STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP000244-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEROY RICE, JR.,

Defendant-Appellant.

Appeal of a Judgment Entered in the Kenosha County Circuit Court, the Honorable Larissa Benitez-Morgan and Orders Denying Postconviction Relief Entered in the Kenosha County Circuit Court, the Honorable Gerad Dougvillo, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUES PRESENTED

1. The court imposed sentence on Mr. Rice while he appeared by videoconferencing via Zoom. The court failed to acknowledge the remote appearance, let alone perform a colloquy with the defendant regarding his right to appear, waiver of the same, or whether the technology was functioning effectively. Is Mr. Rice entitled to resentencing based on the court's failure to conduct a waiver of the right to appear in person and ensure the effectiveness of the video technology?

The postconviction court denied Mr. Rice's motion without a hearing. This court should reverse.

2. Mr. Rice's postconviction motion and motion for reconsideration presented information that was either new or overlooked by the court regarding Mr. Rice's substance abuse needs. Given that the sentencing court did not order eligibility in the Substance Abuse Program as a result of its lingering question regarding Mr. Rice's status as a drug user or a drug dealer, is Mr. Rice entitled to sentence modification?

The court denied Mr. Rice's motion for sentence modification. This court should reverse and remand with directions for the circuit court to consider whether this new factor warrants modification.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Rice does not request oral argument or publication on either issue, as they involve application of facts to existing law, unless the court has unanswered questions after briefing that necessitates additional argument.

STATEMENT OF THE CASE AND FACTS

On August 23, 2020, the state charged Mr. Rice with various counts of battery and domestic violence contrary to Wis. Stat. § 940.19(1) and § 968.075(1)(a). (2). Mr. Rice was also charged with violating a no-contact order according to Wis. Stat. § 941.39(2). *(*2).

On June 7, 2021, Mr. Rice, pursuant to a plea agreement, pled guilty to Count 1 of battery, and Count 4 for violating the no-contact order. (23). The state dismissed and read in all other charges against Mr. Rice as part of the plea agreement. (33:13). The court accepted Mr. Rice's plea and proceeded with sentencing. (33:13).

As is relevant here, the court did not acknowledge, except to note that all the parties appeared by Zoom, that Mr. Rice had a right to be present. Further, the court did not conduct any colloquy with the defendant about the quality of the videoconferencing or question Mr. Rice regarding a waiver of his right to be present. (33:13).

During the state's sentencing recommendations, which included a recommendation for probation consecutive to his revocation sentence (23:2), the district attorney discussed Mr. Rice's prior record, which included a conviction for possession of marijuana and possession of cocaine. (33:15). The state characterized Mr. Rice as an abuser of drugs. (33:15). Notably, in the possession of cocaine conviction, for which Mr. Rice was serving a sentence after revocation of his probation, the court found him eligible for the Substance Abuse Program. (42:16).

The court discussed Mr. Rice's rehabilitative needs:

> THE COURT: [The] [d]istrict attorney's mentioned something about perhaps because you had the possession of cocaine you might have some drug issues. I don't know whether you're using it for personal use or whether you were selling it. I have no idea about that, but what I do know is that I now have to shift the emphasis to protection of the community.

(33:23).

Neither the state nor defense counsel corrected the court's comments. The court found Mr. Rice ineligible for the Substance Abuse Program, indicating that "I don't have any – enough evidence to show you have a substance program need." (33:24). Mr. Rice was found eligible for the Challenge Incarceration Program. (33:24).

The court sentenced Mr. Rice to 1.5 years of initial confinement followed by 6-months of extended supervision as to Count 1 and the same as to Count 4, consecutive to one another and consecutive to his revocation. (33:24).

Mr. Rice filed a postconviction motion, arguing that the court should order resentencing based on the court's failure to perform a proper colloquy to ensure a waiver of Mr. Rice's statutory right to appear in person and, alternatively, to modify Mr. Rice's sentence based on the existence of a new factor. (42).

