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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMBER C. DEBREE,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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Defendant-Appellant-Petitioner, Amber C. Debree, respectfully petitions this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review a decision of the Wisconsin Court of Appeals, District II, dated February 8, 2023, which affirmed a judgment of conviction, an order denying postconviction relief, and an order denying reconsideration entered in the Kenosha County Circuit Court, the Honorable Bruce E. Schroeder and Chad G. Kerkman, presiding.

ISSUES PRESENTED

> Is Ms. Debree entitled to sentence modification in light of her status as a survivor of domestic abuse, specifically at the hands of her husband, who was the victim in this case, was a new factor?

The circuit court denied Ms. Debree's request for sentence modification, concluding that the newly presented information was not a new factor because Ms. Debree could not prove that the information was unknowingly overlooked. (37:16-17; App. 32-33). The court of appeals affirmed, holding that Ms. Debree could not prove that the facts were "unknowingly overlooked by *all* of the parties." *State v. Debree*, No. 2022A1311-CR, unpublished slip op. ¶8 (WI App Feb. 8, 2023) (emphasis in original). (App. 7).

CRITERIA FOR REVIEW

This case merits review by this Court for two reasons. First, this case presents the Court with an opportunity to clarify the law as to the meaning of "unknowingly overlooked" within the new factor test. The court of appeals has held several times that, despite the parties' awareness of a fact or sets of fact at the time of sentencing, the fact or set of facts may be a new factor for purposes of sentence modification. *See, e.g.*, *State v. Armstrong*, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860; *State v. Vaughn*, 2012 WI App 129, 344 Wis. 2d 764, 823 N.W.2d 543; *State v. Ralph*, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990). However, in other cases, such as Ms. Debree's, the court of appeals has concluded that, where the defendant failed to show he or she was simply unaware of existing information prior to sentencing, it is not a new factor.

Second, the court of appeals did not apply forfeiture, pursuant to this Court's decision in *State v. Counihan*, 2020 WI 12, 390 Wis. 2d 172, 938 N.W.2d 530, to the sentence modification claim. *See Debree*, slip op. (App. 3-9). However, the court of appeals effectively ruled that Ms. Debree had forfeited the argument when it concluded that the new information was not "unknowingly overlooked" because she did not interrupt the circuit court at sentencing, contrary to this Court's jurisprudence. *Id.*, ¶¶8-11. (App. 7-9). This appears to undermine the recent forfeiture jurisprudence; accordingly, review is warranted. A defendant should not be required to interrupt the proceedings in order to bring sensitive information that she previously believed to be irrelevant to the court's attention. Instead, the defendant should be

permitted to share those concerns with postconviction counsel, who can properly research, analyze, and raise the claim via a postconviction motion.

Both of these issues meet the criteria for granting review, as a decision by this Court will help develop, clarify and harmonize the law, and the question presented is a question of law that is likely to recur unless resolved. *See* Wis. Stat. § (Rule) 809.62(1r)(c)3.

STATEMENT OF 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. 13). 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. 13-15, 21, 23). Ms. Debree requested that the court modify her term of probation to one year. (37:11; App. 27).

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. 29-30). 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. 32-33).

Ms. Debree extended the time to file a notice of appeal and filed a motion for reconsideration in the circuit court on June 28, 2022. (38:1; 40; App. 36). 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. 37-39). 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. 37-39).

The postconviction court then ordered the state to file a response by July 19, 2022. (*See* 43:1; App. 41). The state responded to Ms. Debree's motion for 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. 42). 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. 18-33, 42-43).

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. 43). 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. 43). 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. 44 (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. 46-47).

Ms. Debree appealed and the court of appeals affirmed. The court of appeals concluded that Ms. Debree knew that she was a victim of domestic abuse in the past, and failed to offer evidence that clearly and convincingly shows that she and her counsel unknowingly overlooked this information or that it would be highly relevant. *Debree*, slip op. ¶9 (App. 7).

ARGUMENT

I. Ms. Debree was entitled to sentence modification because she presented a new factor as a matter of law.

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. This court should accept review and hold that when a defendant unknowingly overlooks information she knew because she was unaware of the relevance of that information prior to the circuit court's sentencing comments, she is not precluded from later using that information as a basis for sentence modification.

In this case, Ms. Debree was being sentenced for disorderly conduct, and during the sentencing, the circuit court focused its attention on her history. The court stated, seemingly rhetorically, that it heard "all this about [her] new life and everything" but that it was thinking "oh, come on. What about this past background?" and that she had a "terrible, really a terrible record." (21:10). Ms. Debree did not have an opportunity to address the court's specific concerns and questions about her past. Therefore, in her postconviction motion, Ms. Debree provided previously overlooked information regarding her history as a survivor of domestic abuse.

