehl being incarcerated for a significant portion of his life. (43:8; App. 31).

Next, the court emphasized Mr. Muehl's substance abuse issues, stating: "You have an obvious substance abuse issue." (43:8; App. 31). The circuit court acknowledged his continued struggle with his addiction to the point of incurring additional criminal charges. (43:8; App. 31). It concluded: "there are pronounced rehabilitative needs that are present." (43:9; App.32).

Mr. Muehl was then sentenced to 16-month initial confinement term with six months of extended supervision. (43:11; App. 34).

3. Circuit court declares Mr. Muehl eligible for treatment programs

The circuit court next declared Mr. Muehl eligible for substance abuse treatment as part of the CIP/ERP while incarcerated.² (43:11; App. 34). It also stated a mandatory minimum incarceration period; he could not be released on extended supervision until having served at least 13 months of his initial confinement. (43:11; App. 34). Specifically, it stated:

"You are eligible, statutorily, for the challenge incarceration program and are eligible for the substance abuse program. However, the Court requires that you not be released to extended supervision until having served no less than 13 months of initial confinement." (43:11; App. 34).

² The circuit court also made him eligible for the Challenge Incarceration Program (CIP). (43:11; App. 34)

4. Other sentencing factors emphasized by defense counsel

Defense counsel emphasized Mr. Muehl's lack of violent issues since these convictions in 2013 and 2014. Next, counsel emphasized Mr. Muehl's present acknowledgment that he needs drug treatment for drug-related issues. (R. 43:5; App. 28). Finally, counsel summarized these mitigating factors:

"[Mr. Muehl's] ... been taking care of his parents when he is not incarcerated. They are in the community. Mother with MS, father with some back issues. He's caring for them. He is trying to build a wheelchair ramp in the home. He and his fiancé are living in that home. There is stability there. She is a CNA helping to care for the family." (43:5; App. 28).

At the original sentencing hearing, defense counsel (Atty. Wallace) stressed different mitigating factors: the consequences leading up to the offenses charged. (42:15; App. 17). Particularly, he described the contents of a letter the victim wrote him recanting some of her statements to the police: that no physical abuse occurred (only verbal abuse), that she sought out Mr. Muehl because she knew he was being released, that she had just finished rehab in a treatment facility, and that she called the police after she and Mr. Muehl argued because she knew she could get him "in trouble." (R. 42:15; App. 17).

The Court noted these "consequences" when issuing the original sentence. (42:18; App. 20). It stated:

"Given the discussion, particularly, that Mr. Wallace has placed on the record about the consequences leading up to this particular -- these particular charges, the Court does not have difficulty finding that probation and supervision at this time is an appropriate determination. I am going to order that a two-year period of probation be imposed on both of the sentences." (42:18; App. 20).

5. Mr. Muehl learns of treatment program ineligibility

After the sentencing on his revocation, Mr. Muehl submitted a request for clarification as to the 13-month minimum incarceration period required in his sentence. (39). He asked if he would "be eligible for release to extended supervision after 13 months confinement" if he

did not complete treatment in either the CIP or ERP. (39). Judge Dutcher replied to the request: “Programming must be completed before early release.” (39).

When Mr. Muehl sought out treatment via the ERP while incarcerated, he first learned that he was statutorily ineligible for the CIP/ERP because his offense falls under Wis. Stat. Ch. 940. (44:4; App. 41). He receives no other substance abuse treatment while incarcerated. (44:4; App. 41).

6. Court denies Mr. Muehl’s sentence modification motion

Thereafter, Mr. Muehl filed a motion to modify his sentence requesting to reduce the incarceration period by three months based on his CIP/ERP ineligibility as a new factor. (44:1; App. 38). He implored the court to grant the motion for treatment-related reasons. (44:4; App. 41).

In the motion he emphasized his desire to seek treatment sooner. (44:4; App. 41). He believes he needs substance abuse treatment to develop much-needed drug abuse prevention skills and address his substance dependence. (44:4; App. 41). He feels motivated to start treatment while on extended supervision. (44:4; App. 41). He can gain needed skills and return to living with and caring for his parents alongside his fiancé. (44:4; App. 41). He and his fiancé have been in a relationship for four years without any domestic issues. (44:4; App. 41). He values the stability in his living situation and relationship. (44:4; App. 41). And he recognizes his need for drug treatment in order to contribute to both. (44:4; App. 41).