The court[1] denied the motion without a hearing. (44:2; App. 4). As to the right to appear issue, the court based the denial on the court acting in accordance with the Kenosha County Courts COVID-19 Operational Plan as authorized by the Wisconsin Supreme Court and Mr. Rice's waiver by failing to object to the COVID-19 procedures. (44:1; App. 3). Additionally, as to the new factor motion, the court found that Mr. Rice failed to show that his substance abuse (via his prior convictions and a post-sentencing classification report) was a new factor. (44:2; App. 4).

Mr. Rice filed a motion for reconsideration, arguing that the court failed to apply the proper legal standards. (46). The court denied the motion for reconsideration without further legal analysis on the

[1] The postconviction motion and motion for reconsideration was decided by Judge Gerad Dougvillo, whereas the original sentencing court was Judge Larissa Benetiz-Morgan.

issue of the right to appear. (49:1; App. 5). As to the new factor, the court found that the sentencing court spoke of a lack of information about Mr. Rice's eligibility for programming, but Mr. Rice failed to redress the issue. (49:1; App. 5). Additionally, the court reasoned that Mr. Rice assumed the court overlooked the prior offenses and that the court used "it's [sic] discretion to not make the defendant eligible." (49:2; App. 6). Mr. Rice appeals from these orders.

ARGUMENT

I. Mr. Rice is entitled to resentencing based on a violation of his statutory right to appear in person.

A. Standard of review.

"The interpretation of a statute and its application to a particular set of facts present questions of law that we review independently of the circuit court's decision, but benefitting from its analysis." *State v. Soto,* 2012 WI 93, ¶14, 343 Wis. 2d 43, 53, 817 N.W.2d 848, 853 citing *Rasmussen v. Gen. Motors Corp.,* 2011 WI 52, ¶14, 335 Wis. 2d 1, 803 N.W.2d 623. "Additionally, whether a defendant's undisputed statements and actions in a criminal proceeding constitute waiver of a statutory right is a question of law for our independent review." *Id.*, *citing State v. Ward*, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236.

B. The court failed to perform a proper waiver.

Wisconsin Statute § 971.04(l)(g) sets forth the right of criminal defendants to be present at the pronouncement of judgment. Specifically, Wis. Stat. §§ 971.04(1) and (l)(g) state: "Except as provided in subs. (2) and (3), the defendant shall be present ... [a]t the pronouncement of judgment and the imposition of sentence." *See State v. Koopmans,* 210 Wis. 2d 670, 680, 563 N.W.2d 528 (1997); *State v. Soto*, 2012 WI 93, 1127-34, 343 Wis. 2d 43, 817 N.W.2d 848.

The defendant in *Koopmans* failed to show up to her sentencing hearing and the sentencing court found that she waived her right to appear by knowingly and voluntarily failing to be present. *Koopmans*, 210 Wis. 2d at 673. The Wisconsin Supreme Court considered whether a "defendant may waive his or her statutory right pursuant to Wis. Stat. § 971.04(1) (1995-96) to be present at sentencing by knowingly and voluntarily being absent from the proceeding." *Id*. at 672. The court held that "a defendant may not waive his or her statutory right to be present at sentencing even, if the waiver is made knowingly and voluntarily." *Id*.

The Wisconsin Supreme Court clarified *Koopmans* in *State v. Soto*, 2012 WI 93. *Soto* addressed Wis. Stat. § 971.04(l)(g) in the context of a plea hearing conducted via videoconferencing, where the defendant and his attorney appeared in person in the courtroom but the judge appeared via video from a courtroom in

a different county. *Id.*, ¶¶6-7. The Court in *Soto* interpreted Wis. Stat. § 971.04(l)(g) and *Koopmans* to mean that a defendant may waive, but not forfeit, the statutory right to be in the same courtroom as the presiding judge during plea and sentencing hearings. *Id.*, ¶44. "Therefore, if this right [to be present in the courtroom with the judge] is to be relinquished, it must be done by waiver, the intentional relinquishment of a known right." *Id.*, ¶40 (internal quotations omitted).

