COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP963-CR **Cir. Ct. No. 2009CF3017**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT CURTIS NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JEAN A. DIMOTTO, Judges.[1] *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

[1] The Honorable Daniel L. Konkol presided over sentencing and was responsible for the judgment of conviction. The Honorable Jean A. DiMotto, as successor to Judge Konkol's felony calendar, presided over and denied the postconviction motion.

¶1 PER CURIAM. Robert Curtis Nelson appeals from a judgment of conviction and an order denying his postconviction motion. Nelson asserts that a new factor justifies resentencing, but the circuit court rejected this notion. We agree with the circuit court and affirm.

¶2 In 2009, Nelson was charged with one count of sexual assault of a child under age thirteen and one count of causing a child under age thirteen to view sexually explicit conduct. In exchange for a no-contest plea, the State agreed to dismiss and read in the assault charge and to amend the second count to one count of causing mental harm to a child.

¶3 The sentencing hearing was held on May 5, 2010. The State argued, in part, that Nelson would "benefit from treatment" and suggested that the treatment should initially take place "in a confined setting." The circuit court ultimately sentenced Nelson to nine years' imprisonment under the indeterminate sentencing scheme, based on the alleged timeframe of Nelson's offenses. Among other things, the circuit court commented that Nelson needed intensive psychotherapy, sex offender treatment, and cognitive intervention.

¶4 Nelson subsequently moved for "modification and reduction" of his sentence on new grounds. Specifically, he alleged that he was "unable to be enrolled" in sex offender or drug treatment prior to his first parole eligibility date, "contrary to the court's purpose in the sentence structure which it imposed." The circuit court denied the motion without a hearing, noting that the unavailability of programs was not a new factor and that Nelson had not shown the programming was relevant to the original sentence structure. Nelson appeals.

¶5 A new factor is a fact or set of facts that is "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); *and see* ***State v. Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828 (re-affirming ***Rosado***'s definition of "new factor"). The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether sentence modification is warranted. ***Id.***, ¶37.

¶6 Whether a fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶33. If a court determines that the facts do not constitute a new factor, the court's analysis may end there. ***Id.***, ¶38.

¶7 We agree with the circuit court that Nelson has not shown programming availability to be a new factor.[2] The circuit court noted only that Nelson needed therapy. It did not specify when that therapy had to be given or structure the sentence around any therapy. Indeed, the circuit court expressly acknowledged that Nelson would be eligible for parole after serving as little as a third of his sentence, and Nelson's sentence was not in any way contingent upon him receiving any therapy while confined.

[2] Though we do not rely on it for our holding, we believe it to be common knowledge, at least among sentencing courts in Milwaukee County, that the waitlist for therapeutic programming from the Department of Corrections can be quite lengthy. It should also be common knowledge that although the circuit court may direct that an offender receive programming, the court has little or no control over when or how the Department provides that treatment.

¶8 Further, by reading Nelson's motion and appellate brief, one might be left with the impression that rehabilitating Nelson was the circuit court's only objective. Such conclusion would be erroneous. The circuit court also emphasized the need to protect children, to protect the public, to send a message of deterrence, and to send a message of punishment—all of which would be accomplished by a period of incarceration, irrespective of whether Nelson receives any therapy. Thus, the fact that Nelson may not be able to obtain programming on a timetable he prefers is not "highly relevant" to the original sentence.[3] Accordingly, the availability of treatment options is not a new factor, and the circuit court properly denied the postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[3] For the same reasons, Nelson's current inability to obtain programming also does not frustrate the purpose of the sentence, though the "frustrate the purpose" prong no longer exists as a separate element in a new-factor analysis. *See* ***State v. Harbor***, 2011 WI 28, ¶¶39-52, 333 Wis. 2d 53, 797 N.W.2d 828.