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SUPREME COURT

STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2021AP1755-CR
Appeal No. 2021AP1758-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL LEE MUEHL,
Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

Issues Presented for Review 3

Reasons for Granting Review 4

Statement of the Case and Facts. 4

Argument

 I. This Court should review this matter because early
 release program ineligibility should be considered a new
 factor as a matter of law when a circuit court conditions a
 minimum confinement period on program completion..... 9

 II. This Court May Properly Decide this Issue Rather than
 Dismiss it as Moot. 11

Conclusion 12

Certification..... 13

Certificate of Compliance with Rule 809.19(12)..... 14

ISSUES PRESENTED FOR REVIEW

Issue #1: New Factor

Is statutory ineligibility for early release prison treatment programs a new factor justifying sentence modification when the circuit court conditions a shorter sentence on successful completion of those treatment programs?

A 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.

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 and the circuit court declared him eligible. Further, his ineligibility is highly relevant because the circuit court emphasized his need for substance abuse treatment multiple times and set a minimum release date (13 months) conditioned on completing the early release programs. Thus, a new factor exists.

Yet the Court of Appeals concluded that even though the circuit court conditioned a minimum release date on successful early-release program completion, that condition did not make early release program eligibility highly relevant to the sentence. Accordingly, the court of appeals denied Mr. Muehl's appeal because it found no new factor existed.

Issue #2: Mootness

Is this appeal moot because Mr. Muehl will have completed both his incarceration period and his extended supervision by the time this matter would be decided by this Court?

Because the court of appeals determined no new factor existed, it did not address this issue. However, Mr. Muehl will have completed both his incarceration period and his extended supervision period prior to the time this appeal would be decided by this Court. Thus, this issue is also relevant for this Court to review.

REASONS FOR GRANTING REVIEW

1. Review is warranted because the court of appeals' decision conflicts with another court of appeals case that accepted the circuit court's acceptance of the State and Defense's stipulation that early release program ineligibility constitutes a new factor. *See Wis. Stat. § (Rule) 809.62(1r)(d)* (review may be appropriate when the court of appeals' decision is in conflict with controlling decisions of this Court and the court of appeals).
2. Review is also necessary because this wrongly decided opinion is judge-authored and likely to result in confusion because it is citable in Wisconsin courts. *See Wis. Stat. § (Rule) 809.62(1r)(c)* (review is appropriate when a decision of this Court would clarify the law).

STATEMENT OF THE CASE AND FACTS

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. (R28:5-6). 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. (R28:6). When law enforcement investigated the out-of-place vehicle, they contacted Mr.

Muehl and observed drugs in the vehicle. (R28:5-6). This observation eventually led to his arrest and the additional discovery of drug paraphernalia. (R28:5-6). Mr. Muehl was arrested for possessing methamphetamine, possessing drug paraphernalia, driving without a valid license, and violating his bond conditions. (R28:5). The Department of Corrections (DOC) thereafter revoked Mr. Muehl's probation on March 1, 2021. (R28:5).

1. DOC recommends a nine-month incarceration term

The DOC recommended Mr. Muehl receive a nine-month incarceration term, in total, between both counts. (R28:8). The DOC also included Mr. Muehl as eligible for the Challenge Incarceration Program and Earned Release Program (hereinafter "early release programs")¹. (R28:8). It did include his prior opportunities for substance abuse treatment, which have not all been successfully completed. (R28:8). The DOC noted that he had not made treatment a priority in the past. (R28:8).

2. Circuit court explains its sentence

The circuit court declined to follow the DOC's recommendation. (R43:10). It emphasized these sentencing factors:

1) Severity of the Offenses

The circuit court acknowledged the severity of the injuries suffered by the victim. (R43:9). It referenced photographs of the injuries involved, which the court said indicated a pretty significant level of violence. (R43:9). It noted the battery offense nearly could have been charged as a higher battery. (R43:9). The court also discussed the other domestic offense which was dismissed and read in. (R43:9). It was also acknowledged as involving harm, in a significant way, within the domestic context. (R43:10). The circuit court summarized the offenses as "pretty serious." (R43:10)

2) Safety of the Public

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

public has a right to expect that there is going to be an appropriate response to that type of criminality.” (R43:10).

3) Defendant's Character

The circuit court first noted his criminal record, describing it as “incredible, in a negative way.” (R43:7). It acknowledged most of his offenses as dated. (R43:7-8). Then the court addressed his work history, calling it “probably not particularly significant,” (tying this conclusion to significant periods of incarceration). (R43:8).