In other words, "a valid waiver that intentionally relinquishes a right must be done with actual knowledge of the right being waived." *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶36, 325 Wis. 2d 135, 785 N.W.2d 302. For example, in a case involving the right to a jury trial, our supreme court explained that in order to qualify as a valid waiver, the defendant "must waive the right knowingly, intelligently, and voluntarily, with 'sufficient awareness of the relevant circumstances and likely consequences.'" *State v. Smith*, 2012 WI 91, ¶54, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). This affirmative relinquishment of a right requires a colloquy from the court regarding the right implicated. The court "shall ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. In so doing, questions should be asked to suggest to the defendant that he has the option of refusing to employ videoconferencing[.]" *State v. Anderson*, 2017 WI App

17, ¶33, 374 Wis. 2d 372, 396, 896 N.W.2d 364, 375, quoting *Soto*, 2017 WI App at ¶48.

Further, the court in *Soto* set forth two requirements when a plea hearing and sentencing are conducted simultaneously. First, "the judge should enter into a colloquy with the defendant that explores the effectiveness of the videoconferencing then being employed." *Id.*, ¶46. Second, the court must determine whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. *Id*.

The defendant in *Soto* was found to knowingly waive his right to be physically present in the same courtroom as the judge where the court questioned him about the sound and video quality of the videoconferencing and allowed him to withdraw his plea before moving on to sentencing. *Id*. at ¶47.

In Mr. Rice's case, the following basic principles apply:

- Wisconsin Statute § 971.04(l)(g) provides a defendant an absolute right to be physically present in the same courtroom as his sentencing judge.
- This right may be waived but not forfeited.
- If no valid waiver of the right to be present at sentencing occurred, then the defendant is entitled to resentencing.

- When videoconferencing is at issue, the court must ascertain its effectiveness to ensure the defendant can adequately participate in the proceedings.

Here, the facts and law applicable to Mr. Rice's claim for resentencing fall somewhere between *Koopmans* and *Soto*. *Soto* sets a "fairly low standard" to be met to demonstrate proper waiver under Wis. Stat. § 971.04(l)(g). As in *Koopmans*, the record is indisputable that the sentencing court conducted no colloquy with Mr. Rice about his right to be physically present or his knowing, intelligent, and voluntary waiver of his right to appear in person. Like *Soto*, on the other hand, Mr. Rice's Wis. Stat. § 971.04(l)(g) proceeding utilized videoconferencing with the defendant in jail and the judge in the courtroom. In addition to failing to conduct a waiver, the sentencing court engaged in no colloquy with Mr. Rice about the "effectiveness of the videoconferencing." *See Soto*, 343 Wis. 2d 43, 46.

Mr. Rice was not asked if he "was able to see, speak to and hear the judge and that the judge [could] see, speak to, and hear the defendant and counsel." *Id.* The sentencing court also failed to "ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing" or communicate that Mr. Rice had "the option of refusing to employ videoconferencing for a [sentencing] hearing at which judgment will be pronounced." *Id.*

Because the court failed to conduct any colloquy as required in *Soto* and *Koopmans,* he is entitled to resentencing.

C. Mr. Rice retained the right to appear in person despite the COVID-19 orders and was not required to affirmatively assert his right to appear in person.

The circuit court's ruling on Mr. Rice's postconviction motion was legally erroneous in that it failed to address the proper legal standard, instead suggesting that the court was somehow relieved of its statutory duties during the COVID-19 pandemic.

While the pandemic brought with it an order suspending in person hearings for a time, this did not alleviate the requirement for the court to obtain a waiver. Practically speaking, had the court conducted a waiver, Mr. Rice may have asserted his right to be present, meaning he would have to wait until the court returned to in-person hearings before he had an in-person sentencing hearing. Regardless, his retention of the right was not suspended because of the COVID-19 orders.

