STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMBER C. DEBREE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction,
the Honorable Bruce E. Schroeder, Presiding,
and an Order Denying Postconviction Relief
and an Order Denying Reconsideration,
the Honorable Chad G. Kerkman, Presiding,
Entered in the Kenosha County Circuit Court

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did Amber Debree's postconviction motion present a new factor that warranted modification of her sentence?

The postconviction court concluded that Ms. Debree's motion did not present a new factor. This court should conclude that Ms. Debree has proven a new factor as a matter of law and remand for the circuit court to exercise discretion in ruling on the merits of the claim.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. § 809.23(1)(b)4; *see also Waukesha County v. Genevieve M.*, 2009 WI App 173, ¶5, 322 Wis. 2d 131, 776 N.W.2d 640. Oral argument is not requested.

STATEMENT OF THE CASE AND FACTS

On June 23, 2021, Amber C. Debree pleaded no-contest to disorderly conduct with domestic abuse assessment, a Class B misdemeanor, in violation of Wis. Stat. §§ 947.01(1) and 973.055(1). (14:1; 21:5). On the same date, the Honorable Bruce E. Schroeder withheld sentence and placed Ms. Debree on probation for a term of two years. (14:1; 21:11).

The charge in this case arose from an altercation between Ms. Debree and her husband. (2:2). The two had been fighting and arguing most of the day, and it became physical prior to the husband calling the police. (2:2). The husband stated that Ms. Debree had hit him several times and that he had recorded a portion of the altercation. However, he stated that he did not want Ms. Debree to get in trouble and her hitting him did not cause him pain. (2:2).

In exchange for Ms. Debree's plea to the single count of disorderly conduct, the state agreed to move to dismiss the repeater enhancer and make no specific sentencing recommendation. (21:2). The state's sentencing argument focused on the facts alleged in the complaint, and noted Ms. Debree's prior criminal convictions. Specifically, the state mentioned a 2012 bail jumping conviction, multiple disorderly conduct convictions in 2013, and a number of theft, forgery, bail jumping and retail theft convictions. (21:6). In total, there were "about six or seven individual convictions." (21:6). The state also mentioned that Ms. Debree had been on probation several times, the most recent of which was in 2017, which she completed in 2018. (21:6).

The defense requested that the circuit court consider imposing a fine only. (21:7). Prior to issuing its sentence, the circuit court, the Honorable Bruce E. Schroeder, presiding, provided Ms. Debree an opportunity for allocution, which she exercised. (21:7). Ms. Debree explained that her conduct in this case

occurred after she found out that her twenty-one-year-old daughter was pregnant and that her husband was the father of the baby. (21:7-8). While Ms. Debree recognized that it was a "touchy subject," she explained, "I need [the court] to know why I flipped out that day." (21:7-8). Ms. Debree also stated that her actions were not appropriate and she wanted to take full responsibility by entering a plea. (21:8).

During its sentencing discussion, the circuit court asked Ms. Debree several questions. These questions included whether she had been accused of any unlawful act in her lifetime "in Wisconsin, Illinois or anywhere else[,]" other than the offenses previously mentioned by the state, whether she had been in jail at any other point in time, whether she had been in the military, and various questions about her children. (21:8).

Next, the circuit court went on to comment on the statements made by defense counsel regarding Ms. Debree taking responsibility by pleading guilty. The court described these comments as "so bogus." (21:9). The court then detailed a situation that occurred in another case, in which a man who had "committed a vicious, senseless murder, but unlike the usual course of things," the man "really accepted responsibility" by pleading guilty without counsel and without a plea deal. (21:9). It went on to describe the other "99.99 percent of the people who come through here," who only say they are accepting responsibly, but who are instead accepting a deal from the district attorney, "like [Ms. Debree]." (21:9-10). The court

further explained that this was "number one" of its considerations. (21:10).