The next day the circuit court denied the motion. (90; App. 47). Its decision, in its entirety:

“The Court has considered Mr. Muehl’s request for sentence modification and it is denied. Mr. Muehl does not introduce any information that would have impacted the Court’s determination that a 16-month term of Initial Confinement was appropriate. His eligibility/ineligibility for the [CIP/ERP] had no bearing upon this decision, whatsoever. Mr. Muehl’s treatment needs will be addressed through Extended Supervision.” (90; App. 47).

This appeal follows.

ARGUMENT

I. Because Mr. Muehl's CIP/ERP Ineligibility Constitutes a New Factor Relied Upon by the Circuit Court when Issuing a Minimum Sentence Contingent on Program Completion, the Court Erred by Denying His Sentence Modification Motion.

A. Applicable Legal Standards

i. Sentence Modification New Factor Requirements

A circuit court may modify a sentence upon the defendant's showing of a "new factor." *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 837. The process to justify sentence modification because of a new factor involves two steps.

First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. 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." *Id.*, ¶40.

Secondly, "if a new factor is present, the circuit court determines whether the new factor justifies modifying the sentence." *Id.*, ¶37. Under *Harbor*, this step involves considering whether the new information means the original sentence has become unjust. *Id.* ¶51. This analysis requires review of the rationale for the imposed sentence to determine if, had it known the new factor, the court would have acted differently. See *Id.*, ¶¶50-51. The purpose for the original sentence is an important consideration in determining whether the sentence has become unjust. *State v. Yanda*, No. 2018AP412-CR, unpublished slip op., (WI App June 18, 2019) ¶20.

Here, Mr. Muehl can show by clear and convincing evidence the existence of a new factor. He is statutorily ineligible for ERP/CIP; but no one knew it at sentencing. His ineligibility is highly relevant because the Court emphasized his need for substance abuse treatment multiple times and set a minimum release date (13 months) conditioned on completing the ERP/CIP. Thus, a new factor exists.

Yet, the circuit court determined that new factor failed to justify sentence modification because the circuit court would not have acted differently regardless of the new information. As explained below, this conclusion was an erroneous exercise of its discretion.

ii. Standards of Review

Whether a fact or set of facts constitutes a new factor is a question of law reviewed independently. *Harbor*, 2011WI 28 at ¶33. The determination of whether a new factor warrants sentence modification is reviewed for an erroneous exercise of discretion. *Id.* Because Mr. Muehl's case raises the question of whether the court erred in determining the new factor failed to warrant sentence modification, it is reviewed for an erroneous exercise of discretion. *Id.*

B. The Relevant Issue is Not Whether a New Factor Exists, but Rather Whether the New Factor Warrants Modifying Mr. Muehl's Sentence.

A new factor exists here: Mr. Muehl's ERP/CIP ineligibility. Recent caselaw and the court's response support this factor qualifying as a new factor for sentence modification.

Recently, both a circuit court and this Court recognized a defendant's CIP/ERP ineligibility constituted a new factor. *State v. Yanda*, No. 2018AP412-CR, unpublished slip op., (WI App June 18, 2019) ¶17. In *Yanda*, the defendant learned of his ERP/CIP ineligibility in the same manner Mr. Muehl learned of his ineligibility: after the sentencing court declared him eligible. The defendant then requested a sentence modification to reduce his incarceration term from four years to two years. *Id.* ¶6-7. The court denied the motion, but all parties—including the State, the circuit court, and this Court—recognized his ineligibility as a new factor. See *Id.* ¶8 (State), ¶16 (Circuit Court), ¶17 (Court of Appeals).

Likewise, in this case, the State never opposed the new factor and the circuit court (effectively) recognized Mr. Muehl's CIP/ERP ineligibility as a new factor.

Although the circuit court's denial never directly acknowledges the existence of a new factor, it implicitly recognizes a new factor. First, Mr. Muehl's sentence modification motion expressly claimed CIP/ERP ineligibility as a new factor and cited *Yanda* in support; and the circuit court never denied the existence of a new factor. Nor did the circuit court address *Yanda* or distinguish this matter from *Yanda* in its denial. Instead, it said the "new information" (new factor) did not influence whether it would have done things differently. In sum, it appears the circuit court implicitly found a new factor existed, but it denied the motion because it failed the second step of the new factor test (whether the new factor warrants sentence modification).

Thus, as in *Yanda*, the issue on appeal is not whether Mr. Muehl's CIP/ERP ineligibility creates a new factor. Rather, the issue is whether the circuit court erred at step two of the process outlined in harbor—concluding that new factor did not warrant sentence modification.

