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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP1755-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT M. SCHUELLER,

Defendant-Appellant.

ON APPEAL FROM A DENIAL OF A MOTION FOR SENTENCE MODIFICATION ENTERED IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE RICK T. CVEYKUS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Nearly 20 years after being convicted of intentionally killing another person after a bar fight, Schueller sought sentence modification in the circuit because new treatments for his post-traumatic stress disorder (PTSD) can, he claims, dramatically reduce his symptoms or even alleviate them entirely.

He claims that the sentencing court believed that his PTSD could not be cured, so these new treatments are a new factor highly relevant to his sentence.

The circuit court denied his motion, finding that, while the treatments were new since sentencing, they were not highly relevant to the sentence. The circuit court found that protection of the public and punishment were the main factors considered at sentencing, and while Schueller's PTSD was relevant, the new treatment was not highly relevant to the sentence.

This Court should affirm because the mere availability of new treatments for Schueller's PTSD is not a new factor. No cases have held that, and, by contrast, it has long been the law that rehabilitation—the goal of receiving treatment—is not a new factor. Even if new treatment can be a new factor, the treatability was not highly relevant to Schueller's sentence. The circuit court clearly stated that the protection of the public and punishment were the two most important considerations in its sentence.

ISSUE PRESENTED

Did Schueller demonstrate a new factor that was highly relevant to his sentence?

The circuit court answered: No.

This court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

In 2004, Schueller was charged with first-degree intentional homicide for the death of Forrest Vruwink.[1] (R. 47:1.) A bartender told police that Schueller and Vruwink argued about a pool game and that argument turned physical. (R. 47:1.) Schueller told Vruwink to "come to his (Schueller's) house in the morning and they would 'finish it.'" (R. 47:1.) Schueller was forced to leave the bar, and Vruwink eventually left too. The bartender told police that she thought she heard Schueller outside the bar, yelling, and then she heard four gunshots. (R. 47:1.)

While police were responding to the shooting and setting a perimeter, Schueller approached police and told them he was who they were looking for and he was who shot Vruwink. (R. 47:1.)

A bar patron who witnessed the incident told police that she left after Schueller and before Vruwink. (R. 47:2.) Schueller was standing in the street, and she spoke with him. (R. 47:2.) He showed her that he was holding a handgun, and he asked her "where those guys were that beat him up." (R. 47:2.) She left in her car and when she was around the corner, she heard at least three shots. (R. 47:2.)

Vruwink was shot four times: twice in the shoulder, once in the groin, and once in the head. (R. 47:2.) He died of the gunshot wounds. (R. 47:2.)

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[1] Pursuant to Wis. Stat. § (Rule) 809.86(3), the State uses the real name of the victim of a homicide.

Schueller ultimately pleaded no contest to an amended count of second-degree intentional homicide. (R. 4:1.)

A pre-sentence investigation (PSI) was filed. (R. 119:1.) This included his PTSD diagnosis and included one doctor's opinion that Vietnam veterans "suffering PTRSD [are] predisposed . . . to emotional and behavioral outbursts. They are likely to over interpret threatening situations and react accordingly." (R. 119:8.) Yet, the author opined that:

> [t]his was not as simple as PTSD combined with a self medicating war vet having a flashback. . . . This is not a reaction to a perceived threat. This is calculating behavior combined with chemical impairment and poor decision making and the end result was the murder of Forrest Vruwink.

(R. 119:11.) The author recommended lengthy incarceration and noted that Schueller "will have the opportunity to address his needs for treatment while serving his sentence. The additional structure and controlled environment will . . . make it possible for him to address his Post Traumatic Stress Disorder." (R. 119:12.)

At sentencing, Schueller called Dr. Michael J. Nelson, a psychologist. (R. 1:6.) He evaluated Schueller and diagnosed him with "Axis I, Post Traumatic Stress Disorder, chronic, secondary to military combat and secondary to an assault in Madison in the late 1970s." (R. 1:8.) He described PTSD generally, the symptoms he saw in Schueller, and the effects PTSD had the night he shot Vruwink. (R. 1:9–12.)

The State acknowledged that "[w]e do know he suffers from Post Traumatic Stress Syndrome" but did "not believe at all that this is a factor, though. He had time from the first event to be out of the situation, to settle down." (R. 1:59.) Going to retrieve the gun and returning to the scene caused the second confrontation with Vruwink, at which point he might have "had a fear as [Vruwink] was coming towards him,

but it was definitely an imperfect self-defense argument that would need to be made." (R. 1:60.)

