LITIGATING CREATIVE SENTENCE MODIFICATION MOTIONS

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I. The circuit court's inherent authority to modify a sentence: tension between finality & the ability to change an unjust sentence.

A. Historical development.

1. Early 1900s: common law generally prohibited courts from revising sentences – whether up or down – after the expiration of the court's "term" or after execution of the sentence had begun. ***State ex rel. Zabel v. Municipal Court***, 179 Wis. 195, 191 N.W.2d 565 (1923).

2. 1970: Wis. Supreme Court adopted 90-day time limit from the date of sentencing for a motion to modify a sentence. ***Hayes v. State***, 46 Wis. 2d 93, 175 N.W.2d 625 (1970) ("within reasonable limits we think an unjust sentence should be corrected by the trial court").

3. 1985: Wis. Stat. § (Rule) 973.19 is created. Sub. (1)(a) allows defendant to move for modification of sentence within 90 days of sentencing, if the defendant is not seeking postconviction relief under Wis. Stat. § (Rule) 809.30.

    a. Section 973.19 applies to defendants who do not want to pursue an appeal yet want to seek a sentence modification on the ground that the sentence is too severe. ***State v. Noll***, 2002 WI App 273, ¶9, 258 Wis. 2d 573, 653 N.W.2d 895.

    b. In practice, § 973.19 is rarely used because proceeding under that provision forfeits the opportunity for a "full blown appeal" under § 809.30. ***State v. Scaccio***, 2000 WI App 265, ¶5, 240 Wis. 2d 95, 622 N.W.2d 449.

B. Current law.

1. Judiciary has inherent power to modify a sentence. "This power is exercised to prevent the continuation of unjust sentences." ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524.

2. **But** a circuit court's inherent authority to modify a sentence is "a discretionary power that is exercised within defined parameters." ***Crochiere***, 273 Wis. 2d 57, ¶12.

    a. A court may not modify a sentence on mere reflection or because it has second thoughts about the sentence. *See*, *e.g.*, ***State v. Grindemann***, 2002 WI App 106, ¶24, 255 Wis. 2d 632, 648 N.W.2d 507 (a court's altered view of facts known to the court at sentencing, or a reweighing of their significance, "is a classic example" of the mere reflection or second thoughts which cannot form the basis for a sentence modification).

    b. A court may not impose a harsh sentence to "shock" the defendant, while intending to later reduce the sentence. ***State v. Wuensch***, 69 Wis. 2d 467, 480, 230 N.W.2d 665 (1975).

3. A court may modify a sentence: (1) to correct an illegal or a void sentence or a clerical error; (2) when the sentence is unduly harsh or unconscionable; or (3) on the basis of a new factor. ***State v. Stenklyft***, 2005 WI 71, ¶¶60 & 115, 281 Wis. 2d 484, 697 N.W.2d 769; ***State v. Harbor***, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828.

II. Authority to correct illegal sentences and clerical errors.

A. Sentence in excess of maximum.

1. A sentence that exceeds the maximum penalty is void, the sentence is valid only to the extent of the maximum term authorized by statute and "shall stand commuted without further proceedings." Wis. Stat. § 973.13.

2. Statute also applies when state fails to prove the prior conviction necessary to establish habitual criminal status. ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998).

3. Although under § 973.13 the challenge to a sentence that exceeds the maximum cannot be forfeited, "further

proceedings" may be needed, *i.e.*, a motion establishing that the sentence is illegal.

B. Correction of clerical error.

1. The circuit court, not the clerk of circuit court, must determine if an error appears in the sentence portion of a written judgment of conviction. ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857.

2. The record of the circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987).

3. A court has the power to correct a clerical error at any time. ***Prihoda***, 239 Wis. 2d at ¶17 (correction made 20 years after sentencing). However, where the defendant has a legitimate expectation of finality in the sentence as imposed, double jeopardy limits the court's ability to "correct" a sentence by increasing its length. *See*, *e.g.*, ***State v. Willett***, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881.

