STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2021AP1755-CR

Appeal No. 2021 AP 1758-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 denying Defendant's Motion for Sentence Adjustment,

The Honorable Guy D. Dutcher Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

Did the fact that Mr. Muehl was statutorily ineligible for prison programming constitute a new factor warranting sentence modification?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinions nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one-judge appeal.

STATEMENT OF THE CASE

Mr. Muehl was charged with Battery and Disorderly Conduct in Waushara County Case Number 2013CM531, both as crimes of domestic abuse and as a repeater, following an incident on November 15, 2013 where he committed acts of abuse against the victim after she refused to have sex with him. R1:1-4. The victim reported that Mr. Muehl had grabbed her by the biceps and threw her to the bed, then covered her mouth as to not wake up the other occupants of the residence, and hit her in the face. R1:4. Law enforcement further observed a large bruise on the victim's side, which the victim stated had occurred when Mr. Muehl had pushed her around during an incident at another residence within Waushara County. R1:4.

Mr. Muehl was further charged with Disorderly Conduct as a Domestic Abuse offense and Misdemeanor Bail Jumping, both as repeaters, in 2014CM149. R1:1-2. This stemmed from an incident where Mr. Muehl violated his no contact order by having contact with the victim in 2013CM531, and the victim alleged that Mr. Muehl had placed his hands around her neck and slapped her. R1:3.

Mr. Muehl eventually entered a plea of no contest to misdemeanor battery as charged, in 2013CM531, and to misdemeanor bail jumping as charged in 2014CM149, with the remaining charges dismissed and read-in. R42:2-3. After an

argued sentencing, the Honorable Bernard Bult withheld sentence and placed the defendant on two years of probation, consecutive to any other sentence. R42:19. It had been noted during his sentencing that Mr. Muehl was incarcerated at the time of sentencing. R42:17.

Eventually Mr. Muehl's probation was revoked, and he appeared before the Honorable Guy D. Dutcher for sentencing after revocation on March 30, 2021. R43:1-2. At that sentencing, the State recommended a sentence of eighteen months of initial confinement and six months of extended supervision. R43:4. The defense recommended a time served sentence, noting that 167 days of credit. R43:6.

The court began its analysis of the sentence by noting that Mr. Muehl had a lengthy criminal history with a number of prior convictions relating to acts of violence and an unwillingness to follow rules. R43:7. The court noted that these were dated, but further noted that the principal reason for that was because he had been incarcerated for some time. R43:7-8. The court also noted that the defendant had "an obvious substance abuse issue," and that he had rehabilitative needs. R43:8-9. The court then turned to the gravity of the offense, and noted in particular that the battery charge was severe when examining the injuries to the victim. R43:9. The court stated that the facts of the case "indicate a pretty significant level of violence, probably pretty close to the point where there might have been some question about whether there might be a higher level of battery than was actually charged." R43:9. The court then discussed the second incident and noted that it further indicated that "a pattern that you've demonstrated throughout your past is that you demonstrate violence against those with whom you are involved." R43:9-10.

The court sentenced Mr. Muehl to a term of confinement on both charges consisting of sixteen months of initial confinement and six months of extended supervision. R43:11. The court then stated that he was statutorily eligible for the challenge incarceration program and the substance abuse program, but determined

he could not be release until he had served at least thirteen months of initial confinement. R43:11.

On September 15, 2021, Mr. Muehl, through his attorney, filed a motion requesting sentence modification, arguing that the fact that the defendant was statutorily ineligible for programming on the battery charge in 2013CM531 constituted a new factor, and requested that the Court reduce the defendant's sentence to thirteen months of initial confinement. R44:4. The Court in a letter dated September 16, 2021, denied this request. R45:1. It wrote,

> "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 SAP had no bearing upon this decision, whatsoever. Mr. Muehl's treatment needs will be addressed through Extended Supervision."

R45:1.

Mr. Muehl appeals.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED MR. MUEHL'S MOTION FOR SENTENCE MODIFICATION

A. CASE LAW REGARDING SENTENCE MODIFICATION

A court may modify a criminal sentence upon a showing by the defendant that a new factor exists. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W. 2d 828 (citing *State v. Hegwood*, 133 Wis. 2d 544, 546, 335 N.W. 2d 399 (1983)). The defendant bears the burden to show that a new factor exists. *Id*. at ¶36. This is a question of law. *Id*. Then the inquiry shifts to whether the circuit court determines whether that new factor justifies modifying the sentence. *Id*. at ¶37. A new factor is defined 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."

Id. at ¶40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W. 2d 69 (1975))

B. MR. MUEHL'S INELIGIBILITY FOR PROGRAMMING IS NOT A NEW FACTOR JUSTIFYING SENTENCE MODIFICATION

In *State v. Schladweiler*, 2009 WI App 177, ¶1, 322 Wis. 2d 642, 777 N.W. 2d 114, the Court of Appeals determined that DOC's denial of placement into CIP programming did not constitute a new factor for purposes of sentence modification. In that case, Schladweiler had been found statutorily eligible for programming at sentencing but the Department of Corrections subsequently declined to place him into the program as he would not be eligible for the Challenge Incarceration Program until after a point in which he would not be age-eligible for it. *Id*. at ¶3. The circuit court denied a request for sentence modification. *Id*.