Trial counsel argued that one of Schueller's pre-plea evaluations found that his PTSD "diminished his capacity to appreciate . . . and conform his conduct to the requirements of law." (R. 1:74.) And, despite his disorder affecting his memory, Schueller never denied that he shot Vruwink. (R. 1:76–77.) Counsel described PTSD to emphasize why it was a heavy factor in the events around the shooting. (R. 1:79–81.) Counsel talked about the treatment available. (R. 1:81–82.) He argued that Schueller's PTSD was a factor in his behavior, especially around the shooting. (R. 1:82–83.)

The circuit court identified the general sentencing objectives, pointing out that "[p]rotection of the community and punishment of the defendant are significant objectives. Anytime someone's life is taken in a violent manner, this is considered one of the most serious offenses in our society." (R. 1:89.)

It also noted that life sentences are common with intentional homicide cases even without prior criminal history because "our society looks at these offenses as being grave, and that's why they are serving life sentences." (R. 1:90–91.)

The circuit court credited his diagnosis and observed that Schueller "functioned in our society despite suffering from Post Traumatic Stress for a number of years." (R. 1:93–94.) The court stated that:

> Post Traumatic Stress Syndrome is a factor because the Court does have to look at the mental and emotional health problems of a defendant.
>
> It's a factor that really does slice both ways in terms of a Court's analysis. It mitigates his behavior in terms of why he may have acted the way he did that night, but it also I think aggravates the situation

> when you look at somebody in terms of danger to the public.
>
> . . .
>
> I understand that Post Traumatic Stress is something that Mr. Schueller will always have because of his service in Vietnam. And it's treatable to a certain degree, but it's not something he will ever be cured of.
>
> So, it's something that the Court has concerns about when you look at the protection of the public.

(R. 1:95–96).

The circuit court considered "the viciousness and the aggravated nature of this crime, and it did result in death." (R. 1:98.) The court found that Schueller was drunk, had been smoking marijuana, and left to obtain a gun "the most significant facts." (R. 1:98–99.)

The circuit court sentenced Schueller to 25 years of initial confinement and 15 years of extended supervision. (R. 1:105; 4:1.) The court expressly stated that Schueller "would need to be on supervision for the balance of his life given this Post Traumatic Stress Syndrome diagnosis. (R. 1:106.)

Nearly 20 years after sentencing, Schueller sought sentence modification in the circuit court. (R. 131:1.) He argued that, while his PTSD was known and considered at sentencing, new "effective programming and assistance . . . warrant downward modification of" his sentence so he can "receive the help he has always needed in order to heal." (R. 131:1–2.) He claimed that "the efficacy of contemporary treatment options on alleviating and even ridding a person of PTSD" was a new factor. (R. 131:9.) The new treatments could not have been known at the time of sentencing. (R. 131:9.) He argued that his PTSD "and its inability to be treated" were highly relevant to his sentence because his PTSD was discussed at length during sentencing and, he argued, the

circuit court believed that it was "untreatable." (R. 131:9–10.) He further argued that new treatment options warranted sentence modification. (R. 131:11–12.)

The circuit court denied the motion. (R. 143:1.) The court noted the discussion of Schueller's PTSD at sentencing, including how it could be seen as both mitigating and aggravating. (R. 143:2.) The circuit court noted that the sentencing court "looked beyond [Schueller's] PTSD diagnosis. In particular, the Court focused on the seriousness of the offense and punishment of the offender." (R. 143:2.)

The circuit court "ha[d] no problem finding that the advances in treating combat veterans for PTSD over the last 20 years were not known to the trial judge at the time of sentencing, because the advances had not yet occurred." (R. 143:3.) However, the circuit court found that Schueller "fail[ed] to satisfy his burden in showing that the PTSD diagnosis was 'highly relevant' to the sentencing court." (R. 143:3.) While PTSD was considered during sentencing, the seriousness of the offense and punishment were "the controlling aspects that were highly relevant to the judge's sentence." (R. 143:3.) The sentencing court noted that even first offense cases of intentional homicide commonly result in life sentences, but Schueller had a prior allegation of being involved in a confrontation at the same bar, with a gun, shortly before the shooting. (R. 143:3–4.)

The circuit court found that, despite the existence of new treatments and their effects, there was "no evidence that such treatment has occurred with [Schueller] as of today, or that he would be one of those individuals that could continue in a life without a PTSD diagnosis." (R. 143:4.) Nor had he "shown that he will be able to be part of the population that shows marked improvement based on the new treatment." (R. 143:4.) With that, the court found that Schueller had not demonstrated a new factor, so it denied the motion without

considering whether the new factor would merit sentence modification. (R. 143:4.)

Schueller now appeals.

STANDARD OF REVIEW

Whether a motion presents a new factor is a legal question that this court independently reviews. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828.

ARGUMENT

Schueller did not prove a new factor that was highly relevant to his sentence.

A. To be entitled to sentence modification, a defendant needs to show the existence of a new factor that justifies modification.