Additionally, the court's order denying postconviction relief erroneously shifted the burden to Mr. Rice to affirmatively assert the right to appear in person, when the duty remains on the court to conduct a colloquy, not on the defendant to assert the right. (44:1; App. 3). Contrary to the court's assertion, Mr. Rice was not required to object based on the

COVID-19 orders, as the order did not suspend his right to appear.

The court was still required to confirm that Mr. Rice understood he retained the right to appear and was waiving the same. *See Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶36, 325 Wis. 2d 135, 785 N.W.2d 302. (To establish a valid waiver the party relying on waiver must prove that the waiving party knew of the right being waived.)

Based on *Anderson* and *Soto*, a circuit court attempting to conduct a sentencing hearing via videoconferencing is required to first inform the defendant that they do, in fact, have the right to appear in person and then ascertain whether or not they are affirmatively waiving that right. No such colloquy was done by the court in this case and the COVID-19 order should not be considered waiver of this right.

Given the requirements from *Soto* and *Koopmans* are absent in this case, Mr. Rice's rights under Wis. Stat. § 971.04(l)(g) were violated and he is entitled to resentencing.

II. Mr. Rice presented a new factor warranting sentence modification to the circuit court: that he has a substance abuse need rendering him eligible for the Substance Abuse Program.

A. Legal principles and standard of review.

A circuit court has inherent authority to modify a criminal sentence based on a "new factor." *State v. Harbor,* 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. Deciding a motion for sentence modification based on a new factor is a two-step inquiry. First, the defendant has the burden to demonstrate by clear and convincing evidence that a new factor exists as a matter of law. *Id.,* ¶6. Then, if a new factor exists, the circuit court exercises its discretion to determine whether the new factor justifies modification of the sentence. *Id*.

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, 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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The purpose of sentence modification is to correct unjust sentences. *Harbor*, 333 Wis. 2d, ¶51.

Whether a fact or set of facts constitutes a new factor is a question of law reviewed independently on appeal. *Harbor*, 333 Wis. 2d 53, ¶33. However, the

determination of whether a new factor warrants sentence modification involves the circuit court's exercise of discretion, and therefore, is reviewed under an erroneous exercise of discretion standard. *Id*.

Eligibility for programming, such as the Earned Release Program, is part of the required findings the court must make at sentencing hearings where a defendant is sentenced to a bifurcated sentence. *See* Wis. Stat. §§ 973.01(3g), 302.05(3)(a)2.

B. Mr. Rice demonstrated the existence of a new factor as a matter of law.

The first part of the two-part test for sentence modification requires the defendant to show the existence of a new factor by clear and convincing evidence. *Harbor*, ¶36. Mr. Rice has met his burden.

1. Mr. Rice's criminal history and DOC's determination of Mr. Rice's substance abuse needs is highly relevant to the imposition of sentence.

While Mr. Rice's actual substance abuse needs were in existence at the time of sentencing, they were unknowingly overlooked by both the court and the parties. The court at sentencing based its SAP ineligibility determination on not having enough information about whether Mr. Rice was using drugs or selling drugs. (33:23). Despite the postconviction court's post hoc interpretations of the court's understandings, the sentencing court specifically

stated that it did not have enough evidence to show Mr. Rice had a substance abuse need, as it did not know whether or not Mr. Rice was a *user* or a *dealer*, and therefore rendered him ineligible for SAP. (33:23-24).

Unfortunately, the court overlooked the existence of Mr. Rice's past criminal record as a clear indication that he was a substance user, including a conviction for possession of THC under Wis. Stat. § 961.41(3g)(e) in 2012 and possession of cocaine (2nd+) in § 961.41(3g)(c) in 2020. (33:14-15). The court overlooked prior offenses that demonstrate use, not delivery.

Perhaps this was because neither of the parties were asking for a prison sentence and therefore eligibility for prison programming was not part of their recommendations. But, in any event, the court clearly had questions about whether or not Mr. Rice was a user or a dealer, questions which had answers, in the form of prior convictions, that the court unknowingly overlooked.