Next, the court emphasized Mr. Muehl’s substance abuse issues, stating: “You have an obvious substance abuse issue.” (R43:8). The circuit court acknowledged his continued struggle with his addiction to the point of incurring additional criminal charges. (43:8). It concluded: “there are pronounced rehabilitative needs that are present.” (43:9).

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

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. (R43:11)¹. (These programs are referred to collectively as “early release programs” hereinafter.) 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. (R43:11). 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

¹ The challenge incarceration program provides counseling, treatment, exercise, and education, *see generally* WIS. STAT. § 302.045, and the substance abuse program provides treatment, *see generally* WIS. STAT. § 302.05. The circuit court must declare a defendant eligible for these programs at sentencing. *See* §§ 302.045(2)(cm) and 302.05(3)(a)2. Upon successful completion in these programs, a participant may be eligible for early release to extended supervision.

having served no less than 13 months of initial confinement.”
(R43:11).

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). 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).

At the original sentencing hearing, defense counsel (Atty. Wallace) stressed different mitigating factors: the consequences leading up to the offenses charged. (42:15). 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).

The Court noted these “consequences” when issuing the original sentence. (R42:18). 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." (R42:18).

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. (R39). 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. (R39). Judge Dutcher replied to the request: “Programming must be completed before early release.” (R39).

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. (R44:4). He receives no other substance abuse treatment while incarcerated. (R44:4).

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. (R44:1). He implored the court to grant the motion for treatment-related reasons. (R44:4).

In the motion he emphasized his desire to seek treatment sooner. (R44:4). He believes he needs substance abuse treatment to develop much-needed drug abuse prevention skills and address his substance dependence. (R44:4). He feels motivated to start treatment while on extended supervision. (R44:4). He can gain needed skills and return to living with and caring for his parents alongside his fiancé. (R44:4). He and his fiancé have been in a relationship for four years without any domestic issues. (R44:4). He values the stability in his living situation and relationship. (R44:4). And he recognizes his need for drug treatment in order to contribute to both. (R44:4).

The next day the circuit court denied the motion. (R90). 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.” (R90).

7. *The court of appeals concludes program ineligibility is not a new factor.*

The court of appeals affirmed the circuit court's ruling. *State v. Muehl*, Appeal Nos. 2021AP1755-CR, 2021AP1758-CR, unpublished order Wis. Ct. App. March 31, 2022.) It concluded Mr. Muehl's program eligibility was not highly relevant to the sentence imposed; thus, it was not a new factor. Id. ¶1. (App.4).

Specifically, the court emphasized how the circuit court waited until after it sentenced Mr. Muehl to 16 months initial confinement before discussing his eligibility for early release under the challenge incarceration program and the substance abuse program. And then the circuit court stated he would not be eligible for release until he served "no less than 13 months of initial confinement." The court of appeals concluded the circuit court's words demonstrate that it wanted to ensure Mr. Muehl served a minimum of 13 months initial confinement rather than incentivize his treatment. Id. ¶18. (App.9).

ARGUMENT

1. **This Court should review this matter because early release program ineligibility should be considered a new factor as a matter of law when a circuit court conditions a minimum confinement period on program completion.**

Mr. Muehl claims a new factor exists in this case (his early release program ineligibility). Thus, he argued the issue for appeal was not whether a new factor exists, but whether the circuit court erred by determining that new factor failed to justify modifying its sentence.

In contrast, the State argued the circuit court found no new factor exists. Therefore, it claimed the circuit court never addressed the second prong of the sentence modification analysis: whether the new factor justifies modification of the sentence. Thus, the State asked the court of appeals to determine if a new factor exists. And if so, to remand the matter to the circuit court.

Multiple points indicate early release program ineligibility should be considered a new factor as a matter of law when a circuit court conditions a minimum confinement period on program completion. Should this Court deem program ineligibility in this instance a new factor, it would simplify the issue, streamline future appeals, and conserve judicial resources.

First, the circuit court never stated explicitly that Mr. Muehl's early release program ineligibility was not a new factor.

