COURT OF APPEALS DECISION DATED AND FILED

June 27, 2017

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. 2016AP918-CR | **Cir. Ct. No. 2014CF137**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIMITRI C. BOONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRENNAN, P.J. Dimitri C. Boone appeals from a judgment of conviction entered on his guilty plea and an order denying his postconviction motion. Boone seeks sentence modification on the grounds of a new factor under ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. He claims

the new factor was a report, prepared *after* sentencing by an employee of the Public Defender's office, which showed "gross inaccuracies" in the presentence investigation (PSI) prepared by the Department of Corrections (DOC) with regard to his performance while on DOC supervision. These inaccuracies, he argues, were highly relevant to the trial court at sentencing, entitling him to a re-sentencing under ***Harbor***. Relatedly, he argues that the trial court erroneously exercised its discretion in finding that the new factor did not justify re-sentencing.

¶2 We disagree and affirm the circuit court. Boone failed to meet his burden of showing that the post-sentencing report was a new factor under ***Harbor***. None of the purportedly inaccurate information was in fact, inaccurate, or new, and none was highly relevant to the trial court at sentencing.

BACKGROUND

¶3 In 1992 Boone was convicted of second degree sexual assault of a child; the charges were based on an incident in which he assaulted a thirteen-year-old girl in a store where he worked. He was sentenced to one year in the House of Correction, which was imposed and stayed, and he was placed on five years of probation. In 1997 he was convicted of second-degree sexual assault and sentenced to prison. At that same time, his probation in the 1992 case was revoked and he was sentenced to ten years in prison to be served concurrent with the prison sentence for his 1997 conviction.

¶4 In this case, Boone pled guilty to second-degree sexual assault of a child in connection with an assault on his girlfriend's thirteen-year-old niece. He faced a maximum sentence of forty years in prison. Boone entered into a plea agreement. Under the agreement the State and defense jointly recommended two years in prison and one year extended supervision. A PSI was ordered.

¶5 At the start of the sentencing hearing, the court asked whether either side had corrections to the PSI. Trial counsel noted the following five corrections:

> 1) Boone denied committing the 1985 juvenile offense listed on his record at page four of the PSI;
>
> 2) As to an escape charge listed in his record, Boone disputed the length of time the PSI said he was out of custody;
>
> 3) Boone disputed the PSI assessment that he showed little progress in sex offender treatment because he had actually remained in the program until the end of his extended supervision;
>
> 4) Boone denied ever refusing a polygraph test as the PSI reported, and asserted that he took and passed two;
>
> 5) Boone, who was on electronic monitoring, did not dispute that he was held in custody on those dates [given in the PSI], but he explained that those occasions were due to malfunctioning of his bracelet that was on, and he was released after the bracelet was repaired, and he said that [DOC staff] apologized to him every time, and noted that he, ultimately, did discharge even with those times that he was held in custody.

¶6 The State and defense made their agreed-upon joint recommendation of two years of initial confinement and one year of extended supervision. The court commented about the sentencing recommendation in the plea agreement before arguments by counsel: "[The recommendation] strikes me as odd in light of the circumstances and the defendant's record."

¶7 Upon questioning by the court, the State strongly defended its recommendation, which it said was "focus[ed] primarily on the crime the defendant committed[,]" and was based on the fact that Boone's prior convictions were "all more than 10 years ago." The State also noted his consistent work history. Defense counsel noted Boone's strong history of employment with the

same employer. He repeated that the electronic monitoring program violations mentioned in the PSI "were primarily technical having to do with equipment, and that he was released after they checked it, fixed it and apologized to him and let him go." Counsel stated that this part of the PSI should not "be overemphasized."

¶8 The sentencing hearing was long—the transcript consists of thirty-eight pages. After the State and defense counsel spoke, Boone himself addressed the court, as did his mother. Then the trial court began its sentencing—the court's portion of the sentencing alone consisted of thirteen pages. The court started with the facts of the sex assault, the age disparity between Boone, in his forties, and the victim, aged thirteen. The court recounted the details of the sex acts and at the end referred to Boone as a repeat sex offender. The court described Boone's grooming of the victim, his predatory behavior and his history of victimizing minor females. The court concluded this part of the sentencing by saying that Boone needed intensive treatment in a confined setting. "Incarceration appears to be the only means to provide for community safety and withhold from him the ability to create additional victims."

¶9 After describing Boone as a predator, pedophile, and a "serious, serious danger to the community," the court addressed his prior record. The court explicitly stated that it was not considering the juvenile sex assault/disorderly conduct from thirty years before—which defense counsel had objected to at the start of the sentencing. The court did consider the 1992 sex assault—undisputed by Boone—and the fact that his probation on that case was subsequently revoked. The court mentioned the 1995 escape but called it "relatively minor" and then finally mentioned the 1997 second-degree sexual assault, for which Boone had been sentenced to ten years in prison. None of these convictions or sentences

were disputed by Boone. The court noted that all of the priors were over fifteen years old.