III. Authority to modify sentence that is unduly harsh or unconscionable.

A. An authority that was recognized in 1975 and still exists.

1. Even though no new factor is present, a circuit court has authority to modify a sentence when the court determines the sentence is unduly harsh or unconscionable. ***Harbor***, 333 Wis. 2d 53, ¶35 n.8, *citing* ***Wuensch***, 69 Wis. 2d at 480 ("we perceive no valid reason why a trial court should not be permitted to review a sentence for abuse of discretion based on its conclusion the sentence was unduly harsh or unconscionable").

2. If the circuit court reduces a sentence on this basis, the court must set forth its reasons why it concluded the sentence originally imposed was unduly harsh or unconscionable. ***Wuensch***, 69 Wis. 2d at 480.

3. A circuit court's determination as to whether the sentence imposed was unduly harsh or unconscionable is reviewed for an erroneous exercise of discretion. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

B. An authority rarely used.

1. "If there are cases that overturn a sentence on the grounds that the sentence was too harsh or unconscionable they are few and far between." ***Stenklyft***, 281 Wis. 2d 546, ¶115.

2. ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979): supreme court affirmed circuit court's modification of sentence as unduly harsh where the circuit court gave "additional consideration" to the fact that the defendant had chosen not to testify rather than lie to the court.

3. ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990): court of appeals affirmed circuit court's modification on the ground that the sentence was unduly harsh compared to an accomplice's sentence. At the time of Ralph's sentencing the court knew the length of the sentence the state had agreed to recommend for the accomplice, which was less than what Ralph received. But the court did not know that the accomplice had previously served time in jail. That information provided a basis for the circuit court to determine that Ralph's sentence was unduly harsh compared to the accomplice's.

4. But in ***State v. Klubertanz***, 2006 WI App 71, ¶41, 291 Wis. 2d 751, 713 N.W.2d 116, the court of appeals affirmed the circuit court's ruling that it did not have the authority to modify where the defendant claimed his sentence was rendered unduly harsh because he was sexually assaulted in prison. The court of appeals wrote that a circuit court's authority to review its sentence to determine whether the sentence is unduly harsh "does not include the authority to reduce a sentence based on events that occurred after sentencing." ***Id***. at ¶40.

IV. The *New* New Factor Test

A. ***State v. Harbor***, 2011 WI 28, 333 Wis.2d 53, 797 N.W.2d 828

1. In ***Harbor,*** the Wisconsin Supreme Court Court affirmed the definition of new factor set out in ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975). The test for proving a new factor has two parts:

   (a) The new information is a fact or set of facts highly relevant to the imposition of sentence;

   (b) 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 the parties.

2. The significance of the ***Harbor*** opinion is that it clarified that the court is *not required to find that the alleged new factor frustrated the purpose of the sentence.*

3. The defendant has the burden of proving a new factor by clear and convincing evidence.

V. New Factor: What Is/What Isn't

A. What Is Not a New Factor (however, note that many of these cases were decided before *State v. Harbor* and can arguably be distinguished on that basis):

Defendant's desire to tell his side of the story at a postconviction hearing – ***Rosado v. State***, 70 Wis.2d 280, 234 N.W.2d 69 (1975)

Disparity in sentencing between co-defendants – ***State v. Toliver***, 187 Wis.2d 346, 361-362, 523 N.W.2d 113 (Ct. App. 1994); disparity in accomplices – ***State v. Studler***, 61 Wis.2d 537, 541, 213 N.W.2d 24 (1973)

Defendant's progress or rehabilitation while incarcerated – ***State v. Kluck***, 210 Wis.2d 1, 7-8, 563 N.W.2d 468 (1997), ***State v. Krueger***, 119 Wis.2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984)

An inmate's response to treatment while incarcerated – ***State v. Prince***, 147 Wis.2d 134, 136-137, 432 N.W.2d 646 (Ct. App. 1988)

An inmate's shorter-than-normal life expectancy – ***State v. Ramuta***, 2003 WI App 80 ¶21, 261 Wis.2d 784, 661 N.W.2d 483

An inmate's post-sentencing decline in health – ***State v. Michels***, 150 Wis.2d 94, 99-100, 414 N.W.2d 278 (Ct. App. 1989)

DOC determination that an inmate isn't eligible for the Challenge Incarceration Program – ***State v. Schladweiler***, 2009 WI App 177, 322 Wis.2d 642, 777 N.W.2d 114