C. Because the Circuit Court Denied Mr. Muehl's Sentence Modification Motion Without Demonstrating a Reasoned and Rational Decision It Erred in its Denial

Because the circuit court's cited reasons for denial fail to demonstrate a rational process, the court erroneously exercised its discretion.

A circuit court's exercise of discretion must demonstrate a reasoned and reasonable decision. *State v. Larsen*, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). As a working definition, a circuit court properly exercises its discretion if it: (1) demonstrated a rational process to reach a decision that "a reasonable judge could reach," (2) examined the relevant facts, and (3) applied a proper standard of law. *Industrial Roofing v. Marquardt*, 299 Wis.2d 81, 726 N.W.2d 898, 906 (2007).

Applied to sentence modification decisions, this standard requires the circuit court to consider whether the new factor makes the original sentence unjust. *Harbor*. ¶51. Specifically, *Harbor*

requires the circuit court to review the rationale and purpose for the original sentence to determine if, had it known the new factor, the court would have acted differently. *Id.*, at ¶¶50-51.

Here, the lower court does not satisfy all three elements listed above. It appeared to examine the relevant facts and apply the proper standard of law from *Harbor*. The circuit court specifically stated it considered the motion and would not have acted differently, as required in *Harbor*. See *Id.* At ¶50-51. However, the circuit court's denial fails to demonstrate a rational process of reviewing the purpose of the sentence in making its decision. Thus, because its exercise of discretion in denying Mr. Muehl's sentence modification motion fails to demonstrate a reasoned and reasonable decision, it was an erroneous exercise of discretion.

i. The Circuit Court did not Demonstrate a Rational Process when it Issued its Denial.

Here the circuit court's denial cannot demonstrate a rational process because it inherently contradicts part of the purpose of the original sentence. The circuit court says the new information would not have impacted its determination "that a 16-month term of Initial Confinement was appropriate," because Mr. Muehl's CIP/ERP eligibility had "no bearing upon" the 16-month Initial Confinement decision whatsoever. Essentially, the court concludes it would not have acted differently had it known of the new factor.

But that conclusion appears irrational because the circuit contemplated an outcome where a 16-month sentence would not be appropriate. By including a minimum 13-month Initial Confinement term as part of the sentence—so long as Mr. Muehl completed the CIP/ERP—it incentivized a sentencing outcome that involved Mr. Muehl's CIP/ERP eligibility. Contrary to the court's assertion, Mr. Muehl's program eligibility did have a bearing upon the length of his initial confinement term. At a minimum, had the court known of the new factor it would have acted differently by not including a 13-month minimum sentence conditioned on CIP/ERP completion.

Next, compared to analogous cases, the circuit court's brief and abrupt denial falls short of demonstrating a rational process that thoroughly reviewed the sentencing factors in light of the new information and the purpose of the sentence.

Previously, this Court emphasized a circuit court's refusal to modify the defendant's sentence due to a new factor was not an abuse of discretion because the court provided a reasoned explanation on the record for the denial. *State v. Lawrence*, No. 2013AP796-CR, unpublished slip op., (WI App October 10, 2013) ¶11. There the circuit court considered the additional information and intricately reviewed the information in light of the factors underlying the sentence³. *Id.* ¶10. This Court concluded the circuit court "engaged in a detailed process of reasoning to reach its determination." *Id.* ¶11.

Unlike the court in *Lawrence*, in this case the circuit court's denial provides no detailed process of reasoning on the record. Because the circuit court did not hold a hearing on the sentence modification motion, unlike in *Lawrence*, this denial was not placed on the record. Instead, the circuit court denied the motion the next day in a one paragraph letter. That lone paragraph includes no references to the factors still justifying Mr. Muehl's sentence in light of the new information—noteworthy, in particular, because his motion stressed treatment (rehabilitation) had been one factor justifying his sentence. And most importantly, the denial included no explanation as to why the circuit court conditioned a 13-month minimum sentence on CIP/ERP completion. In sum, the brief denial does not show the court engaged in a detailed process of reasoning that reviewed all the

³ This Court noted how the circuit court explained at this level of detail as to what factors still supported the sentence despite the new factor. It cited: (1) the severity of the underlying offense, (the physical battering of women); (2) its concern regarding the defendant's credibility, based on previous false representations he made to his medical providers about his alcohol and drug use; (3) the defendant appeared more accepting of going to jail earlier and had not complained of depression; (4) that many defendants with substance abuse problems and mental health issues receive jail sentences; and (5) the defendant's violent history. *State v. Lawrence*, No. 2013AP796-CR, unpublished slip op., (WI App October 10, 2013) ¶10.

relevant facts and the purpose of the sentence in light of the new factor.