¶10 Then the court returned to the repeated nature of his sexual assaultive behavior: "And, yes, there has been a break in Mr. Boone's criminal behavior, but what is disturbing, very disturbing is the repetitive nature of his sexual assaults." The court noted that Boone had been convicted of three sexual assaults in twenty years. The court referred to him as a sexual deviant who did not learn from the sexual offender treatment, a predator, a menace and danger to children, and a serious danger to the public.

¶11 The court also properly consider mitigating factors such as Boone's entry of a guilty plea, his sparing the victim of having to testify in court, his employment and the fact he had no mental health or AODA issues.

¶12 The court rejected the joint recommendation, stating, "I just see this case absolutely different and much more close to the way the PSI writer sees it." The PSI writer recommended a prison sentence of twelve to fifteen years.[1] The court stated in summary:

> The basis for my sentence is the defendant's third sexually assaultive behavior, third sexual assault conviction in a period of, approximately 20 years. He's been on supervision previously. He's had sex offender treatment previously. He's been in prison previously. He's been revoked previously. His level of compliance with probation and the DOC has been, as they note in the PSI, atrocious.

[1] The PSI appeared to contain a typo; it stated a recommendation of "12 to 25 years," but the court stated it was reading the recommendation to make sense.

> The defendant needs to be taken off the streets. He's a serious danger to the public. He needs rehabilitation, but it has to start in a prison setting. He cannot be released. The recommendation of both sides, again, with all due respect, is too low. I might and probably not even in that case, but I might if Mr. Boone presented as someone who is 46, who has no criminal record, whatsoever, complete, absolutely 45 or 46 years of law-abiding behavior, no offenses, and this defendant presents with multiple offenses, maybe two or three years in and one or two years out is then appropriate. It's not in this case.

The court sentenced Boone to ten years initial confinement and five years extended supervision.

¶13 Boone filed a postconviction motion for resentencing. In it he argued that the PSI writer's characterization of him as willfully noncompliant with supervision was "false," and he attached a report prepared by a State Public Defender staff member that summarized the chronological log in his probation file and compared it with the PSI's summary. The motion asserted that "at least *some* of the distance between the sentence the State recommended and the one the Court imposed is attributable to the PSI writer's characterization of Mr. Boone as willfully noncompliant with supervision—a characterization that turned out to be false." It argued that the accurate picture—that Boone's "performance on parole not only did not deteriorate, but actually improved over time and was quite good for a period of years"—was "unknowingly overlooked" and therefore constituted a new factor that warrants sentence modification under ***Harbor***. The postconviction court denied the motion in a written decision.

¶14 Further details will be included as necessary to the discussion.

DISCUSSION

Boone has not established the existence of a new factor because the disputed information was neither new nor highly relevant to the imposed sentence.

A. Standard of review and legal principles.

¶15 To gain sentence modification, a defendant must first demonstrate by "clear and convincing evidence the existence of a new factor." ***Harbor***, 333 Wis. 2d 53, ¶36. The elements of a new factor are set forth in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), as:

> [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. (emphasis added).

¶16 Where that has been established, the trial court, in its discretion, "determines whether that new factor justifies modification of the sentence." ***Harbor***, 333 Wis. 2d 53, ¶37. A court may dispose of such a motion on either of the requirements—is it a new factor?—or does it justify modification?—and if the motion fails as to either one, the court "'need go no further in its analysis' to decide the defendant's motion." ***Id.*** (citation omitted). "Erroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was highly relevant to the imposed sentence and was relied upon by the trial court." ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656. Whether a fact or set of facts presented by the defendant constitutes a new factor is a question of law. ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶17 The trial court's determination as to whether a new factor justifies sentence modification is reviewed for erroneous exercise of discretion. ***Hegwood***,

113 Wis. 2d at 546. It is well established that there is a "strong policy against interference with the discretion of the trial court in passing sentence." ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457 (1975).

B. Boone's arguments.

¶18 To prevail on his new factor argument, Boone must show by clear and convincing evidence that there were inaccuracies in the PSI, that they were new, or unknowingly overlooked at sentencing and that they were highly relevant to the sentence. *See* ***Rosado***, 70 Wis. 2d at 288. In order to establish that there were inaccuracies in the PSI, Boone must first establish that specific statements in the PSI are not accurate. Boone argues that "the volume of materially inaccurate information that was presented to and expressly relied upon by the circuit court" justifies re-sentencing, even under the deferential review accorded to sentencing decisions. He argues that it is clear from the sentencing hearing that the inaccurate information was both highly relevant to the imposed sentence and was relied upon by the trial court. *See* ***Norton***, 248 Wis. 2d 162, ¶9. We disagree.