A circuit court has the "inherent authority to modify [a] criminal sentence[ ]" when a defendant shows the existence of a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 35. A defendant may move to modify his sentence based on a new factor at any time. *See State v. Noll*, 2002 WI App 273, ¶¶ 11–12, 258 Wis. 2d 573, 653 N.W.2d 895.

To prevail on a sentence modification motion based on a new factor, a defendant must prove by clear and convincing evidence both that a new factor exists and that the new factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶¶ 36–37. If the postconviction court determines that the defendant did not prove the existence of a new factor, then it is not required to determine whether, in the exercise of discretion, it should modify the sentence. *Id.* ¶ 38.

A "new factor" is "a fact or set of facts highly relevant to the imposition of [the original] sentence, but not known to the [circuit court] at the time of [the] original sentencing," either because the facts did not exist or because all the parties

unknowingly overlooked them. *Harbor*, 333 Wis. 2d 53, ¶ 40 (citation omitted).

To be highly relevant to the imposition of the original sentence a new factor must impact a factor which was considered in imposing the original sentence. *State v. Carroll*, 2012 WI App 83, ¶ 10, 343 Wis. 2d 509, 819 N.W.2d 343. A new factor is highly relevant to the imposition of a sentence when, even though it may not frustrate the purpose of the original sentence, it would have made the court's approach to sentencing different. *See Harbor*, 333 Wis. 2d 53, ¶ 50.

If a defendant fails to establish that there is a new factor, his claim fails and there is no need to go on to consider whether any new factor warrants modification of the sentence. *Harbor*, 333 Wis. 2d 53, ¶ 38.

"[A] new expert opinion based on previously known or knowable facts is 'nothing more than the newly discovered importance of existing evidence.'" *State v. Grindemann*, 2002 WI App 106, ¶ 25, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting *State v. Fosnow*, 2001 WI App 2, ¶ 25, 240 Wis. 2d 699, 624 N.W.2d 883). Said another way, when an expert expresses an opinion in a post-sentencing report based on "previously known or knowable facts," that "report is not a 'fact or set of facts'" that did not exist or that the parties unknowingly overlooked at sentencing. *State v. Sobonya*, 2015 WI App 86, ¶ 7, 365 Wis. 2d 559, 872 N.W.2d 134.

Harbor's standard for sentence modification based on a new factor does not require a showing that the "alleged new factor must also frustrate the purpose of the original sentence." *Harbor*, 333 Wis. 2d 53, ¶ 52. However, when a court decides whether to exercise its discretion and modify a sentence based on a new factor, the court may "consider whether the new factor frustrates the purpose of the original sentence." *State v. Ninham*, 2011 WI 33, ¶ 89, 333 Wis. 2d 335, 797 N.W.2d 451.

B. The mere availability of new treatment for a known disorder is not a new factor.

Schueller renews his argument that treatment advances for PTSD since his sentencing are a new factor. (Schueller's Br. 11–13.) The circuit court accepted that they were new since sentencing. (R. 143:3.) However, just because a fact or set of facts was not in existence at sentencing does not mean that that fact or set of facts can qualify as a new factor.

New availability of treatment is not a new factor. Schueller cites no cases that have ever held that treatment for a known condition is a new factor. (Schueller's Br. 13–15.) New treatment is, in essence, a new appreciation or expert opinion about previously-known facts, and it has long been known that "mental health professionals will sometimes disagree on matters of diagnosis and treatment." *State v. Slagoski,* 2001 WI App 112, ¶ 11, 244 Wis. 2d 49, 629 N.W.2d 50. So, a new recommendation about treatment is not a new factor. *Id.*

Schueller does not address the long history of cases that hold that response to treatment and rehabilitation are not new factors. *State v. Kluck,* 210 Wis. 2d 1, 7–8, 563 N.W.2d 468 (1997) (an inmate's progress or rehabilitation while incarcerated is not a new factor); *State v. Krueger,* 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984); *State v. Prince,* 147 Wis. 2d 134, 136–37, 432 N.W.2d 646 (Ct. App. 1988) (an inmate's response to treatment while incarcerated is not a new factor). This is the case because the purpose of sentence modification is not to reward rehabilitation but to correct an unjust sentence. *Kluck*, 210 Wis. 2d at 8.

Our supreme court has held that an inmate's potential response to treatment as part of a rehabilitation program in prison is not a new factor warranting a modification of his sentence. *State v. Crochiere*, 2004 WI 78, ¶ 15, 273 Wis. 2d 57,

681 N.W.2d 524, *modified on other grounds*, *Harbor*, 333 Wis. 2d 53, ¶¶ 47 n.11, 52 (citing *Prince*, 147 Wis. 2d at 136–37).

