COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP414-CR **Cir. Ct. No. 2008CF904**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER D. GRUBOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Alexander D. Grubor appeals from a judgment of conviction for first-degree reckless homicide, and from an order denying his postconviction motion for sentence modification. Because the trial court properly exercised its discretion in determining that Grubor's lack of eligibility for the

Earned Release Program (ERP) did not justify the modification of his sentence, we affirm.

¶2 In 2008, officers were dispatched to the Grubor residence to investigate a report of an unresponsive adult male. Upon arrival, Grubor and his son were tending to the unconscious male, S.H., and officers began resuscitation efforts. S.H. was soon pronounced dead, the result of a heroin overdose.

¶3 Grubor's son told police that his father had sold a bindle of heroin to S.H. earlier that day, and that they both watched S.H. consume the drug in the Grubor residence. Grubor told police that he had actually delivered the heroin to another person named Nick, knowing that Nick intended to share the heroin with S.H. Grubor admitted having watched S.H. consume the drug in the Grubor residence.

¶4 Grubor was charged with first-degree reckless homicide pursuant to WIS. STAT. § 940.02 (2011-12).[1] Grubor was also charged in a companion case with several counts of delivering heroin. As part of a negotiated settlement, Grubor entered an ***Alford***[2] plea to the original charge, and the State agreed to move to dismiss and read in the companion case, and to cap its recommendation at twelve years imprisonment, with eight years of initial confinement and four years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Pursuant to ***North Carolina v. Alford***, 400 U.S. 25 (1970), a defendant may accept a criminal conviction while maintaining his or her innocence. In this case, Grubor's ***Alford*** plea was based primarily on a medical report opining that heroin was not the sole cause of S.H.'s death.

¶5 At sentencing, the State abided by the terms of its recommendation, and Grubor filed a defense-commissioned sentencing memorandum. The memo indicated that Grubor agreed with and would join in the State's sentencing recommendation for a twelve-year bifurcated sentence. The trial court stated both the aggravating and mitigating factors it was taking into consideration, and imposed the jointly recommended twelve-year bifurcated sentence, with eight years of initial confinement and four years of extended supervision.

¶6 After sentence was pronounced, the trial court noted that Grubor was not eligible for the Challenge Incarceration Program, but asked the State for its position on whether the defendant should be found eligible for the ERP. The State objected "to any further opportunities to reduce" the imposed sentence. The Court nonetheless found Grubor eligible:

> In considering the earned release program, generally I look at a couple of things. I look at … the reason the defendant is here. The defendant is here fundamentally because he had – is a drug addict and sold drugs and had a drug dependency. In addition, I look to the defendant's age and performance in life. While there's many things about Mr. Grubor's life that I find unacceptable and to some extent reprehensible, his performance in the fact that he is arriving here at such an age tells me that he has potential of some kind.

¶7 Thereafter, the Department of Corrections sent a letter to the trial court advising that Grubor was not statutorily eligible for the ERP,[3] and the trial court amended the judgment of conviction accordingly. Grubor filed a postconviction motion requesting a sentence modification on the ground that his

[3] The Department pointed out that Grubor's crime of conviction was under Chapter 940, and was therefore a statutorily excluded offense pursuant to WIS. STAT. § 973.01(3g) and (3m).

ineligibility for the ERP constituted a new factor. Specifically, Grubor asked that one of his eight confinement years be converted to extended supervision.

¶8 At the postconviction hearing, the trial court summarized its original sentencing concerns:

> [The] Court recalls well the case involving Mr. Grubor, the facts underlying it and the concerns that [were] obvious relative to the community protection. The description in this case of Mr. Grubor's behavior and activity raised real concern at the time of the transactions he was engaged in [which] clearly placed the community at risk and a young man died.

The trial court also acknowledged that at the time of sentencing, it believed that Grubor was eligible for the ERP, and had considered the program appropriate in this case:

> Mr. Grubor … [became] a law violator fairly late in life, and I believe it was borne out of his drug addiction. So part of the incentive that the Court believed to be appropriate in considering at the time of sentencing was if he was able to receive treatment that that would place the community in a better position upon his release to not ever have him come and place the community at risk again.