The court then moved on to its "number two," consideration, discussing Ms. Debree's criminal record. The court described it as a "terrible, really a terrible record." (21:10). The court stated that it heard "all this about [her] new life and everything" but that it was thinking "oh, come on. What about this past background?" (21:10).

As to Ms. Debree's statement at sentencing, the circuit court commented on the permissive nature of the culture Ms. Debree lived in, seemingly referring to what she had found out about her husband. (21:10). The court stated, "So while I certainly understand what may have provoked this incident, your behavior is not acceptable and certainly not lawful." (21:11). The court also commented that it ordinarily would have sent someone with Ms. Debree's criminal history to jail. However, the court hoped she would decide to live in conformity with the law, and therefore placed her on probation for a term of two years, which was the maximum term. (21:11); *see* Wis. Stat. § 973.09(2)(a)1.

Ms. Debree filed a timely notice of intent to seek postconviction relief from the judgment of conviction pursuant to Wis. Stat. § 809.30. Her sole claim for postconviction relief was sentence modification based on a single new factor.

In her postconviction motion, Ms. Debree argued that evidence that she was a survivor of domestic abuse at the hands of her husband—the victim in this case—was a new factor warranting sentence modification. (26:4; App. 6). Ms. Debree posited that the sentencing court had been unaware of her husband's prior charges because the parties had unknowingly overlooked the information and its relevance to the sentencing in this case. (26:4-6; 37:5, 7; App. 6-8, 14, 16). Ms. Debree requested that the court modify her term of probation to one year. (37:11; App. 20).

The circuit court, the Honorable Chad G. Kerkman, presiding, held a hearing on Ms. Debree's postconviction motion on June 7, 2022. At the hearing, the state agreed with Ms. Debree that the new information constituted a new factor and that it warranted the requested modification. (37:13-14; App. 22-23). The postconviction court however, disagreed, and concluded that because Ms. Debree had not established that she herself was unaware of her status as a survivor of domestic abuse, or that her attorney unknowingly overlooked it, it was not a new factor. Specifically, the court determined:

> I need to know whether "if" it was unknowingly overlooked and I don't know that that's true. Because I don't have a defense attorney here.

> So I'm making my decision and I'm denying the motion. Feel free to appeal to the Court of Appeals, but that's my decision. There's no showing that the defense attorney unknowingly overlooked this factor because she should have known about this. She should have talked to her client. That's what a good defense attorney would have done. That's what a competent defense attorney would have done. And I don't have a defense attorney here telling me otherwise. That's my decision.

(37:16-17; App. 25-26).

Ms. Debree moved to extend the time to file a notice of appeal[1] and filed a motion for reconsideration in the circuit court on June 28, 2022. (38:1; 40; App. 29). The motion for reconsideration claimed that Ms. Debree was entitled to reconsideration due to the postconviction court's manifest error of law, and addressed the controlling case law on the term "unknowingly overlooked" in the context of a new factor. (38:2-4; App. 30-32). Specifically, the motion addressed the court's apparent misunderstanding that the new information had to be unknown to the parties, as well as to the court, or that the motion needed to allege ineffective assistance of counsel. (38:2-4; App. 30-32).

The postconviction court then ordered the state to file a response by July 19, 2022. (*See* 43:1; App. 34). The state responded to Ms. Debree's motion for

[1] This court granted Ms. Debree's motion to extend the time to file a notice of appeal. (41:1-2).

reconsideration by letter on July 19, 2022, noting that it had no objection to the motion at the hearing on June 7, and continued to have no objection due to its belief that a new factor existed and the requested modification of the term of probation was appropriate. (42:1).

In a written decision filed on August 3, 2022, the postconviction court again concluded that Ms. Debree had not established the existence of a new factor and accordingly denied the motion for reconsideration. (43:2; App. 35). The court's written decision, for the first time addressed the evidence presented in Ms. Debree's postconviction motion. (43:2-3; *see generally* 37; App. 22-26, 35-36).

