COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2298-CR **Cir. Ct. No. 2012CF410**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY D. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE and DAVID M. REDDY, Judges. *Judgment affirmed*; *order affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Larry Mitchell appeals a judgment of conviction for second-degree sexual assault of a child and an order denying his motion for

sentence modification. Mitchell argues the circuit court erroneously determined he did not present a "new factor" for sentence modification purposes. Mitchell further argues his sentence was unduly harsh when compared to the sentence of another defendant who sexually assaulted the same victim. We reject Mitchell's argument that the sentence was unduly harsh. However, we agree Mitchell presented new factors. Accordingly, we remand for the circuit court to exercise its discretion to determine whether the new factors warrant sentence modification.

BACKGROUND

¶2 Mitchell was charged with one count of sexual intercourse with a child under sixteen, contrary to WIS. STAT. § 948.02(2).[1] At the time of the offense, Mitchell was seventeen years old and the victim was fourteen years old. Mitchell pled guilty to the charged offense, which did not involve threat or use of force.

¶3 At the July 25, 2013 sentencing, the circuit court addressed Mitchell's "terrible record." Mitchell had juvenile adjudications for robbery of a pizza delivery person and two "take and drive[s]." Additionally, while on bond for this case, Mitchell committed disorderly conduct while armed, consisting of a drive-by shooting with a pellet gun.

¶4 The court also discussed Mitchell's "terrible childhood." Mitchell was placed in foster care in Mississippi when he was three. His parents' whereabouts were unknown at the time of sentencing. As a child, Mitchell

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

discovered his grandmother and two uncles shot to death. The court stated, "I don't know what I can do or what society can do to make things right but he still at age nineteen has to assume responsibility for his conduct even though he had that terrible childhood."

¶5 The court repeatedly noted the COMPAS report indicated Mitchell had "no strengths." The court also repeatedly stated Mitchell never had a job and had no education. The court speculated that Mitchell was homeless and stated he had residential instability. The court also indicated Mitchell had "no real family support" since his mother and father disappeared and his grandmother and uncles were killed. The court stated rhetorically, "Where is his—where is his support?"

¶6 The court then turned to the topics of rehabilitation and probation, observing:

> Now when one is contemplating probation one has to contemplate rehabilitation. I don't know how to rehabilitate … Mitchell because he has never been habilitated. He has no strengths, has no job skills, has no education. He probably because of the absence of his mother and significant relatives never really bonded with anyone. He needs re—he needs habilitation. Rehabilitation is not in the cards. Rehabilitation means that he can be—there's something to work with.

The court also questioned how probation could even be considered. It stated, "What would they tell him to do? What could they do for him? How can they habilitate him? I just don't know where to start with … Mitchell." The court concluded, "I don't think the community services have been fully tried but I don't think they're up to the needs of … Mitchell." The court then ordered ten years' imprisonment, consisting of five years' initial confinement and five years' extended supervision.

¶7 A little over nine months after sentencing, psychologist Nick Yackovich conducted a psychological and sociological assessment of Mitchell, in order to "provide diagnostic clarification and a mental health profile." Yackovich prepared a report detailing, inter alia, Mitchell's family history, criminal history, educational/vocational history, psychosocial assessment, and cognitive functioning. The report included discussion of an institution educational assessment conducted approximately three months after Mitchell's sentencing.

¶8 Mitchell filed a postconviction motion for sentence modification. He argued the sentencing court relied on inaccurate information and Yackovich's report contained new factors. Alternatively, Mitchell argued his sentence was unduly harsh as compared to another defendant. The circuit court denied the motion, concluding the report was not a new factor.[2] While it recognized there was some new information provided, the court concluded it would be a "slippery slope" to permit postsentencing psychological assessments to qualify as a "new factor." Further, it determined Mitchell's sentence was not unduly harsh because the differing sentences were justified by the defendants' respective backgrounds. Mitchell appeals.

DISCUSSION

I. Whether Mitchell demonstrated "new factors"

¶9 Mitchell first argues the circuit court erroneously determined he failed to present any "new factors" for purposes of sentence modification.

