STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2022 AP 001311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMBER C. DEBREE

Defendant-Appellant.

ON APPEAL FROM
KENOSHA COUNTY CIRCUIT COURT,
CASE NO. 21 CM 360
THE HONORABLE BRUCE E. SCHROEDER,
PRESIDING,
AND ORDERS DENYING POSTCONVICTION RELIEF
AND RECONSIDERATION,
THE HONORABLE CHAD G. KERKMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

I. At sentencing, Defendant-Appellant Amber Debree did not mention being a domestic abuse victim. She then sought a modification of her sentence, arguing her prior victimization was a "new factor."

Is prior victimization a "new factor" when not mentioned at sentencing?

The Trial Court answered: "No."

Appellant argued: "Yes."

Respondent argues: "No."

STATEMENT ON ORAL ARGUMENT OR PUBLICATION

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). Publication is not necessary.

STATEMENT OF THE FACTS

Incident Leading to Underlying Charge:

On April 8, 2021, around 4:00 a.m., Kenosha Police responded to the Debree residence after Amber Debree hit her husband Zachary Debree (Zachary) with her fist, a vacuum cleaner, and a scooter. (R. 2:2). Zachary recorded part of the attack on his phone, which he showed to law enforcement, and had visible injuries consistent with what he'd reported. (R. 2:2). An eleven-year-old child also witnessed the incident and gave a statement to police. (R. 2:2). Debree was charged with disorderly conduct, domestic abuse, as a repeater. (R. 2:1).

Procedural Posture:

On June 23, 2021, Debree ultimately pleaded guilty to disorderly conduct, domestic abuse, without the repeater enhancer, and the state agreed to make no specific recommendation at sentencing. (R. 21:1-2). At sentencing, the state recited the facts as contained in the criminal complaint as well as her prior criminal convictions and the sentences

imposed, including "multiple disorderly conduct convictions", "a number of theft and forgery and bail jumping and retail theft convictions . . . about six or seven individual convictions", and that Debree had been "on probation several times." (21:5-6). Debree's attorney argued for a fine disposition and explained that Debree had "received some troubling news" the night of the incident "which led to her actions, but she knows that she acted in a manner that is improper and is taking full responsibility for that" and that Debree was "working to better herself since this incident." (21:6-7).

Debree addressed the court at sentencing, saying "I need you to know why I flipped out that day." (21:7-8). Debree then said that "that day I found out that my husband and my daughter are having a kid together, so that was very disturbing news." (21:7). Debree stated that her "actions were not appropriate" but "[t]hat's exactly why I am taking full responsibility." (21:7).

The sentencing judge cited Debree's lengthy criminal history but optimism that Debree would "reflect on not just this

episode but all the others when [Debree] got in trouble with the law and decide that [she] ha[s] to live in conformity with our laws" before placing her on probation for two years. (21:10-11).

Debree filed a motion seeking sentence modification on May 9, 2022, citing that because she'd been victimized by Zachary in the past, that this was a "new factor" warranting modification of her own sentence. (26:4). Specifically, Debree's postconviction motion argues that because Zachary was convicted of disorderly conduct, domestic abuse, in 2012, cited for disorderly conduct for a separate 2012 incident, and investigated for an incident that did not result in arrest in 2019, all with Debree listed as the complainant, these were "new factors." (26:4-5).

At the postconviction hearing, the postconviction judge pressed defense as to "why didn't Ms. Debree nor her attorney know that Ms. Debree was a victim of domestic violence" at the time of her sentencing. (37:4). Debree's attorney then acknowledged "Ms. Debree knew that she was a victim of

domestic violence, however, the importance to the sentencing process in this case was unknown." (37:4-5). The judge cited that "[a] new factor is something not known only to the judge, but to the parties" and denied the motion. (37:6, 16).