These cases are fatal to Schueller's argument. The availability of treatment is only relevant if he was to obtain that treatment and become rehabilitated. The circuit court found that Schueller had brought "no evidence that such treatment has occurred with [Schueller] as of today, or that he would be one of those individuals that could continue in a life without a PTSD diagnosis." (R. 143:4.) Nor had he "shown that he will be able to be part of the population that shows marked improvement based on the new treatment." (R. 143:4.) But even if he had obtained the treatment and cured his PTSD, that would, as a matter of law, not be a new factor, so the mere availability of treatment cannot be a new factor either. *Kluck,* 210 Wis. 2d 1, 7–8.

C. If this Court disagrees and believes that newly available treatment could be a new factor, the availability of treatment or the possibility of curing Schueller's PTSD were not highly relevant to his sentence, so Schueller still has failed to establish the existence of a new factor.

Schueller argues that his PTSD and the court's statement that it was uncurable were highly relevant to his sentence. (Schueller's Br. 13–15.) Schueller notes the prevalence of his PTSD at sentencing. (Schueller's Br. 13–14.) However, there is a large difference between discussion of his PTSD and whether it was highly relevant to the imposition of his sentence. Obviously, the existence of Schueller's PTSD cannot be a new factor—the PSI, the parties and the circuit court discussed it at length. (R. 1:59–60, 74, 77–91, 93–96; 119:8.) It was therefore known at the time of sentencing and cannot weigh into whether Schueller has demonstrated a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 40. So, Schueller needed to

prove that the treatability of his PTSD, not the disorder itself, was highly relevant to the imposition of his sentence.

At sentencing, the circuit court stated that "[p]rotection of the community and punishment of the defendant are significant objectives. Anytime someone's life is taken in a violent manner, this is considered one of the most serious offenses in our society." (R. 1:89.) There, it identified the two most important factors. To the extent that the circuit court considered Schueller's PTSD, it had "to look at the mental and emotional health problems of a defendant." (R. 1:95.) But, it weighed both for and against him. (R. 1:95.) The court stated its belief that Schueller "will always have" PTSD, but it also acknowledged that it was treatable. (R. 1:95–96.)

Therefore, the record is clear that the perceived lack of treatability of Schueller's PTSD was a small factor that went into the court's consideration of the protection of the public. (R. 1:96.) The court considered other factors as much more significant, such as "the viciousness and the aggravated nature of this crime, and it did result in death." (R. 1:98.) The court found that Schueller was drunk, had been smoking marijuana, and left to obtain a gun "the most significant facts." (R. 1:98–99.)

By contrast, in the only published Wisconsin case where the untreatable nature of a defendant's personality disorder was a new factor that justified modification, the circuit court placed the defendant on probation specifically so that he would receive "intensive care and treatment" at Mendota. *State v. Sepulveda*, 119 Wis. 2d 546, 549, 350 N.W.2d 96 (1984).[2] However, Sepulveda was denied admission to

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[2] Because of this difference—statutory authority to modify probation as opposed to the inherent power to modify a sentence—*State v. Harbor* does not directly overrule *State v. Sepulveda*, 119 Wis. 2d 546, 350 N.W.2d 96 (1984). *State v. Harbor,* 2011 WI 28, ¶¶ 43–45, 333 Wis. 2d 53, 797 N.W.2d 828.

Mendota because the intake psychiatrist concluded that treatment would have "very little if any success" in treating Sepulveda's disorders. *Id.* The circuit court set aside his original sentence of probation and imposed a prison sentence. *Id.* at 550. Our supreme court affirmed because "the defendant's inability to gain admission to Mendota[ ] completely circumvented the intent behind the judge's grant of probation." *Id.* at 555. As is clear, the assumed treatability of Sepulveda's disorders was highly relevant to his sentence. Schueller comes nowhere near this same emphasis for his treatability.

The record is clear: the treatability of his PTSD was not highly relevant to his sentence, the brutal nature of his crime and the need to protect the public were. (R. 1:89.) Therefore, he has not shown a new factor that is highly relevant to his sentence.

* * * * *

If this Court determines that a new factor exists, then this Court should remand the matter to the circuit court to determine if the new factor justifies sentence modification. *Noll*, 258 Wis. 2d 573, ¶¶ 6–7. Remand is appropriate because the question of "whether a new factor justifies modification of the sentence is a discretionary decision for the circuit court." *State v. Armstrong*, 2014 WI App 59, ¶ 18, 354 Wis. 2d 111, 847 N.W.2d 860; *Harbor*, 333 Wis. 2d 53, ¶ 37.

CONCLUSION

This Court should affirm the circuit court.

Dated this 16th day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,497 words.

Dated this 16th day of February 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of February 2024.

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