The postconviction court analyzed the allegations contained in the police reports attached to Ms. Debree's postconviction motion and again concluded that Ms. Debree had not established a new factor. (43:3; App. 36). Specifically, the court wrote that Ms. Debree "has not demonstrated by clear and convincing evidence that [she] has a 'history as a survivor of domestic abuse' that would affect the sentencing court's decision to place the defendant on probation for two years with no jail time." (43:3; App. 36). The court also seemingly concluded that Ms. Debree could not be a victim of domestic abuse considering: "the defendant's claim of being a 'survivor of domestic abuse' is contradicted by the fact that the defendant is still married and still living with her husband. She cannot be both a 'survivor' and currently involved in a domestic abuse relationship at the same

time." (43:4; App. 37 (internal record citations omitted)).

The postconviction court also determined that Ms. Debree's motion took its questions at the postconviction hearing out of context and concluded that it understood the law correctly. Finally, the court concluded as follows:

> In conclusion, the defendant is asking this court to read more into her provided police reports than what is there to make a finding of "a history as a survivor of domestic abuse." The defendant continues to live with her husband. The defendant was aware of her relationship with her husband at the time of the sentencing but is arguing that the "relevance" of her relationship was unknowingly overlooked by all parties. The sentencing judge was aware of the facts underlying the defendant being "triggered" and chose to place the defendant on probation instead of imposing jail time for the numerous criminal convictions the defendant has, which are unrelated to her relationship with her husband.

(43:6-7; App. 39-40).

This appeal follows.

ARGUMENT

I. The circuit court erred in denying Ms. Debree's postconviction motion and motion for reconsideration when it concluded that she did not present a new factor.

A. Legal standard.

A motion for sentence modification presents a two-part inquiry. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the circuit court must determine whether a new factor exists. *See id.*, ¶¶33, 36. Second, if the circuit court finds that a new factor exists, it must exercise its discretion in determining whether the new factor justifies sentence modification. *See id.*, ¶¶33, 37.

Whether a new factor exists presents a question of law that appellate courts review independently. *State v. Scaccio,* 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. A defendant seeking a sentence modification must demonstrate, by clear and convincing evidence, that there is a new factor to justify the modification. *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). 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. at 8 (citation omitted).

"[T]he defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *Harbor*, 333 Wis. 2d 53, ¶38. The determination of whether a new factor warrants sentence modification is reviewed for erroneous exercise of discretion. *Id.*, ¶33.

B. Ms. Debree's postconviction motion presented a new factor.

In her postconviction motion, Ms. Debree argued that the sentencing court was unaware of her husband's—the victim in this case—prior history of committing domestic abuse against her and of other concerning behaviors for which Ms. Debree made reports to law enforcement. The postconviction court focused on why the information was unknowingly overlooked, believing that defense counsel should have been a called to testify. (37:6; App. 15) The court therefore failed to apply the correct standard in finding that this newly presented information was not a new factor.

First, Ms. Debree established that her status as a victim of domestic abuse by the victim in this case would have been highly relevant to the imposition of sentence. The sentencing court questioned Ms. Debree regarding her background and criminal history—it wanted to know more about Ms. Debree and why she committed crimes in the past. (*See* 21:8, 10). The sentencing court specifically asked, "what caused all those"—referring to her prior convictions. (21:10). The

information newly presented in Ms. Debree's postconviction motion answers, in part, the sentencing court's question. Ms. Debree's criminal record and some of the reports she made to police regarding her husband's violence toward her occurred very close in time. (*See* 21:6; 27; 28). Survivors of domestic violence often have long-lasting trauma, which causes them to suffer from PTSD and affects their lives in myriad ways, particularly in how they respond to stress. (26:5-6; App. 7-8). Therefore, as Ms. Debree argued in her postconviction motion, the new information mitigates Ms. Debree's culpability and provides an explanation, not an excuse, for her reaction. (26:6; App. 8). Ms. Debree established, and the state conceded, that this information was highly relevant. (26:5-6; 37:13; App. 7-8, 22).