STANDARD OF REVIEW

Whether a defendant has presented facts that constitute a new factor is a question of law that this Court reviews independently of the trial court. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis.2d 53, 797 N.W.2d 828. "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court," and this Court reviews that determination for erroneous exercise of discretion. *Id*.

There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *State v. Gallion*, 2004 WI 42, ¶ 18, 270 Wis.2d 535, 678 N.W.2d 197.

ARGUMENT

I. THE POSTCONVICTION COURT PROPERLY DENIED DEBREE'S MOTION FOR SENTENCE MODIFICATION BECAUSE DEBREE HAS NOT ESTABLISHED A NEW FACTOR AS A MATTER OF LAW.

Courts use a two-step inquiry to evaluate new factor claims. A defendant must first "demonstrate by clear and convincing evidence the existence of a new factor." *Harbor*, 333 Wis. 2d 53, ¶ 36. A new factor is a "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 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)). "All of the parties" includes the defendant. *State v. Vaughn*, 2012 WI App 129, ¶ 35, 344 Wis.2d 764, 796, 823 N.W.2d 543; *Harbor*, 2011 WI at ¶¶ 40, 52, 333 Wis.2d at 74, 78; *see also State v. Kluck*, 210 Wis.2d 1, 7, 563 N.W.2d 468 (1997).

If an alleged new factor is premised on information the defendant had in his or her possession at the time of sentencing, the defendant's decision not to raise it at the sentencing hearing means that the information cannot constitute a new factor. A defendant's "failure to testify" when he is available "can only be interpreted as a conscious tactical choice." *Rosado*, 70 Wis.2d at 289. The fact that such a "knowing failure to testify deprived the trial court of the defendant's story does not transform his side of the story into a 'new factor' at the post-conviction hearing." *Id.*

The fact that information known to the defendant at the time of sentencing cannot be the basis of a new-factor claim has been repeatedly held by appellate courts. *See id.*; *State v. Crockett*, 2001 WI App 235, ¶ 14, 248 Wis. 2d 120, 131, 635 N.W.2d 673. In *Crockett*, the defendant claimed his sentence must be modified because there was a "lack of consensus among codefendants that Crockett was the primary shooter and [a] lack of corroboration with [a co-defendant's] claim that Crockett pressured [the co-defendant] to reload the pistol." *Id.*

The court of appeals agreed that these were not "new factors" – "[a]lthough the trial court may have 'unknowingly overlooked' these facts, Crockett does not claim that he was unaware of them as well. Therefore, these are not new factors." *Id.* The defendant had that information at the time of sentencing but chose not to reveal it until months later, and thus, the court rejected his claim that these were "new factors." *Id.*

"The existence of a new factor does not automatically entitle the defendant to sentence modification." *Harbor*, 333 Wis.2d 53, ¶ 37. After proving a new factor's existence, the defendant must prove that the new factor justifies sentence modification. *Id.* ¶¶ 37-38. "[I]f a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence. In making that determination, the circuit court exercises its discretion." *Id.* ¶ 37 (citation omitted). A circuit court correctly exercises its discretion when it "ma[kes] no error of law, and it explains its reason for

concluding that the facts [the defendant] presented did not justify modification of her sentence." *Id.* ¶ 63.

Upon receiving a postconviction motion requesting sentencing modification, a court "may either deny the motion if 'the motion and files and records of the action conclusively show that the person is entitled to no relief; or . . . 'grant a prompt hearing.'" *State v. Grindemann*, 2002 WI App 106, ¶19, 255 Wis.2d 632, 648 N.W.2d 507 (*quoting* Wis. Stat. § 974.06(3)).

A. The details Debree did not initially share at her sentencing cannot constitute a new factor warranting sentence modification.

Debree argues that her prior domestic abuse victimization by the victim in her own domestic abuse case constitute a new factor. However, as Debree acknowledges, she was aware of her status as a domestic abuse victim at the time of her own sentencing. Therefore, her prior victimization cannot constitute a new factor.