Additionally, the Department of Corrections staffing report,[2] which was not in existence at the time of sentencing, specifically details and confirms Mr. Rice's need for the eligibility in the Substance

[2] Mr. Rice also submitted, in the motion for reconsideration, the Division of Adult Institutions Policy and Procedure Manual in response to the state and court's assertions that the DOC classification report did not contain information that Mr. Rice had a substance abuse issue.

Abuse Program as a user. (42:17-18, 46:8-24). This classification report was not in existence at the time of sentencing.

Given the court's comments that it did not have enough evidence that Mr. Rice had a substance abuse need in addressing whether to make him eligible for the Substance Abuse Program and the concern about whether Mr. Rice was a user or a dealer (and not eligible for ERP), the overlooked prior record and new classification report would have been highly relevant to the court's determination of eligibility for the Earned Release Program at sentencing.

2. Mr. Rice's substance abuse needs warrants modification.

The court erroneously exercised its discretion by denying Mr. Rice's postconviction motion for sentence modification. In its written denial of both the postconviction motion, the court erroneously suggested that Mr. Rice was arguing that the court erroneously exercised its discretion in denying eligibility for ERP at the original sentencing. (44:2; App. 4). Later, in the order denying Mr. Rice's motion for reconsideration, the court ruled that the court didn't abuse its discretion because it had considered the prior offenses at sentencing when it determined that Mr. Rice was ineligible for the substance abuse program. (49:2; App. 6).

From the circuit court's analysis, it is clear that the court applied the wrong standard to this new factor under the second prong of the test.

The circuit court must make a record of its exercise of discretion. *See McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.*

The purpose of a court's sentencing comments is to explain the basis of the sentence and demonstrate that it properly exercised its sentencing discretion, and considered all of the necessary factors. *See State v. Bolstad*, 2021 WI App 81, ¶¶15-16, 399 Wis. 2d 815, 824, 967 N.W.2d 164.

Contrary to the court's ruling that the court considered the prior convictions, the sentencing court only mentioned *one* prior conviction and followed up with a question from the court about whether this conviction made him a user or a dealer. (33:23). The denial of the motion fails to address the fact that the sentencing court unknowingly overlooked that there were *two* prior convictions for simple possession and the fact that the sentencing court indicated it had questions about Mr. Rice's substance abuse needs based on this one conviction.

What's more, the postconviction court's ruling fails to consider the relevant information provided in the DOC classification report, namely how Mr. Rice has been empirically classified as having a substance

abuse issue, a fact that directly answered the sentencing court's question of whether Mr. Rice was a dealer or a user, in the context of his eligibility for programming. The sentencing court did not have this information and therefore could not have used it in its discretionary decision to deny eligibility for programming.

While the court still has the discretion to deny eligibility regardless of statutory eligibility, the court, in its discretion, determined Mr. Rice was eligible for the Challenge Incarceration Program. (33:24, 26). The court's grant of eligibility in one ERP program and the apparent 'lack of evidence' regarding eligibility for the other is important information and context that is also missing from the postconviction court's ruling.

The record suggests that the court had questions about statutory eligibility, not that it made a discretionary reason to deny the program despite statutory eligibility, based on all of the necessary and relevant information. The postconviction court failed to address the fact that, had the sentencing court known of the nature of Mr. Rice's prior convictions or possessed the report from DOC, it would have answered the court's very direct question in determining eligibility for ERP: whether Mr. Rice was a user (had a substance abuse issue) or a dealer (had no substance abuse issue). Additionally, the postconviction court erroneously failed to consider important information in its ruling, specifically how the Substance Abuse Program is consistent with the court's stated goals of protecting the public.

CONCLUSION

Counsel respectfully requests that this court vacate the sentence and remand for resentencing. Alternatively, Mr. Rice requests this court find that he has met his burden for demonstrating a new factor and remand for proper consideration of the same.

Dated this 6th day of May, 2022.

Respectfully submitted,

Electronically signed by Kelsey Loshaw

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 3,566 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of May, 2022.

Signed:
Electronically signed by
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