1. Boone's claimed inaccuracies were not new, unknowingly overlooked, inaccurate, or highly relevant to sentencing.

¶19 Boone argues that the PSI as a whole presented "gross inaccuracies." On closer examination however, he specifically attacks only two paragraphs of the PSI. Yet Boone's report analyzing those two paragraphs of the PSI is seven single-spaced pages and it points to nothing in the PSI that is false. Rather, the gist of his complaint about those two paragraphs of the PSI is that, even where it is "technically accurate," it does not tell the full story, and the full story is that his cooperation was generally good and his infractions generally minor.

¶20 Boone's claimed inaccuracies in the PSI consist of the following four disputed facts.

¶21 The first disputed fact is his claim that the PSI was inaccurate when it said he made "little progress" in sexual offender treatment, while complaining of back problems that prevented him from sitting in group session. The truth, Boone argues, is shown in his post-sentencing report, that says he "struggled at times, [and] required some [DOC] intervention early on" but finally completed it by the end of his sentence.

¶22 First of all we note that Boone bases this claim of "gross inaccuracy" on an adjective describing his progress, "little." He disputes that he made "little" progress, but does not dispute that his progress in the sex offender treatment was slow. By his own admission it took him the entire six years of supervision to complete treatment. He offers as an excuse for his slowness, his bad back. We conclude "little" progress is not inaccurate in describing extremely slow progress. And it is certainly not a gross inaccuracy.

¶23 Additionally, the fact that he completed treatment was known to Boone and the court at sentencing. His lawyer pointed it out at the beginning of the sentencing. Accordingly it does not qualify as a new or an unknowingly overlooked fact under ***Harbor***, 333 Wis. 2d 53, ¶57.

¶24 And finally, the trial court did not rely on an inaccuracy. It *acknowledged that he completed the treatment and cited it in the sentencing*. The rapidity with which he completed the treatment was not an issue at sentencing. The trial court did not find the "little progress" statement in the PSI highly relevant at sentencing.

¶25 Boone's second claimed inaccuracy is a statement in the PSI that Boone had "… an increased number of contacts [] with minors which were against the rules of supervision." Boone contends that the word "increased" is inaccurate. In his post-sentencing report the writer stated that the truth was actually that at the beginning of his probation period, September 2006, he did have contact with minors, his niece and nephew, and then later in another incident with a friend and her two children. He does not deny that contact with minors was prohibited and that he violated it. He argues that it did not "increase" and admits that he was warned by his agent and thereafter had no contact with minors until the end of his supervision. The use of the word "increased," he argues, is "grossly inaccurate."

¶26 Once again, we conclude that the PSI statement is not inaccurate, much less grossly so. Boone "increased" his contact by having contact, not just one time, but two. Again, Boone knew about the amount and nature of his contact with minors at his sentencing—it was not new nor could it be said to be "unknowingly overlooked" at sentencing. Boone could have spoken up. So, once again, Boone does not satisfy the ***Harbor/Rosado*** elements. But even more importantly, the trial court made no reference to this contact with minors at his sentencing, so it clearly was not highly relevant to the sentence.

¶27 The third area of "gross inaccuracy" on which Boone relies is the statement in the PSI that Boone refused to submit to a polygraph test, for which refusal he was sanctioned. Boone does not dispute the fact that he refused and the refusal went on for some time. Rather, he offers an excuse for refusal—a bad back. He contends he could not sit for longer than thirty minutes at a time. After his agent put him in custody for the refusal (which he does not factually dispute), he was instructed to get his ability to sit up to an hour, which he eventually did, and then took the polygraph on December 3, 2007.

¶28 Once again, the PSI was not inaccurate, and certainly not grossly inaccurate. Boone admits refusing and being sanctioned. Rather, he objects to the omission of the back excuse and the subsequent taking of the polygraph. But these omissions do not make the PSI statement by itself inaccurate. And again, the omissions that he complains about were corrected prior to sentencing. Boone's lawyer at sentencing pointed out Boone's eventual compliance with the polygraph at the beginning of sentencing. So, the polygraph information was known to the court at sentencing. The claimed inaccuracy was specifically corrected and was not relied on by the trial court, so it cannot be considered highly relevant to sentencing under the ***Harbor/Rosado*** analysis.

¶29 The fourth area of claimed inaccuracy is the PSI statement that Boone was held in custody for four specific time periods. As with his other arguments, Boone admits the statement is accurate as to custodial detentions for those dates. But the claim of inaccuracy is based on the omission of all of the reasons for the custody. For example, the May 11, 2007 through July 3, 2007 custody, Boone explains, was due to Boone's initial refusal to take the polygraph. The September 18, 2008 through September 25, 2008 custody was due to a missed home visit due to his having phone problems. The March 11, 2010 through March 19, 2010 custody was due to a report from a citizen that Boone was stalking the caller's daughter, and the March 26, 2011 through March 28, 2011 custody was due to technological issues with Boone's electronic monitoring bracelet.

