

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 3, 2016**

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. 2015AP1429-CR**

**Cir. Ct. No. 2013CF1209**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARQUIS T. WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR. and MICHAEL J. APRAHAMIAN, Judges. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Marquis T. Williams appeals from a judgment of conviction entered upon his guilty plea to first-degree reckless homicide and from

an order denying his postconviction motion for sentencing relief.<sup>1</sup> Because we conclude that Williams failed to establish either a new factor justifying sentence modification or an erroneous exercise of the sentencing court's discretion, we affirm.

¶2 In 2013, L.P. died from a heroin overdose. According to the criminal complaint, Williams provided the heroin which caused L.P.'s death. Williams pled guilty to the homicide and the circuit court imposed a fourteen-year bifurcated sentence, with seven years each of initial confinement and extended supervision. After pronouncing sentence, the circuit court stated:

You know, I did fill out a Written Explanation of Determinate Sentence. Mr. Williams one of the things I've made you eligible for is both the Challenge Incarceration and Earned Release program. If you are offered those programs by the State Program of Corrections I would recommend strongly that you avail yourself.

Thereafter, the department of corrections sent a letter to the circuit court advising that Williams was not statutorily eligible for either the Challenge Incarceration Program (CIP) or the Earned Release Program (ERP),<sup>2</sup> and the circuit court amended the judgment of conviction accordingly.

¶3 Williams filed a postconviction motion asserting that (1) his ineligibility for the CIP and the ERP constituted a new factor warranting sentence modification and (2) the sentencing court erroneously exercised its discretion by

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<sup>1</sup> The Honorable Donald J. Hassin, Jr., presided at sentencing and entered Williams's judgment of conviction. The Honorable Michael J. Arahamian heard and decided Williams's postconviction motion.

<sup>2</sup> Williams was convicted of a violation of WIS. STAT. § 940.02(2)(a) (2013-14), which is a statutorily excluded offense pursuant to WIS. STAT. § 973.01(3g) and (3m). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

referring without qualification to Williams as a “drug dealer.” The postconviction court denied the motion in full.

¶4 On appeal, Williams maintains that his ineligibility for the CIP and the ERP constitutes a new factor warranting sentence modification. A trial court may modify a sentence based on the existence 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 set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *Id.*, ¶40. The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *Id.*, ¶36. Whether a new factor exists presents a question of law that this court reviews independently. *Id.*

¶5 We conclude that Williams’s ineligibility for the CIP and the ERP does not constitute a new factor. The circuit court’s belief that he was eligible for the CIP and the ERP was not a factor highly relevant to the imposition of its sentence. First, the circuit court’s primary focus at sentencing was on the severity of Williams’s offense and the need “to protect the public from people like [Williams].” Williams’s rehabilitative needs were not highly relevant to the circuit court’s sentence. Second, insofar as the circuit court considered Williams’s rehabilitation, the court noted that Williams could benefit from treatment and encouraged him to “continue [his] march to sobriety.” The sentencing court never tied its general discussion of Williams’s treatment needs to participation in either the CIP or the ERP, and never mentioned either program in explaining the reasons for its sentence. Rather, the circuit court only referenced Williams’s eligibility for the CIP and the ERP after pronouncing sentence, even then acknowledging there

was no guarantee Williams would be afforded the opportunity to participate in either program.

¶6 Williams next contends that the circuit court erroneously exercised its sentencing discretion by apparently lumping Williams in with drug dealers as a general class. At sentencing, Williams portrayed himself as a heroin addict who distributed drugs to the victim but was not a drug dealer. The circuit court considered this a distinction without a difference:

When you distribute heroin you're a drug dealer. You may have been a user, Mr. Williams, apparently you were. You were also a drug dealer. And we can't avoid the significance of that and the effect that that has on a community but for people like you Mr. Williams we probably wouldn't be in court on these types of matters. Unfortunately we are.

Relying on *State v. Ogden*, 199 Wis. 2d 566, 544 N.W.2d 574 (1996), Williams argues that the circuit court's comments equating his addiction-driven distribution of heroin to the actions of a professional drug dealer motivated by financial gain evinces "a preconceived policy of sentencing that is 'closed to individual mitigating factors.'" *Id.* at 571 (citation omitted). We disagree.

¶7 On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination. *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. To demonstrate an erroneous exercise of discretion, the defendant must show an unreasonable or unjustifiable basis in the record for the sentence imposed. *State v. Taylor*, 2006 WI 22, ¶18, 289 Wis. 2d 34, 710 N.W.2d 466.

¶8 *Ogden* stands for the proposition “that a judge’s predispositions must never be so specific or rigid so as to ignore the particular circumstances of the individual offender upon whom he or she is passing judgment.” *Ogden*, 199 Wis. 2d at 573. In *Ogden*, the sentencing court refused the defendant’s request for statutorily authorized Huber release for child care, stating simply that it did not allow this privilege. *Id.* at 572. In the instant case, the circuit court considered Williams’s individual characteristics, including that Williams did not have a prior criminal record, had strong family support, had accepted responsibility for the victim’s death, and was making efforts toward sobriety. The circuit court stated its appreciation that Williams recognized the heroin epidemic had become a scourge on the community. In the end, the circuit court determined that whether Williams merely distributed heroin to support his own addiction or dealt heroin for financial gain, the effect was the same: the victim died as a result of the heroin Williams distributed. It is the circuit court’s function to weigh the relevant factors and considerations and the weight to be given to each factor is committed to the circuit court’s discretion. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Williams has not shown any “unreasonable or unjustified basis” for his sentence that would cause us to question its propriety. *See Taylor*, 289 Wis. 2d 34, ¶18 (citation omitted).

*By the Court.*—Judgment and order affirmed.

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