¶9 The trial court noted that the purpose of the ERP "was to have the individual go through an intensive program" thereby lessening his risk upon release. The court explained that because Grubor would not be participating in the ERP, "any reduction in concern that may have been connected to his potential future programming is also not present." The trial court reasoned that though Grubor would have a lengthy period of sobriety in prison, he would not be forced to deal with the deeper issues underlying his addictions:

> I don't care whether he's here for four years, eight years, 15 years. He is an addict. He may be a dry addict such as we maintain dry drunks in our prison system, but he will still be an addict … on the date he's released. That places

> the community at risk. That increases the concern of the Court, and that makes appropriate the original sentence that I meted out in this case absent the ability of the defendant to take advantage of any programming for treatment in the prison.

Based on the lack of pre-release intensive institutional programming, the trial court determined that sentence modification was not justified or appropriate.

¶10 A trial court may, but is not required to, modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶¶35, 37-38, 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 … it was unknowingly overlooked by all of the parties." ***Id.***, ¶40. A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. ***Id***., ¶38. The existence of a new factor does not automatically entitle the defendant to sentence modification. ***Id***., ¶37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id***. Though the existence of a new factor presents a question of law we review de novo, whether and to what degree a sentence should be modified is a discretionary determination for the trial court. ***Id***., ¶¶36-37. A trial court's discretionary determination will be sustained if it examined the proper facts, applied the correct standard of law, and reached a reasonable conclusion using a rational process. ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861.

¶11 We conclude that even assuming Grubor's ERP ineligibility constituted a new factor,[4] the trial court properly exercised its discretion in denying the sentence modification motion. The trial court explained that early release following completion of the ERP was different from early release without the benefit of institutional programming, and that the latter scenario placed the community at too great a risk given Grubor's history. The trial court concluded that releasing Grubor from prison without first reducing his risk through institutional programming was contrary to the court's intent at sentencing and stated: "Therefore my conclusion is that the original sentence that I imposed is not affected by the ineligibility of this defendant for treatment programming." The trial court considered the appropriate facts and standards, and its decision represents a well-considered and logical reasoning process.

¶12 Further, we note that the trial court's postconviction analysis and decision comports with its exercise of discretion at Grubor's original sentencing, where it considered not only Grubor's rehabilitative needs, but the need to protect the public. At sentencing, the trial court considered "particularly offensive" and "aggravating" that after S.H's death, Grubor "went forward and sold the same narcotic in the community." Similarly, the sentencing court considered that:

> Your past history involves experience in prison for drugs. On the don't-get-it-scale, that registers with me. Prison is not a good place, and you more than anyone should know that since you were there. That gives the Court concerns regarding your ability to conduct yourself in a way which comports with the rule of law and more importantly gives

[4] Because we determine that the trial court properly exercised its discretion, we need not decide whether Grubor's ERP ineligibility constitutes a new factor. ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828 ("if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law.") (citations omitted).

> the Court concern with respect to the safety and health of the community.

¶13 That the trial court's primary concern at sentencing was not ensuring treatment for Grubor is further illustrated by the fact that it was not until well after its sentencing pronouncement that the court even considered Grubor's ERP eligibility. It was not until after the trial court decided the sentence's length and addressed unrelated matters such as the conditions of extended supervision, restitution, surcharges, and sentence credit, that the trial court made its ERP eligibility determination. Defense counsel had not asked for the ERP determination, and the record demonstrates that it was not a consideration in determining the length and structure of Grubor's imprisonment.

¶14 In sum, the trial court properly exercised its discretion in denying Grubor's postconviction motion. It explained why the proposed modification was at odds with the court's intent at the time of Grubor's sentencing, and this analysis is fully consistent with the trial court's on-the-record reasoning at Grubor's original sentencing hearing.

By the Court.—Judgment and order affirmed.

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