Second, it is undisputed that the sentencing court was unaware of the previous history between Ms. Debree and her husband because it was not presented by either party at sentencing. (37:13-14; App. 22-23). The state conceded as much at the postconviction hearing. (37:13-14; App. 22-23).

Third, Ms. Debree established that the information was unknown to the sentencing court because it was unknowingly overlooked by the parties. The state represented at the postconviction hearing that it had unknowingly overlooked the information because it was not aware of Ms. Debree's husband's earlier convictions for domestic abuse against her. (37:15; App. 24). Further, the information was unknowingly overlooked by the defense at sentencing

because its relevance was not known until after the parties had made their arguments, Ms. Debree had the opportunity for allocution, and the sentencing court had begun discussing its sentencing decision. (*See* 21:10-11).

The term "unknowingly overlooked" does not imply, by its plain language that it must be unknown. *See Franklin*, 148 Wis. 2d at 8. The definition of a new factor includes that the information must have been *unknown* by the sentencing court, but does not use the same language for the parties. *See id.* Therefore, to interpret "unknowingly overlooked" as meaning the same thing as "not known" is not a reasonable interpretation. The case law supports Ms. Debree's and the state's interpretation in this case.

The fact that the parties were either unaware, as the state was, or unaware of the significance of the information to sentencing, as the defense was, is sufficient. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69; *State v. Vaughn*, 2012 WI App 129, ¶36, 344 Wis. 2d 764, 823 N.W.2d 543 (finding a "new factor" by virtue of the fact that the sentencing court was unaware of the newly presented information at sentencing). In *Rosado*, the information was not "unknowingly overlooked" because defense counsel had notice from a hearing prior to sentencing that the circuit court viewed the information presented in the postconviction motion to be highly relevant to the imposition of sentence. There, the circuit court delayed sentencing specifically in order to provide the defense

an opportunity to respond to or rebut information that had been presented by the state and which the court considered relevant to sentencing. *Id.* at 287.

At sentencing, counsel made a strategic decision not to present the defendant's version of events as to the issue the court had made clear was highly relevant. *Id.* at 289. Because it was clear to the defense prior to and at sentencing that the information would be highly relevant and they chose not to present it, it was not considered to be a new factor for purposes of postconviction. *Id.* at 288-89.

In addition, there are multiple cases where courts have found new factors even when the new factor is something that defense counsel could have been aware of at the time of sentencing. *See State v. Armstrong*, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860 (finding a new factor when a sentence was imposed based on erroneous belief about how much credit defendant would receive); *State v. Ralph*, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990) (finding that a codefendant's prior jail time was a new factor when parties compared codefendant's sentencing recommendations at sentencing hearing). These cases did not require an ineffective assistance analysis or testimony by counsel as to why the information was unknowingly overlooked. *See Armstrong*, 354 Wis. 2d 111; *Ralph*, 156 Wis. 2d 433.

In *Armstrong*, although the parties were aware, and informed the sentencing court, of the amount of sentence credit Armstrong had, they did not consider

or determine how the sentence credit would apply given his sentence structure. *Armstrong*, 354 Wis. 2d 111, ¶14. Despite the sentencing court asking the parties how sentence credit would "calculate in," repeatedly stating that Armstrong had a lot of credit, and appearing concerned that the time Armstrong would be serving in custody would not be long, the defense did not ask for a continuance in order to provide the court with the correct information that was at its disposal. *See id.*, ¶¶15-16. Applying these cases to the situation at hand, Ms. Debree established a new factor because the information was not purposefully left out, but rather unknowingly overlooked.