¶30 Again, none of the PSI statements is inaccurate. And to the extent that Boone is arguing that adding the reasons helps Boone, clearly only the final one falls into that category. But more importantly, as with the other claimed inaccuracies above, all of the claimed *true* facts were known at sentencing. Boone's lawyer informed the court about them. And none was referenced by the

trial court at sentencing and therefore cannot be said to have been highly relevant to sentencing, failing this final ***Harbor/Rosado*** factor.

¶31 Because we conclude that Boone has failed to meet his burden of showing that any of the specific statements he complains about in the PSI were inaccurate, and because every one of them was something Boone knew about at the time of sentencing, and some were even specifically pointed out to the trial court by his lawyer, none is a *new* factor that was *unknowingly overlooked*. And none of the specific complained-about statements were referenced by the trial court at sentencing. Accordingly, Boone fails to meet his burden of showing any were "highly relevant" to sentencing. ***Rosado***, 70 Wis. 2d at 288.

2. None of the court's comments show that the claimed inaccuracies were highly relevant to sentencing.

¶32 To the extent that Boone is arguing that two general comments of the trial court at sentencing about Boone's non-compliance with supervision constitute inaccuracies that rise to the level of new factors, we address that assertion briefly.

¶33 We acknowledge that the court made two general statements about the poor nature of Boone's compliance with supervision. The court said, quoting the PSI writer: "[Boone's] level of compliance with probation and the DOC has been, as they note in the PSI, atrocious." It also characterized his history of non-compliance on probation and his behavior as "the worst of the worst when it comes to complying with court orders." Determining *how relevant* this information was to the court in imposing sentence, requires us to look at the full context of the court's remarks.

¶34 From the context of all of its sentencing remarks it is clear that the serious nature of this sexual assault of a thirteen year old by a man in his forties, and the fact that it was his third sexual assault of a minor, and the fact that Boone was a three-time repeat sexual offender were the facts the court found highly relevant to the court's sentence. The court stated:

- "[T]his is a defendant who presents to the court as a multiple time habitual offender."
- "[W]hat is disturbing, very disturbing is the repetitive nature of his sexual assaults. He now has been convicted of three sexual assaults in, approximately, 20 years."
- "He has victimized now, yes, over the course of 20 years, multiple victims, not counting his juvenile offense. He has three adult convictions for sexual assault, three."
- "Mr. Boone, is a serious, serious danger to the public. He's a danger to children."
- "Mr. Boone needs a long period of imprisonment because he needs to be -- and I'm focusing on deterrence, rehabilitation and punishment."

The court repeatedly referred to Boone as a sex offender, predator, sexual deviant and pedophile.

- "I believe, clearly, that Mr. Boone is a predator, that he is a pedophile and that he is a serious, serious, serious danger to this community."
- "[H]e clearly is a predator. He clearly is a menace. He clearly has not learned anything from his prior sexual assaults and from his sex offender treatment."

The court repeatedly referred to the fact that Boone had been convicted of two other sexual assaults, had the opportunity of probation, the punishment of prison and the benefit of sex offender treatment, and still reoffended.

- "He has not learned from his repeated sex offender treatment."

¶35 The court repeated its main focus on Boone's repeat sexual offending as the reason it rejected the joint plea negotiation. The court stated that because of Boone's record of multiple sex assaults, the fact that this offense occurred after he completed sex offender treatment, the need to protect minor children and the public, it could not follow the recommendation. Alluding to the gravity of the offense, the court stated that it "might" approve of the recommended sentence for this crime for a defendant of the same age with "no criminal record, whatsoever," but "probably not even in that case[.]" In rejecting the recommendation, the court made clear that Boone's non-compliance with probation or court orders was not a relevant factor, much less a highly relevant one.

¶36 Boone's performance while on supervision was simply not the basis the sentencing court gave for imposing its sentence. The full context of the court's explanation of the sentence makes clear that it was Boone's crime, his record, and his failure to benefit from prior treatment that were highly relevant to the imposition of the sentence. The court appears to have believed the brief portion of the PSI that conveyed the impression that Boone did not do well on supervision, and the court acknowledged that belief more than once. But there is nothing in the record to suggest that his performance on supervision was highly relevant.

¶37 Because we conclude that the post-sentencing report describing Boone's performance on supervision does not constitute a new factor, we need not reach the question of whether the sentencing court erroneously exercised its discretion in determining that it did not justify sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶38.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.