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. However, the court of appeals rejected the claim, reasoning that, "Although the sentencing court did not know that Debree was a victim of domestic abuse in the past, Debree herself

did." *Debree*, slip op. ¶9 (App. 7). Therefore, the court turned to whether it was unknowingly overlooked, concluding that Ms. Debree knew about the information and "chose[ ] not to disclose it." *Debree*, slip op. ¶¶9-10 (App. 7-8).

The court of appeals also seems to have concluded that the information about Ms. Debree's past abuse was not "highly relevant" to the imposition of sentence, despite the sentencing court's statement that its "number two" consideration was Ms. Debree's past and background. *Debree*, slip op. ¶¶9-10 (App. 7-8).

As such, the court of appeals overlooked Ms. Debree's argument that her status as a victim of domestic abuse at the hands of the victim in this case would have been highly relevant to the imposition of sentence. Specifically, 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 answered the sentencing court's remaining questions about her background, which was highly relevant to the sentence, as it was the "number two" consideration. Moreover, 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. 14-15). Therefore, as Ms. Debree argued in her postconviction motion, the new information not only relates to her background and past, but also mitigates Ms. Debree's culpability in this case. The information provides an explanation, not an excuse, for her reaction to a stressful event.

In addition to the he 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).

This Court should accept review and clarify that the term "unknowingly overlooked" does not require, 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.* In fact, the new factor test makes that distinction, when it discusses things that are new factors because they were not in existence at the time of the original sentencing *or* unknowingly overlooked by the parties. *See id. (citing Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69*).* Therefore, to interpret "unknowingly overlooked" as meaning the same thing as "not known" is not reasonable. While the case law supports Ms. Debree's interpretation in this case, the topic has not specifically been addressed by this Court.

Further, such a holding would be in line with this court's holdings in *Counihan* and *Rosado*, that unless a defendant has sufficient notice and strategically chooses not to present certain information, it is appropriate to raise an alleged error by the circuit court during sentencing in a postconviction motion. *See State v. Counihan*, 2020 WI 12, ¶37, 390 Wis. 2d 172, 938 N.W.2d 530; *Rosado*, 70 Wis. 2d at 288-89. Applying the forfeiture rule puts defendants and counsel "in an impossible predicament—between a rock and a hard place." *See State v. Coffee*, 2020 WI 1, ¶28 n.5, 389 Wis. 2d 627, 937 N.W.2d 579. Failing to jump in when the court is pronouncing sentence may result in the claim being forfeited. *See id.* But if the defense interrupts the court, then they may actually make the defendant's position at sentencing worse. *See id.*

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. 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).

Clarifying this issue is particularly important for a case such as Ms. Debree's, where a defendant's new factor is based on sensitive information such as prior abuse or trauma. Many survivors of domestic abuse do not think of themselves as victims, may not fully recognize the impacts of trauma on their lives within a particular time frame, and for these reasons as well as others, they may be hesitant to label themselves as victims of domestic abuse in legal proceedings.

If this issue is made clear, abuse survivors will be less likely to be blamed, judged, and ridiculed when they share such personal information. Here, the postconviction court picked apart the specific facts of the police reports that Ms. Debree attached to her postconviction motion, seemingly looking for reasons not to believe her. (43:2-4; App. 42-44). The court then concluded that, "These three acts [of domestic abuse that Ms. Debree reported to police] do not form a clear and convincing basis for the defendant's alleged 'trauma she previously sustained, which triggered her fight or flight response.'" (43:3-4; App. 43-44).

The postconviction court further questioned Ms. Debree's status as a domestic abuse survivor because she was still married to her abuser—"She cannot be both a 'survivor' and currently involved in a domestic abuse relationship at the same time.'" (43:4; App. 44). This case therefore presents the Court with an opportunity to break down one of the many hurdles in place for survivors of abuse in the criminal justice system.

Accordingly, this Court should grant review and reverse the court of appeals' stringent reading of the new factor requirement, and remand back to the circuit court for a consideration as to whether modification is warranted under these facts and circumstances.

CONCLUSION

For the reasons set forth herein, Ms. Debree asks this Court to accept review and reverse.

Dated this 9th day of March, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,780 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 9th day of March, 2023.

Signed:

LAURA M. FORCE
Assistant State Public Defender