[2] The Honorable John R. Race sentenced Mitchell, and the Honorable David M. Reddy decided the postconviction motion.

Mitchell argues the court had incomplete information at sentencing concerning his education, residential stability, habilitation, employment, and strengths.[3] He argues evidence regarding those issues and Yackovich's psychological assessment are new factors.

¶10 Circuit courts have inherent authority to modify criminal sentences upon the defendant's showing of a "new factor." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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., ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Deciding a motion for sentence modification based on a new factor is a two-step inquiry. ***Id.***, ¶36. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. ***Id.*** Whether the proffered fact or set of facts constitutes a new factor is a question of law. ***Id.*** The existence of a new factor does not, however, automatically entitle the defendant to sentence modification. ***Id.***, ¶37. Rather, if a new factor is present, the circuit court determines in its discretion whether that new factor justifies sentence modification. ***Id.***

¶11 We agree with Mitchell that he has demonstrated new factors for purposes of sentence modification. First, Mitchell's education level and

[3] At times, Mitchell asserts the court relied on inaccurate—as opposed to incomplete—information at sentencing. However, he makes no argument for resentencing on that basis under the standard set forth in ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

intellectual ability is a new factor. The State argues the circuit court correctly determined Mitchell had "in effect a lack of education" because he moved from school to school and was repeatedly suspended and/or expelled. It further asserts that Mitchell's education level cannot be a new factor because Mitchell would have been aware of his own education.

¶12 The State fails to acknowledge, however, that Mitchell did not obtain an education assessment until shortly after he was sentenced. Indeed, the State fails to address the education assessment whatsoever. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (failure to refute argument constitutes a concession). That assessment revealed Mitchell had an age-appropriate eleventh-grade education equivalency, since he was seventeen when taken into custody. Because he was assessed before being placed in institution programming, the assessment was a reliable indication of Mitchell's education level at the time of sentencing.

¶13 Additionally, Yackovich opined that, considering Mitchell's traumatic childhood, Mitchell's educational reports were "quite good" and that he "would likely have excelled (and still could with assistance) as a student equivalent to those attending college or higher levels of learning." Yackovich's opinions and Mitchell's education assessment were largely confirmed by Mitchell's earning of a GED after only nine months in the correctional system, with individual scores well above the minimum.

¶14 Another new factor was that Mitchell's foster parents were willing to help him transition to the community and further his education. Both foster parents were present to support Mitchell at his postconviction hearing. Thus, the sentencing court was mistaken when it speculated Mitchell would be homeless and

lacked family support.[4] Additionally, this new factor increases the significance of the education new factor because it makes it more likely Mitchell will successfully continue his education.

¶15 We also agree with Mitchell that his employment history constitutes a new factor. Contrary to the sentencing court's belief, Mitchell did have a limited work history; he worked at Holi Cannoli while in Elkhorn for three months before having foot surgery. He also worked through the Rawhide program in the auto shop. While Mitchell would, of course, have known of this work history at the sentencing hearing, he was never specifically asked about it and had no reason to believe it was important. In the first instance, seventeen year olds are generally not expected to have significant work skills or experience, so there was little reason to anticipate the court's reliance on the factor.

¶16 Secondly, Mitchell had already responded accurately when questioned on the topic. Mitchell told the COMPAS screener he was currently unemployed, was employed or in school less than half of the previous year, and "reported having no skills or trade for which he can find work." While we agree with the State that the circuit court cannot be faulted for relying on this information, it is important to consider that Mitchell was being held in jail at the time. Under the circumstances, Mitchell likewise cannot be blamed for overlooking the fact that his menial jobs would be important to the sentencing court. While Mitchell's work history was perhaps not substantially significant in

[4] The State does not respond to Mitchell's argument that his foster-parent support is a new factor, much less assert the factor was previously known to the court or any party. We therefore deem the argument conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

its own right, the presumed lack of any work history was a basis of the court's significant conclusion that Mitchell had never been "habilitated."