Next, the second prong of the test from *Harbor* asks whether the circuit court might have done the sentence differently had it known of the new factor. *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828 ¶50. Here, the circuit court jumped directly to the second prong of the *Harbor* Test: it answered whether it would have acted differently in light of the information (new factor). The circuit court's denial states Mr. Muehl presents no information "that would have impacted the Court's determination that a 16-month term of Initial Confinement was appropriate." Effectively, the court says it would not have acted differently had it known about his program ineligibility—this is the circuit court's answer to the second prong of the *Harbor* test.

And because the court only answers the second prong of the Harbor test when the first prong is satisfied, the circuit court's response implicitly recognizes Mr. Muehl's program ineligibility as a new factor.

Such an acknowledgment of early release program ineligibility aligns with the most recent court of appeals decision to address the issue. In *State v. Yanda*, No. 2018AP412, unpublished slip op. (WI App June 18, 2019) the court of appeals affirmed the circuit court's exercise of discretion when the circuit court accepted the parties' stipulation that program ineligibility constituted a new factor.

The court of appeals asserts that *Yanda* does not establish a defendant's eligibility for programming is always a new factor. *Id.* ¶19. But the two cases cause confusion: in *Yanda* program ineligibility is highly relevant enough that both parties stipulate it as a new factor; but in *Muehl* it is not highly relevant to even create a new factor?

Further, if this Court finds program ineligibility is a new factor as a matter of law, the issue on appeal would always be whether the circuit court properly exercised its discretion. This limitation could narrow the scope of potential future appeals and reduce the number of appeals. For example, when the court of appeals finds program ineligibility to be a new factor after the circuit court decided to the contrary, the appeals court must remand the case to the circuit court to then decide the second prong of the *Harbor* test. Then, if the circuit court finds the new factor fails to justify sentence modification and that decision gets appealed, it results in a second appeal to the court of appeals. But if program ineligibility is a new factor, it eliminates the potential for this scenario. Further, the issue in these instances is more so whether the circuit court properly exercises its discretion in determining whether program ineligibility justifies modifying a sentence.

Thus, the issue should be not whether program ineligibility is a new factor, but whether the circuit court properly exercises its discretion in determining whether the new factor justifies sentence modification.

II. This Court May Properly Decide this Issue Rather than Dismiss it as Moot.

Mr. Muehl asked the court of appeals to modify his judgement of conviction to reflect an additional three months' sentence credit because he would have completed his sixteen-month incarceration term prior to the court of appeal's decision. The State, in a footnote, questioned whether the appeal was moot.

The court of appeals did not address the mootness issue because the new factor conclusion was dispositive. *State v. Muehl*, Appeal Nos. 2021AP1755-CR, 2021AP1758-CR, unpublished order Wis. Ct. App. March 31, 2022.) ¶20 n.4.

Still, this Court may properly decide this issue because it is an issue likely to be repeated yet evading appellate review. See *State ex. rel Unnamed Person No. 1 v. State*, 2003 WI 30, ¶19, 260 Wis. 2d 653, 660 N.W.2d 260. Here, the imposition of a minimum confinement period conditioned on successful program completion is such an issue. The nature of a contingent minimum confinement period implies that,

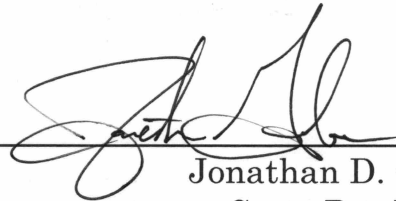
at times, it will involve a shorter time frame. Likely, in some cases, an appeal will not be completed within that brief time frame. Accordingly, it is proper to address the issue: whether early release program ineligibility constitutes a new factor when a circuit court conditions a period of minimum confinement on successful completion of ineligible treatment programs.

CONCLUSION

For the reasons stated above, the petitioner believes this case is appropriate for review, and respectfully requests that review be granted and that the Supreme Court reverse the decision of the Court of Appeals affirming the trial court's decision denying his postconviction motions.

Respectfully submitted,

Dated April 26, 2022.



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CERTIFICATION

In accord with Wis. Stat. § 809.19(8), I certify that this petition satisfies the form and length requirements for a petition for review prepared using a proportional font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point text for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line and a length of 2,388 words.

Dated: April 26, 2022.



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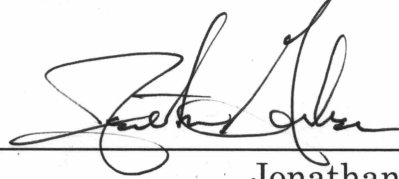
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief 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 brief filed with the court and served on all opposing parties.

Dated: April 26, 2022.



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