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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2022AP000244-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LEROY RICE JR.,

Defendant-Appellant.

ON APPEAL FROM 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

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Whether Mr. Rice is entitled to resentencing based on an alleged violation of his statutory right to appear in person at a sentencing hearing conducted on June 7, 2021 via videoconferencing due to the COVID 19 pandemic.

The Circuit Court denied this post-conviction resentencing motion.

This Court should affirm the decision of the Circuit Court.

2. Whether Mr. Rice is entitled to a sentence modification based on an alleged new factor.

The Circuit Court denied this post-conviction resentencing motion.

This Court should affirm the decision of the Circuit Court.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral

argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). As this is a one-judge appeal, a request for publication is prohibited by Wis. Stat. § 809.23(4)(b).

STATEMENT OF CASE AND FACTS

On August 23, 2020, Leroy Rice the Defendant-Appellant was charged in Kenosha County Circuit Court File Number 20CF1071 with domestic abuse related charges and violating a no contact order that had previously been imposed by a court in connection with a prior case (a violation of section 941.39(2)). On June 7, 2021, pursuant to a plea agreement, the Defendant pled guilty to Battery, Domestic Abuse, Repeater (count 1) and Violate No Contact Order (Misdemeanor Conviction), Repeater (count 4). On that same day the Defendant was sentenced. On count 1, the Defendant was given a prison sentence with 1 year and 6 months of initial confinement and 6 months of extended supervision consecutive to two prior cases. On count 4, the defendant was also given a prison sentence with 1 year and 6 months initial confinement and 6 months of extended supervision. This sentence was made consecutive to count 1 and the

defendant was made eligible for the Challenge Incarceration Program (CIP) but not the Substance Abuse Program (SAP) (33:24).¹ At this hearing on June 7, 2021, the Defendant appeared by videoconferencing (Zoom) due to the COVID 19 pandemic (33:2).

Mr. Rice filed a post-conviction motion for resentencing arguing that his statutory right to appear in person for sentencing was violated and arguing that his sentence should be modified based on substance abuse as a new factor (42).

The Circuit Court denied both post-conviction motions (44). This appeal follows.

ARGUMENT

1. Mr. Rice is not entitled to resentencing based on a violation of his statutory right to appear in person at his sentencing hearing conducted on June 7, 2021 because the Circuit Court appropriately followed the Wisconsin Supreme Court's COVID 19 related orders and the Kenosha County Operational Plan adopted pursuant to those orders.

This issue involves a question of statutory interpretation related to Wisconsin Statutes section 971.04 as well as the application of that statute to a particular

¹ On count 1, the defendant was not made eligible for any earned release programming. The nature of that conviction for a 940 offense made him statutorily ineligible for earned release programming (33:25-26).

set of facts and so this Court reviews the decision of the Circuit Court independently, but benefitting from the Circuit Court's analysis. *State v. Soto*, 2012 WI 93, ¶ 14, 343 Wis.2d 43, 817 N.W.2d 848.

Under the Wisconsin Constitution, Article Seven, Section Three, the Wisconsin Supreme Court has administrative and superintending authority over the courts and judicial system of the state and a duty to promote the efficient and effective operation of the state's judicial system. *Wis. Const. Art. VII, § 3*. When the Wisconsin court system was faced with the unique and systematic challenge of operating during the COVID 19 pandemic, the Wisconsin Supreme Court issued a variety of Orders on Court Administration beginning on March 22, 2020. Order of the WI Supreme Court dated March 22, 2020—*In re the Matter of Jury Trials During the COVID 19 Pandemic*. The State attached the relevant Wisconsin Supreme Court orders to the State's response to the defendant's postconviction motion filed in the Circuit Court on January 18, 2022 (43). Pursuant to the orders of the Wisconsin Supreme Court, Kenosha County developed an operational plan that was in effect at the time of Mr. Rice's plea and sentencing (43:Attachment 6).

The State acknowledges that prior to the defendant being sentenced on June 7, 2021, he did not waive on the record his right to be personally present for sentencing and he was not specifically questioned about the effectiveness of videoconferencing; however, he is not entitled to resentencing on this basis because the Circuit Court was following Kenosha County's Operational Plan (43:Attachment 6). This plan was created pursuant to Wisconsin Supreme Court orders in response to the COVID 19 pandemic and it was approved on July 23, 2020 and, therefore, was in effect for the entire pendency of Mr. Rice's case which was filed on September 22, 2020 (2). The Kenosha County Operational Plan provided for remote hearings in the absence of an objection or specific request by the defendant, and, on June 7, 2021, Mr. Rice did not object to appearing remotely or request to appear in person. Furthermore, there is no evidence in the plea and sentencing transcript that there were issues with the videoconferencing technology.