¶17 Finally, we conclude Yackovich's psychosocial assessment constitutes a new factor. The COMPAS report indicated Mitchell had no strengths, and the PSI writer indicated, "Mitchell clearly shows an anti-social personality …." Yackovich's report, on the other hand, identifies Mitchell's education and intellectual ability as a strength, as well as his assessment-profile-indicated willingness to engage in treatment. The report explains Mitchell's "testing profile indicates that he is a ready and willing candidate for treatment and other interventions designed for lifestyle change and improvement." Yackovich also opined that "when compared to his cohort of similar age and circumstances, [Mitchell] has shown signs of resiliency and potential for improvement." Finally, Yackovich did not conclude Mitchell exhibited anti-social personality disorder.[5]

¶18 The State argues Yackovich's assessment cannot constitute a new factor because it relies on Mitchell's postsentencing rehabilitation. However, the State ignores that the report also relies on historical factors—including the "new factor" of Mitchell's education level and intelligence—and an individualized psychosocial assessment. Additionally, the State fails to acknowledge Mitchell's argument that, pursuant to ***State v. Vaughn***, 2012 WI App 129, ¶36, 344 Wis. 2d 764, 823 N.W.2d 543, a postsentencing psychological analysis can constitute a new factor if—as here—the circuit court was unaware of the analyses offered in

[5] Rather, Yackovich's "clinical impression" was that Mitchell exhibited "a significantly elevated level of traumatic stress," an "elevated … profile score in the general domain of anxiety and anxiety-related disorders," and a "psychological profile … indicative of one who experiences significant episodes of depressive symptoms, suspiciousness, and labile irritability."

the report at the time of the original sentencing. *See* ***Charolais***, 90 Wis. 2d at 109 (failure to refute argument constitutes a concession).

¶19 We have concluded Mitchell demonstrated multiple new factors for purposes of sentence modification. In issuing its sentence, the circuit court appeared to be believe it had no alternative but to order significant incarceration for Mitchell. It did not know what to do with him and questioned whether he could be managed under probation supervision. We cannot know what the sentence would have been had the court known that there were alternatives available to provide the necessary treatment, structure, and support in the community, and that Mitchell was capable of availing himself of them. We therefore remand for the circuit court to determine in its discretion whether sentence modification is appropriate.

II. Whether Mitchell's sentence was unduly harsh

¶20 Mitchell alternatively argues his sentence was unduly harsh in comparison to Joseph Puente, who was sentenced on the same day by the same judge, and who had repeatedly sexually assaulted the same minor victim, although not on the same occasion as Mitchell. Mitchell argues Puente's conduct was more egregious because he was two years older than Mitchell, the intercourse continued even after Puente was on bond for prior intercourse with the victim, and Puente attempted to begin a sexual relationship with another fourteen year old while on bond. Puente received probation with an imposed and stayed sentence of two years' initial confinement and two years' extended supervision.

¶21 To justify modification of his sentence as unduly harsh, Mitchell must show that the disparity between his and Puente's sentences was arbitrary or based on considerations not appropriate to sentencing. *See* ***Ocanas v. State***, 70

Wis. 2d 179, 187, 233 N.W.2d 457 (1975); ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). A sentence imposed on one defendant that is too lenient does not make a longer sentence imposed on another defendant too harsh. ***Ocanas***, 70 Wis. 2d at 189; ***Perez***, 170 Wis. 2d at 144. A circuit court's decision concerning whether a sentence was unduly harsh is reviewed for an erroneous exercise of discretion. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990).

¶22 We conclude that, even accounting for the "new factors" discussed above, a comparison of Mitchell's and Puente's personal and criminal histories would provide a reasonable basis for disparate sentences. Unlike Mitchell, Puente had no history of school misbehavior, earned a high school diploma, was employed, had residential stability, had no prior criminal record, and had no prior gang affiliation. Accordingly, we conclude the circuit court did not erroneously exercise its discretion when it determined the disparity between Mitchell's and Puente's sentences was neither arbitrary nor based on inappropriate considerations.

By the Court.—Judgment affirmed; order affirmed in part; reversed in part and cause remanded for further proceedings.

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