COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1695-CR **Cir. Ct. No. 2006CF404**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND R. PINCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Raymond Pinch appeals from a judgment of conviction of two counts of forgery and from an order denying his postconviction motion for sentence modification. Pinch argues that he was sentenced on the basis of inaccurate information, that the sentence is the result of an erroneous exercise

of discretion, and that his amenability to treatment is a new factor supporting sentence modification to make him eligible for the Earned Release Program (ERP). We affirm the judgment and order.

¶2 Pinch wrote himself checks from the account of acquaintance he was staying with in the summer of 2006. A family friend gave Pinch the value of the checks in cash upon Pinch's representation that the checks were for work performed. Pinch was charged with eighteen counts of forgery and entered a no contest plea to just two counts. Nine counts were dismissed outright and seven counts were dismissed as read-ins at sentencing. Pinch's sentence was two consecutive terms of three years' initial confinement and eighteen months' extended supervision.

¶3 Pinch's appeal rests almost exclusively on the sentencing court's remarks about his history of drug and alcohol abuse. The sentencing court stated:

> [Y]ou had a significant drug problem and I'm not encouraged by that. And I don't think there's a lot of rehabilitation available there. I give you credit for being on probation seven times before and never being revoked, but you have a rather long history … of drug and alcohol abuse that has gone on most of your life. Marijuana and cocaine. You've had assessments, because you've had drunk drivings. You've had inpatient treatment in 1981, back when you were very young. Another inpatient treatment at the Blandine Halfway House for several months. You had a couple drunk drivings, so you had a couple AODA assessments. You've been through the Department of Community Programs for those and that hasn't changed your drug and alcohol use. You were supposed to go to the POP program as part of probation. You absconded from your agent.
>
> My sense is that putting you on probation and having some drug and alcohol counseling doesn't make sense. My sense is this. If I do that, you will probably commit more crime. You have a longer history of, you know, 25 years of committing crimes even though you, apparently, successfully complete probation. I don't know how

> successful it is if you continue to commit crime. You still have a drug and alcohol problem you don't address that after you've been given opportunities. To try again, I think, is unwise and imprudent and doesn't protect the public safety. I really think that you are a significant risk to reoffend. You don't have much stability in your life and I, therefore, think that significant incarceration is appropriate in this case.

¶4 At the postconviction motion hearing Pinch presented the testimony of a relapse prevention AODA specialist. The expert witness observed that Pinch had not exhibited denial or minimization of his addiction and Pinch was motivated for treatment. He explained that Pinch could immediately benefit from treatment and it was an opportune time to begin treatment.

¶5 Pinch equates the sentencing court's comment that "I don't think there's a lot of rehabilitation available there," as a determination that Pinch's addiction is untreatable. He claims that is inaccurate information and entitles him to resentencing. A defendant has the right to be sentenced on the basis of true and correct information. ***Bruneau v. State***, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977). A defendant who requests resentencing must show that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. The State's burden is then to show that the inaccuracy was harmless. ***Id.***

¶6 We first reject Pinch's contention that the sentencing court conclusively determined that Pinch is untreatable. It never explicitly stated so. The court observed past treatment efforts and that Pinch had not sought further treatments. At best the court expressed an opinion that Pinch was not responsive to treatment. It may not be an objective fact that is capable of being accurate or inaccurate. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App.

1995) ("Factual objectivity refers to *facts* in the sense of what is *really* true, while opinion subjectivity refers to mere 'opinion' or personal taste." (citation omitted)).

¶7 As an assessment of Pinch's amenability to treatment, the sentencing court's view was not inaccurate. Pinch's own expert acknowledged that Pinch's post-sentencing motivation for recovery makes Pinch amenable to successful treatment. Pinch's attitude changed after sentencing because of institutionalization and the cessation of drug and alcohol use. He had an epiphany. At sentencing and prior assessments Pinch did not have the motivation for successful treatment. Pinch did not meet his burden to show that the sentencing court relied on inaccurate information regarding his amenability to treatment.

¶8 We next address Pinch's claim that the sentencing court erroneously exercised its discretion because the stated sentencing objectives did not correlate to the determination that Pinch was ineligible to participate in the ERP and the court failed to explain the relationship. Pinch did not argue in his postconviction motion that the sentencing court erroneously exercised its discretion. The issue is waived. *See* ***Spannuth v. State***, 70 Wis. 2d 362, 365, 234 N.W.2d 79 (1975); ***State v. Lynch***, 105 Wis. 2d 164, 167, 312 N.W.2d 871 (Ct. App. 1981).

¶9 Pinch cites to ***State v. Gallion***, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197: "we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." Pinch does not challenge the determination or explanation of the length of the terms but confines his challenge to the determination that he is not eligible for participation in the ERP. The sentencing court is not required to make separate findings on the reasons for the eligibility decision and we need only consider whether the overall sentencing rationale also justifies the eligibility determination.

State v. Owens, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. The sentencing court's rationale provides an adequate explanation for why it declared Pinch ineligible for the ERP. The court found that a significant period of incarceration was necessary to protect the public in light of Pinch's lengthy criminal history, the nature of the crimes, and Pinch's poor employment and lack of stability. Permitting Pinch to earn early release was contrary to the goal of providing meaningful incarceration. The ineligibility determination was the product of a proper exercise of discretion.

¶10 Pinch argues that information on the treatability of his addiction from his expert witness presents a new factor making it appropriate to modify the sentence to declare Pinch eligible for the ERP. A new factor "refers to 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a new factor exists is a question of law reviewed de novo. ***State v. Johnson***, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990). The new factor must be an event or development that frustrates the purpose of the original sentence. ***Id.***

¶11 It cannot be ignored that Pinch's treatability is directly related to and dependent on his changed attitude since experiencing incarceration. That is, of course, one of the desired effects of incarceration—to bring about a changed and rehabilitated attitude. It is not a change that frustrates the original sentence. *See* ***State v. Crochiere***, 2004 WI 78, ¶22, 273 Wis. 2d 57, 681 N.W.2d 524 ("rehabilitation while incarcerated is not a circumstance that will frustrate the purpose of a sentence, as we conclude it is likely that circuit courts sentence with

the hope that rehabilitation will occur" (citation omitted)); ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988) ("Changes in attitude and prison rehabilitation are not new factors justifying sentence modification."). Pinch did not establish the existence of a new factor as a possible basis for sentence modification.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.