In sum, the Circuit Court did as it was supposed to do in light of the COVID 19 pandemic, the Wisconsin Supreme Court Orders, and the Kenosha County Operational Plan that was in effect during the entire pendency of Mr. Rice's case

and for these reasons Mr. Rice's request for resentencing was appropriately denied.

2. Mr. Rice is not entitled to a sentencing modification because there is no "new factor," and, even if there were, the new factor alleged by the defendant does not justify modification of the sentence.

A. Standard of Review

A motion for resentencing depends on a two-step inquiry. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W. 2d 828. First, the Defendant must demonstrate by clear and convincing evidence that a "new factor" exists. *Id.* Whether a fact or set of facts constitutes a "new factor" is a question of law that the appellate courts review independently. *Id.* ¶ 33. Second, the Defendant must demonstrate that the new factor justifies the modification of the sentence. *Id.* ¶ 37. The determination of whether that new factor justifies sentence modification is committed to the discretion of the Circuit Court and that decision is reviewed for erroneous exercise of discretion. *Id.* ¶ 33.

B. Mr. Rice has not shown by clear and convincing evidence that there is a "new factor."

A new factor is a "fact or set of facts highly relevant to the imposition of a sentence, but not known to the trial judge at the time of sentencing either because it

was not then in existence or because, if it was in existence, it was unknowingly overlooked by both parties." *Id.* ¶ 40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (Wis. 1975)).

In the Defendant-Appellant's brief, Mr. Rice argues that his sentence should be modified based on the existence of a "new factor" which was ignored by the trial court. This new factor that Mr. Rice argues warrants a sentence modification is his alleged substance abuse. The trial court did not actually ignore this argument, but instead found that the past drug convictions were not enough information to show that Mr. Rice had a substance abuse problem (33:23). In his postconviction motion, the defendant provided little additional information about his alleged substance abuse problem relying primarily on the aforementioned prior convictions and on an Inmate Classification Report (42:17-18). The Inmate Classification Report contains no detail about any substance use disorder that the defendant may have and is contradictory, at one point indicating: "COMPAS Substance Abuse Criminogenic Scale: Unlikely." *Id.* With this limited additional information, the defendant has not met his burden to show by clear and convincing evidence that he

has a substance abuse problem that is highly relevant to the imposition of a sentence.

C. The Circuit Court did not erroneously exercise its discretion when it decided that the alleged new factor did not justify a sentence modification.

In this case, Mr. Rice was convicted of Battery, Domestic Abuse, Repeater and Violate No Contact Order (Misdemeanor Conviction), Repeater. As was argued to the Circuit Court at the time of sentencing, Mr. Rice had a history of domestic abuse directed towards this same victim (33:14). The Court's clear focus for purposes of sentencing was the protection of the community which was certainly a sensible and relevant sentencing factor given that the defendant was being sentenced for a domestic abuse offense and for violating a no contact order with the victim (33:23 & 2-3).

As the Wisconsin Supreme Court in *Harbor* noted, "[t]he requirements for sentence modification are meant to 'promote [] the policy of finality of judgments [while at the same time] satisfy[ing] the purpose of sentence modification, which is the correction of unjust sentences.'" *Harbor*, ¶ 51 (quoting *State v. Franklin*, 148 Wis.2d 1, 9, 434 N.W.2d 609 (Wis. 1989)). The defendant has no inherent right to a sentence modification, and the State

sees no injustice in the Circuit Court's decision to emphasize the protection of the public and deny the defendant eligibility for a substance abuse program when sentencing the defendant for domestic abuse related offenses particularly in light of the defendant's abusive history.

CONCLUSION

Mr. Rice is not entitled to resentencing based on an alleged violation of his statutory right to appear in person at his sentencing hearing conducted during the COVID 19 pandemic because the Circuit Court followed the orders of the Wisconsin Supreme Court and the Kenosha County Operational Plan in conducting the hearing using videoconferencing. Mr. Rice is also not entitled to a sentence modification based on a new factor because the limited information he presented to indicate that he has a substance abuse problem does not actually meet the legal standard for a new factor and because, even if it did, the Circuit Court did not erroneously exercise its discretion when deciding that the new factor Mr. Rice claimed did not justify a sentence modification. For these reasons, the decision of the Circuit Court should be affirmed.

Respectfully submitted this 18th day of July, 2022.



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.25 inch margin on left and right sides and 1 inch margins on the top and bottom. The length of this brief is 1,779 words, 10 pages.

Dated this 18th day of July, 2022.



Carli A. McNeill
Deputy District Attorney

CERTIFICATE OF EFILE/SERVICE

I hereby certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of July, 2022.



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