Further, in *Yanda*, this Court again emphasized the circuit court's rational process—labeling it a “careful, deliberative approach”—that reviewed whether a new factor warranted modification. *Yanda* ¶21. In *Yanda*, the circuit court also reviewed on the record, the primary reasons for its sentencing decision, including the relevant *Gallion* factors. *State v. Gallion*, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197.

Step two of the process in *Harbor* does not ask if the new factor would have impacted the court's decision specifically as to overall length; it asks whether the circuit court might have done the sentence *differently*. 2011 WI 28, ¶50. And here, the circuit court would have done the sentence differently. At a minimum, it would not have conditioned a 13-month minimum sentence on successful completion of the CIP/ERP. Thus, the circuit court erred by denying Mr. Muehl's postconviction motion.

ii. Sentence Modification is Warranted Because the New Factor Frustrates the Purpose of the Original Sentence.

Because the new factor here frustrates the purpose of the original sentence, at least in part, it warrants sentence modification.

A circuit court may consider whether a new factor frustrates the purpose of the sentence when determining whether, as part of its exercise of discretion, a new factor warrants sentence modification. See *Yanda* ¶20.⁴

Here, the circuit court conditioned a 13-month minimum sentence on completing the CIP/ERP. That conditioned sentence demonstrates an implied purpose: to incentivize treatment. But without being eligible for CIP/ERP, that sentence purpose gets

⁴ The Wisconsin Supreme Court omitted the previous requirement that a new factor must frustrate the purpose of the original sentence in order to qualify as a “new factor.” *Harbor*, 2011 WI 28 at ¶48.

frustrated—it cannot be actualized so long as Mr. Muehl remains incarcerated.

The circuit court overlooked this frustrated purpose when it denied the motion and missed its chance to incentivize treatment by reconfiguring the sentence. It could have reduced Mr. Muehl's incarceration term by the requested three months and added those three months to his extended supervision. That action makes sense because the circuit court emphasized his treatment needs would “be addressed through extended supervision.”

But the court's brief denial never addressed this frustrated purpose which distinguishes this case and warrants Mr. Muehl's sentence modification.

In *Yanda*, the most closely correlated case to the instant case, the circuit court concluded the defendant's CIP/ERP ineligibility did not justify sentence modification largely because it did not frustrate the purpose of the sentence. See *Yanda* ¶9 (noting the court's principal sentencing concerns did not include the defendant's treatment needs).

Yet, this case notably differs from *Yanda*. First, *Yanda* involved no minimum incarceration term conditioned on completing CIP/ERP; instead, here the court specifically conditioned a 13-month minimum incarceration term on successfully completing CIP/ERP. Next, unlike in *Yanda*, the circuit court's primary sentencing concerns in this case included Mr. Muehl's treatment needs—several times the court stressed his substance abuse treatment needs when covering the *Gallion* factors (character/rehabilitation).

Here, the circuit court stressed Mr. Muehl's treatment needs and incentivized treatment with a conditional minimum sentence—a noble but impossible purpose given his CIP/ERP ineligibility. Accordingly, this new factor frustrated the purpose (at least in part) of the sentence. That frustrated purpose, here, warrants sentence modification.

CONCLUSION

For the reasons given above, the circuit court's order denying Mr. Muehl's Sentence Modification Motion should be reversed. Because Mr. Muehl will have completed his sixteen-month incarceration term prior to this appeal's conclusion, he requests the court issue an order to modify his judgment of conviction to include three months in sentence credit.

Respectfully submitted,

Dated this 21st day of December, 2021.

Electronically signed by Jonathan D. Gunderson
Jonathan D. Gunderson
State Bar No. 1121053

GUNDERSON & GUNDERSON, LLP.
111 N. Broadway Suite B.
Green Bay, WI. 54303
920.544.6793
Jon@gglawoffice.com
Counsel for Defendant-Appellant

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 3,420 words

Electronically signed by Jonathan D. Gunderson
Jonathan D. Gunderson
State Bar No. 1121053

GUNDERSON & GUNDERSON, LLP.
111 N. Broadway Suite B.
Green Bay, WI. 54303
920.544.6793
Jon@gglawoffice.com
Counsel for Defendant-Appellant