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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Rice is Entitled to Resentencing.

A. The court was required, but failed, to obtain an explicit waiver of Mr. Rice's right to appear in person.

The state argues that the approval of Kenosha County's Operational Plan and Mr. Rice's failure to object to a remote hearing should result in denial of the motion for resentencing. (State's Brief at 5). This is a fundamental misunderstanding of Mr. Rice's argument and the constitutional and statutory right to be present.

Mr. Rice is not challenging the Operational Plan that sets forth the procedure for objecting to a remote hearing. However, the Operational Plan's procedure for objecting assumes that the defendant has been made aware that he actually has the right to appear in person and is asserting that right or affirmatively waiving the same.

Contrary to the state's position, while an unprecedented pandemic may have temporarily suspended in-person hearings, it didn't suspend the right of the defendant to demand the same, nor did it alleviate the court's responsibility to fulfill its duty to inform the client of the right *and* to perform a proper colloquy for waiver before proceeding remotely. The state's brief fails to address the fact that there is

nothing in the COVID orders that remove the right to appear in person at sentencing under Wis. Stat. § 971.04(l)(g).

Because a defendant cannot forfeit the right to appear in person, the court must perform a colloquy to ensure an affirmative waiver of the right after being advised of the same. *See Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶37, 325 Wis. 2d 135, 785 N.W.2d 302; *State v. Soto*, 2012 WI 93, ¶¶40, 44, 343 Wis. 2d 43, 817 N.W.2d 848; *State v. Anderson*, 2017 WI App 17, ¶33, 374 Wis. 2d 372, 896 N.W.2d 364.

Additionally, the state's argument that the Operational Plan suspended right to appear in person fails to address that the Operational Plan indicates that suspension of in-person proceedings are subject to exceptions. Specifically, the Operational Plan indicates an exception where technology is not adequate to address proceedings as necessary to protect the constitutional rights of criminal defendants. (*See* 43:10). This is further unrefuted support that the Operational Plan modified the operating procedures during the pandemic, but did not suspend the statutory and constitutional rights of a defendant.

Here, the court did not, as the state asserts, "[do] as it was supposed to do" and ensure that Mr. Rice was affirmatively waiving a known right. (State's Brief at 5). The Operational Plan and its procedures for objecting in the orders were not a sufficient conduit for the court's requirement to do so.

B. Because Mr. Rice retains the right to appear, the court must inform him of the right and ascertain a waiver of the right is knowing, voluntary, and intelligent.

The state's brief concedes that the court failed to advise Mr. Rice of his statutory right to appear and was not specifically questioned about the effectiveness of videoconferencing. (State's Brief at 5).

Therefore, if this court finds that the court was, despite the temporary Operational Plan, required to inform the client of the right and to perform a proper colloquy for waiver before proceeding remotely, along with checking the effectiveness of the technology, Mr. Rice is entitled to resentencing as a result of the court's failure to meet these statutory and constitutional requirements.

II. Mr. Rice is entitled to sentence modification based on a new factor.

A. Mr. Rice's substance abuse needs are a new factor.

The state erroneously argues that the court found the past drug convictions were not enough information to show Mr. Rice had a substance abuse issue and his Inmate Classification Report does not meet the legal standard for a new factor. (State's Brief at 7).

As the parties agree, 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." *State v. Harbor,* 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828, (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Here, the prior convictions were overlooked, the classification report was not in existence, and the combination of the two was unknown to the court at the time of sentencing. Accordingly, Mr. Rice has proved the existence of a new factor.

First, the state's characterization of the court's discussion of prior convictions is misplaced. During its sentencing remarks, the court acknowledged one prior conviction for possession of cocaine, following it up by commenting "I don't know whether you're using it for personal use or whether you were selling it." (33:23). The court did not, contrary to the state's argument, find that the past drug conviction was not enough information to show a substance abuse problem. Instead, the court overlooked that Mr. Rice had not one, but two prior, simple possession convictions, suggestive of use, not dealing. (33:14-15; Appellant's Brief at 18).

Second, the state's assertion that the Classification Report, which it alleges lacked detail, is not a new factor, is misguided. The state argues that the report doesn't have any information about

substance abuse disorders and contradicts itself saying that: "COMPAS Substance Abuse Criminogenic Scale: Unlikely." (State's Brief at 7).

This argument, however shows a lack of understanding regarding Department of Corrections procedures for inmate classification. Per the Bureau of Classification and Movement at the DOC, classification regarding substance abuse diagnoses is determined by multiple factors. The COMPAS is not the determining factor for determining substance abuse issues, as it is mostly a subjective test. In addition to the COMPAS evaluation, there is also an interview portion of DOC assessments. (46:12-13). If there is some discrepancy between the self-reported COMPAS and the interview, the department uses a professional alcohol and drug abuse assessor to determine the individual's needs. (46:6).

In this case, Mr. Rice has been classified, by a professional, as SUD-3, on a scale from 1-4, SUD-1 needing no structured group treatment and SUD-4 (cognitive behavior therapy and ancillary treatment recommended). (42:18; 46:6). Mr. Rice has been classified, despite the COMPAS, as having a substance abuse need.

Finally, the state's argument fails to consider these two facts in combination: Mr. Rice has been classified by professional evaluations as having a recognizable substance abuse need, which is consistent with his prior record of convictions for simple possession. Given the fact that the court had

questions about Mr. Rice's substance abuse needs, information that directly addressed these issues are highly relevant to the determination of eligibility for programming.

B. Mr. Rice's substance abuse needs warrant modification.

The state argues that the circuit court's clear focus at sentencing was on protection of the community. (State's Brief at 8). While this may be true, the state's position does not account for the court's comments regarding unanswered questions as to whether Mr. Rice had a substance abuse problem and would, therefore, be statutorily eligible for the Substance Abuse Program.

Given that the court made Mr. Rice eligible for the Challenge Incarceration Program, it seems highly unlikely that, if the court had been aware of and considered evidence that supported Mr. Rice's substance abuse needs, it would have still denied him eligibility for the Substance Abuse Program.

The information in the classification report along with the prior convictions for simple possession constitute a legal new factor. Mr. Rice is in need of substance abuse treatment. The Department of Corrections has a program available to him that will provide evidence-based rehabilitation, which is consistent with the court's desire to protect the public. Mr. Rice asks this court to modify his sentence based on the existence of a new factor by amending the

Judgment of Conviction and grant for eligibility for the Substance Abuse Program.[1]

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 modify his sentence as requested.

Dated this 2nd day of August, 2022.

Respectfully submitted,

Electronically signed by Kelsey Loshaw

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[1] While Mr. Rice asked for remand in the conclusion of his opening brief, it would be appropriate for this court, given the standard of review, to decide both prongs of the new factor test. *Harbor*, 333 Wis. 2d 53, ¶33 (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).

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 1,428 words.

Dated this 2nd day of August, 2022.

Signed:
Electronically signed by
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