Given these facts established by the record at sentencing, this court concluded that Armstrong had presented a new factor. *Id.*, ¶¶17-18. The issue of sentence credit was highly relevant to the imposition of the sentence, and that Armstrong had demonstrated by clear and convincing evidence the existence of a new factor, which was that he was entitled to less sentence credit due to his sentence structure. *Id.*

Therefore, the postconviction court's focus at the hearing was incorrect. The court asked Ms. Debree's postconviction counsel, "So my question is why did [defense counsel] unknowingly overlook the fact that Ms. Debree was a victim of domestic violence when it's a defense attorney's job to meet with their client and try to get a context of her relationship with the victim and things like that?" (37:6; App. 15). The court's

conclusion also displayed its misunderstanding of the law:

> There's no showing that the defense attorney unknowingly overlooked this factor because she should have known about this. She should have talked to her client. That's what a good defense attorney would have done. That's what a competent defense attorney would have done. And I don't have a defense attorney here telling me otherwise.

(37:16-17; App. 25-26). It is not necessary to prove ineffective assistance of counsel to establish a new factor based on unknowingly overlooked information. *See, e.g.*, *Armstrong*, 354 Wis. 2d 111; *Ralph*, 156 Wis. 2d 433.

Further, the postconviction court failed to remedy its mistake of law on reconsideration. In its nearly seven-page written decision, the court considered and rejected Ms. Debree's reconsideration arguments in one short paragraph. (43:3; App. 36). The court stated that Ms. Debree's argument that it had applied the incorrect standard in holding that she must demonstrate *why* the newly presented information was unknowingly overlooked was "taken out of context." (43:4; App. 37).

The remainder of the decision critiqued Ms. Debree rather than focus on the evidence presented regarding her husband's multiple convictions for committing domestic abuse against her and her various reports over the years about his

behavior. The court's decision scrutinizes Ms. Debree, both on the basis of whether the court believed that she demonstrated sufficient victimization in the police reports that led to her husband's convictions, and whether she subsequently behaved appropriately so as to receive the court's designation as a "survivor." (43:2-7; App. 35-40). As such, the postconviction court's written decision denying Ms. Debree's motion for reconsideration does not remedy the court's misapplication or misunderstanding of the legal definition of a "new factor," which is apparent from the record at the postconviction motion hearing.

Therefore, this court should find that the previously unknown information that the victim in this case, Ms. Debree's husband, had committed acts of domestic abuse against Ms. Debree is a new factor as a matter of law.

C. The circuit court's denial of Ms. Debree's postconviction motion was not a valid exercise of discretion.

Where, as here, a defendant has proven a new factor, the second step is for the circuit court to exercise its discretion to determine whether sentence modification is warranted. *Harbor*, 333 Wis. 2d 53, ¶37. To the extent the postconviction court's comments could be construed as a denial of Ms. Debree's motion as to this second step, they are insufficient to constitute a valid exercise of discretion.

As explained above, Ms. Debree presented the postconviction court a new factor. The circuit court concluded, for various reasons, that each of these was not a new factor. First, in response to Ms. Debree's motion and the state's lack of objection to the motion, the court analyzed whether the newly presented information constituted a new factor, using the incorrect standard of *why* it was unknowingly overlooked by the parties. (37:4, 5, 6, 7, 8, 14; App. 13, 14, 15, 16, 17, 23). Next, in response to Ms. Debree's motion for reconsideration and the state's continued accord, the court analyzed the sufficiency of Ms. Debree's status as a victim and seemingly blamed her for her husband's actions of domestic violence.

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.* As a result of the postconviction court's mistaken focus on an incorrect standard of law and its unexplained focus on irrelevant critiques of Ms. Debree's actions and decisions, the court failed to properly exercise its discretion as to Ms. Debree's postconviction motion.

CONCLUSION

For the reasons stated above, Ms. Debree respectfully requests that this court reverse the denial of her postconviction motion and remand with directions that the circuit court consider, in its discretion, whether to modify her sentence.

Dated this 20th day of October, 2022.

Respectfully submitted,

Electronically signed by
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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 3,749 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 20th day of October, 2022.

Signed:
Electronically signed by
Laura M. Force
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Assistant State Public Defender