

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2771-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF419

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT S. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Scott Schmidt appeals an order denying his motion for sentence modification, arguing that a change in law constitutes a new factor justifying modification. Schmidt also argues the circuit court erroneously exercised its discretion by ordering him to pay fifty percent of all money placed in

his inmate account toward restitution. We reject Schmidt's arguments and affirm the order.

BACKGROUND

¶2 Schmidt was convicted of burglary of a building as a repeat offender. The court imposed five years' initial confinement and four years' extended supervision, and determined Schmidt was eligible for both the challenge incarceration and earned release programs. The court also ordered restitution in the amount of \$5,754.82.

¶3 A Department of Corrections financial specialist asked Schmidt to authorize the deduction of twenty-five percent of all money received in his inmate account to be applied toward restitution. After Schmidt refused, the circuit court ordered that fifty percent of all money placed in Schmidt's inmate account be applied toward restitution. Schmidt moved the court to either stay the payments until his release on extended supervision, or reduce the percentage deducted to twenty or twenty-five percent. Schmidt also filed a motion for sentence modification based on a change in the law regarding early release programs. The court denied these motions and this appeal follows.

DISCUSSION

¶4 Restitution serves the dual purpose of making the victim whole while rehabilitating the defendant, but its primary purpose is to compensate the victim. *State v. Sweat*, 208 Wis. 2d 409, 422, 561 N.W.2d 695 (1997). Here, Schmidt does not challenge the amount of restitution ordered. Rather, he claims the court erroneously exercised its discretion when it ordered that fifty percent of any money placed in Schmidt's inmate account be applied toward restitution.

Citing comments made by the sentencing court, Schmidt apparently believed he would not have to pay restitution until his release to extended supervision. The court stated:

[Court]: All right. I'll find that he is eligible for the Challenge Incarceration Program and the Earned Release Program. I'll then order as conditions of extended supervision that if he hasn't already in his other case that ... he provide a DNA sample.

[Defense Counsel]: He has done that, Judge.

[Court]: He has done that? Okay. Then I'll order that he pay restitution of the \$5,754.82, ... that he have no contact with Margaret Peters or that Mobil gas station, that he obtain and maintain stable residence and that he obtain and maintain full-time employment, that he not reside with any person unless they are made fully aware of his prior criminal record and his status on extended supervision.

¶5 WISCONSIN STAT. § 973.20(10)¹ allows a circuit court to order that restitution be paid while a defendant is imprisoned. *See also State v. Baker*, 2001 WI App 100, ¶17, 243 Wis. 2d 77, 626 N.W.2d 862 (restitution may be held from a defendant's prison wages). Regardless of Schmidt's interpretation of the sentencing court's comments, the court's order denying Schmidt's request to delay or reduce the payments clarified that it had reviewed the file and entered an order consistent with Wisconsin law. The court stated:

Payment of restitution is necessary to make the victim whole and to teach the defendant responsibility. Responsibility needs to be learned and appreciated so that the defendant will be successful *upon release*. The Order entered by the Court satisfies the objective at sentencing

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and ensures the defendant recognize and accept responsibilities for his past criminal conduct.

(Emphasis added.)

¶6 Although Schmidt argues that the percentage set was “retaliatory in nature,” he fails to develop this argument. At any rate, that the court ordered the deduction of fifty percent rather than twenty-five percent after reviewing the record, does not establish any “retaliatory” intent on the part of the circuit court. The court set the deduction percentage it believed was appropriate under the facts of this case. Given the length of Schmidt’s sentence and the amount due, fifty percent is reasonable to achieve the court’s stated restitution goals.

¶7 To the extent Schmidt complains he was not afforded an opportunity to explain his point of view at a hearing, he provides no authority for the proposition that the court is required to hold a hearing before determining how and when restitution is to be paid. In any event, Schmidt’s written request for a stay or reduction in restitution payments set forth his arguments and included a monthly statement of his wages, debts and obligations. Schmidt fails to identify what additional information would have been presented had the circuit court held a hearing.

¶8 Next, Schmidt argues that a change in the law which eliminated “positive adjustment time” and limited opportunities to participate in the earned release and challenge incarceration programs constitutes a new factor warranting sentence modification. A circuit court may modify a defendant’s sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. *Id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor

exists. *Id.* Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶37.

¶9 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 ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *Id.*, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *Id.*, ¶38.

¶10 Here, the circuit court determined that the change in law was not a new factor and did not justify modification. The court stated:

The argument I think I hear is I would give a longer sentence because I believed he was eligible for [the] Earned Release and Challenge Incarceration Program[s].

First of all, it's not factually correct. It's not even close. At the sentencing I found he was eligible because the presentence report tells me to find he's eligible, but I didn't adjust his length of sentence at all because it was positive adjustment time or Challenge Incarceration or Earned Release whatsoever. It has no effect on my sentencing.

¶11 Because the court expressly disclaimed reliance on Schmidt's program eligibility when crafting the sentence, the change in law impacting these programs is not “highly relevant to the imposition of sentence.” Schmidt nevertheless contends the circuit court failed to exercise its discretion when it deferred to the eligibility recommendation made in the PSI. The court, however, “has discretion to order a PSI and to determine the extent to which it will rely upon the information in the PSI.” *State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997). Moreover, in context, the court was merely

emphasizing that it did not consider Schmidt's program eligibility when imposing his sentence. Because Schmidt's program eligibility had no impact on the sentence imposed, the court properly determined that the change in the law did not constitute a new factor justifying sentence modification.

By the Court.—Order affirmed.

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