The Court of Appeals affirmed that determination, noting that the court finding the defendant eligible for programming is only one criteria that the Department of Corrections uses when determining eligibility for programming. *Id*. at ¶1. The circuit court did not have the inherent authority to order that a defendant be placed into a program while incarcerated. *Id*. at ¶10. The court also noted that there was nothing in the court's explanation of its sentencing decision that indicated that it was premised on the defendant's acceptance into CIP. *Id*. at ¶14.

While the State concedes that the facts of this case are not the exact same as in *Schladweiler* (Mr. Schladweiler's offense was statutorily eligible for programming), the factors the court reached in reaching its decision are informative here as well. While the Court made reference to Mr. Muehl having substance abuse issues and a need for treatment, the Court did not anywhere in its sentencing explanation indicate that the reason for structuring the sentence as it did was so that

Mr. Muehl could take advantage of programming while in the prison. R43:11. The court did not even reference programming until it was passing sentence on Mr. Muehl. R43:11. In addition, the court spent a great deal of time in its sentence discussing the gravity of these offenses, including the photographs of the injuries to the victim, as well as Mr. Muehl's lengthy criminal record. R43:7-10. Even if Mr. Muehl were statutorily eligible for programming, there is no guarantee either that the Department of Corrections would have allowed him into programming or that he would have completed it.

Mr. Muehl makes much of the fact that the court set a thirteen month minimum period of initial confinement before Mr. Muehl could be released on extended supervision, and states that this meant the court intended this as an incentive to complete programming and thus Mr. Muehl's ineligibility for programming is a new factor. Mr. Muehl is making an assumption about the Court's motivation in setting the minimum release date that is not borne out by the record. The person in the best position to judge the Court's motivation is the Court itself, and it indicated that no information was provided that would have impacted the Court's determination that sixteen months of initial confinement was appropriate. R45:1. Mr. Muehl simply cannot show to the requisite burden that eligibility/ineligibility for programming was highly relevant to the court's sentence, or that his ineligibility justifies modifying his sentence to the same amount of time as if he would have successfully completed programming.

Mr. Muehl makes much of *State v. Yanda*, No. 2018AP412-CR, unpublished slip op. (WI App. June 18, 2019), and states that the Court's failure to address that case and distinguish it someone means that the Court implicitly recognized that Mr. Muehl's ineligibility was a new factor. There are multiple problems with this. In *Yanda*, the Court of Appeals did not visit the issue of whether ineligibility for programming constituted a new factor because the parties on the trial court level conceded that it did. *Id*. at ¶8. The State in this case is not bound by a concession made by a separate District Attorney's office in an unrelated case. Second, *Yanda*

is not a published Court of Appeals opinion, and thus the Circuit Court was not obligated to address it or distinguish it from the present case.[1]

Mr. Muehl also claims that the State in this instance never opposed finding Mr. Muehl's ineligibility to be a new factor. However, the record establishes that Mr. Muehl's motion for sentence modification was filed on September 15, 2021, and the Court's response was the following day. R44, R45:1. There's nothing in the record to indicate that the State was ever given the opportunity to respond.

C. IF THIS COURT FINDS THAT THE DEFENDANT'S INELIGIBILITY CONSTITUTES A NEW FACTOR, THE PROPER REMEDY IS REMAND FOR THE COURT TO CONSIDER THE SECOND PRONG OF SENTENCE MODIFICATION ANALYSIS

Mr. Muehl asks the Court of Appeals to issue an order to modify his judgment of conviction granting him three months in sentence credit. However, this would not be the proper remedy should this Court rule in his favor.[2] The Circuit Court in this case did not find that Mr. Muehl's ineligibility constituted a new factor, and thus did not consider the second prong of the sentence modification analysis: whether the new factor justifies modification of the sentence. Should this Court find that Mr. Muehl has shown the existence of a new factor, the proper remedy is to remand this case to the Circuit Court for consideration as to whether the new factor justifies modification of the sentence.

[1] Mr. Muehl's brief uses the term "new information" in quotation marks when describing what the Court said in its ruling. App. Brief 11. The State would note that the Court did not use this terminology in its written order denying the motion. R45:1.

[2] The State would question whether this appeal is moot as it has been conceded that Mr. Muehl's initial confinement portion of his sentence would be complete by the time the Court of Appeals rules on his request.

CONCLUSION

Mr. Muehl has not shown to the requisite level of proof that his ineligibility for programming constitutes a new factor which would warrant modification of his sentence. Accordingly, this Court should affirm the decision of the Circuit Court.

Respectfully submitted,

Dated this 18th Day of February, 2022

Electronically signed by Matthew R. Leusink

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RULE 809.18(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(b),(bm), and (c) for a brief. The length of this brief is 2,324 words.

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