Research about adolescent brain development – ***State v. Ninham***, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451

Change in parole policy – ***State v. Wood***, 2007 WI App 190, 305 Wis.2d 133, 738 N.W.2d 81; ***State v. Delaney***, 2006 WI App 37, 289 Wis.2d 714, 712 N.W.2d 368

Economic hardship on the family – ***State v. Prager***, 2005 WI App 95, 281 Wis.2d 811, 698 N.W.2d 837

Completion of all available rehabilitation programs – ***State v. Champion,*** 2002 WI App 267, 258 Wis.2d 781, 654 N.W.2d 242

Newfound realization that behavior caused by childhood sexual exploitation – ***State v. Grindemann***, 2002 WI App 106, 255 Wis.2d 632, 648 N.W.2d 507

Level of community support for the defendant – ***State v. Koeppen***, 2000 WI App 121, 237 Wis.2d 418, 614 N.W.2d 530

Transfer to an out-of-state prison – ***State v. Parker***, 2001 WI App 111, 244 Wis.2d 145, 629 N.W.2d 77

Post-sentencing rehabilitation – ***State v. Crochiere***, 2004 WI 78 ¶14-15, 273 Wis.2d 57, 681 N.W.2d 524

Participation in youth programs – ***State v. McDermott***, 2012 WI App 14, 339 Wis.2d 316, 810 N.W.2d 237

Repeal of possibility of positive adjustment time – ***State v. Carroll***, 2012 WI App 83, 343 Wis.2d 509, 819 N.W.2d 343

B. What Is a New Factor:

Cooperation with law enforcement – ***State v. John Doe***, 2005 WI App 68, 280 Wis.2d 731, 697 N.W.2d 101; ***State v. Boyden***, 2012 WI App 38, 340 Wis.2d 155, 814 N.W.2d 505

The untreatable nature of an inmate's mental condition is such that it frustrates the purpose of the sentence (note that the court ultimately increased the sentence) – ***State v. Sepulveda***, 119 Wis.2d 546, 560-61, 350 N.W.2d 96 (1984)

A potential conflict of interest of the mental health professional who conducted the psychological assessment of the convicted defendant - ***State v. Stafford***, 2003 WI App 138, ¶ 17, 265 Wis.2d 886, 667 N.W.2d 370

A defendant's postconviction voluntary submission to revocation of his parole based on erroneous advice from his parole agent – ***State v. Norton***, 2001 WI App 245 ¶16, 248 Wis.2d 162, 635 N.W.2d 656

Reversal of conviction in another case – ***State v. Hauk***, 2002 WI App 226, 257 Wis.2d 579, 652 N.W.2d 393

VI. Correction of inaccurate information as a new factor.

A. Resentencing claim: inaccurate information at sentencing may entitle defendant to resentencing.

1. Defendant has a due process right to be sentenced on the basis of accurate information. ***United States v. Tucker***, 404 U.S. 443 (1972); ***State v. Travis***, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491.

2. The defendant must establish that: (1) there was information before the sentencing court that was inaccurate; and (2) the circuit court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶¶2 & 31, 291 Wis. 2d 179,

717 N.W.2d 1. Then, the burden shifts to the state to prove beyond a reasonable doubt that the error was harmless. ***Id***.

3. A defendant is entitled to resentencing if he or she satisfies the two-prong test and the error was not harmless. *See* ***Travis*** (resentencing ordered where circuit court imposed sentence with erroneous belief that offense carried a mandatory minimum term of confinement).

B. Sentence modification claim: the correction of inaccurate information may also constitute a new factor, allowing the defendant to seek a sentence modification rather than resentencing.

1. ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656: circuit court sentenced Norton with the understanding that his probation in another case would *not* be revoked. But his probation was revoked, resulting in longer incarceration than the court intended. Court of appeals holds that under the facts of that case, the probation and whether it would be revoked was highly relevant to sentencing. ***Id***. at ¶13. Correction of the inaccurate information was a new factor.

2. ***State v. Wood***, 2007 WI App 190, 305 Wis. 2d 133, 738 N.W.2d 81: circuit court may not convert a motion for sentence modification into a motion for resentencing, absent a clear, unequivocal and knowing stipulation by the defendant.