In *Rosado*, the court found that facts within the defendant's possession cannot constitute a new factor. *Rosado*, 70 Wis.2d at 288. There, the defendant was convicted of sexual intercourse with a minor. *Id*. At 282. Rosado had spent almost six months living with the minor in Puerto Rico prior to the incident for which he was convicted. *Id*. At 285. The victim's mother had testified about the event prior to initial sentencing, but the defendant did not. *Id*. The trial court considered this "Puerto Rican" affair an aggravating factor at sentencing. *Id*. at 287.

After sentencing, the defendant tried to argue that his "version of the Puerto Rican affair, about which he had never testified" constituted a new factor." *Rosado*, 70 Wis.2d at 288. Even though the defendant himself knew about it, the trial court did not. The supreme court held that because "the defendant was available to give his explanation of the Puerto Rican affair at [sentencing] . . . [his] failure to testify at [that] time can

only be interpreted as a conscious tactical choice." *Id.* at 288-89. The court added, "Simply because this knowing failure to testify deprived the trial court of defendant's story does not transform this side of the story into a 'new factor' at the post-conviction hearing." *Id.* at 289.

Debree's failure to mention her past victimization with the victim similarly "deprived the trial court of defendant's story." But for the same reasons as in Rosado, "this knowing failure . . . does not transform this side of the story into a 'new factor.'" *Id.* Debree and her attorney made a "conscious tactical choice" to allow Debree to present her purported reason for her actions the night of the incident, which she maintained at sentencing was because she allegedly learned her husband fathered a child with her daughter, provoking an enraged response by Debree.

Similarly, there is no evidence that Debree's prior victimization was "unknowingly overlooked" by all of

the parties just because it was not addressed at sentencing. Silence on the matter can occur for any number of reasons that have nothing to do with anyone unknowingly overlooking it. It is entirely possible that the state or the court was aware of the conviction and citation Zachary received in 2012, and considered it too dated or irrelevant for purposes of sentencing.

Courts have treated proffered information within the defendant's knowledge at the time of sentencing not a "new factor" justifying sentence modification for good reason – sound considerations of public policy and judicial efficiency should not permit unrevealed information to constitute a "new factor" and require a new sentencing hearing. Were the rule otherwise, a defendant could offer only selective information at a sentencing proceeding, chance, but fail, to receive a favorable sentence, and then assert relevant evidence requiring a new sentencing hearing.

Debree has failed to demonstrate the existence of a new factor that would be highly relevant to the imposition of sentence and thus fails on the first step of the two-step process. It is clear that *Rosado* and *Crockett* are direct and controlling authority on this issue: Information known to the defendant but not provided at the time of sentencing is not a new factor. Just because the defendant failed to fully argue or attempt to justify her reaction or reason for committing disorderly conduct by claiming to be previously victimized by her victim does not transform this into a "new factor" months later.

B. Even if Debree's prior victimization is a new factor, the court properly exercised its discretion in determining it does not justify sentence modification.

The postconviction court properly determined that Debree's prior victimization would not justify modification of her sentence, even if it was deemed a new factor. (43:5). A circuit court correctly exercises

its discretion when it "ma[kes] no error of law, and it explain[s] its reason for concluding that the facts [the defendant] presented did not justify modification of her sentence." *Harbor*, 333 Wis.2d 53, ¶ 63.

In this case, the postconviction court did not make an error of law in determining that the facts Debree presented did not justify sentence modification. The court explained its reasoning both at the hearing and in its written decision by highlighting that "the sentencing judge was clearly concerned about [Debree's] criminal record" to which Debree "failed to show how her relationship with her husband is relevant." (43:5-6).

CONCLUSION

For the foregoing reasons, the State requests this court to affirm the judgment from which this appeal has been taken.

Dated this 18th day of November, 2022

Respectfully submitted,

Signed:

Electronically signed by Emily K. Gaertner

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CERTIFICATION

I hereby verify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 22 pages, 2,579 words.

Signed:

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