STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2013-CF-0574

ERIN A. HEINZ,

Defendant.

DECISION AND ORDER

On August 2, 2017, Defendant Erin A. Heinz filed a Motion to Modify Sentence or, Alternatively, for Re-Sentencing contending that either her post-conviction diagnosis of post-traumatic stress disorder or her post-conviction cooperation with the State of Wisconsin constitute new factors requiring a modification of Heinz's sentence, or that she should be resentenced. The State opposes both sentence modification and a re-sentencing of Heinz.

The Court heard oral argument on August 30, 2017, the State appearing by District Attorney Susan Opper and Defendant Heinz appearing in person and by attorney James Rebholz.

The Court concludes that there was no post-conviction assistance or cooperation with or to law enforcement authorities, thus it does not constitute a basis for sentence modification or re-sentencing. The Court further concludes that the post-conviction diagnosis of post-traumatic stress disorder is not a new factor, it is mere reflection. Moreover, it is not newly discovered evidence; rather it is newly discovered importance of evidence previously known and not used. And, finally, the "new" diagnostic evidence does not relate to the crime at issue. Accordingly, there is no basis for Defendant Heinz's motion for sentence modification or re-sentencing due to her post-conviction diagnosis, and, it is hereby, denied.

BACKGROUND

In the May 10, 2013, complaint, Defendant Heinz was charged with two felony counts of delivery of three grams or less of heroin (contrary to Wis. Stat. § 961.41(1)(d)1), and one misdemeanor count of possession of drug paraphernalia (contrary to Wis. Stat. § 961.573). These charges were amended on August 13, 2013, because the persons to whom Heinz sold the heroin (Co-Defendants Jeremiah and Jennifer Schroeder) provided some of that illegal substance to Cassandra Lutz on March 7, 2013, who thereafter died of an overdose. Heinz and her Co-Defendants were charged with first degree reckless homicide by delivery of a schedule one or two controlled substance (heroin) in violation of Wis. Stat. § 961.41, contrary to Wis. Stat. § 940.02(2)(a). There was a possible maximum penalty in excess of ninety years in prison for Heinz with all of the pending counts. Solely with respect to the remaining Class C Felony, there was a maximum possible incarceration of forty years with a maximum possible initial confinement of twenty-five years.

Pursuant to a plea agreement and after a plea colloquy, on January 16, 2014, Heinz pled "no contest" to the first degree reckless homicide count. The other three counts were dismissed, but read-in. The State agreed to recommend a five year period of initial incarceration for Heinz, together with restitution. Additionally, the State sought a Pre-Sentence Investigation. The Department of Corrections, Division of Community Corrections, prepared and filed that Report on March 14, 2014.

The Pre-Sentence Investigation Report ("PSI") was a thorough 16-page report together with an attached 8-page Risk Assessment. Heinz's tumultuous and abusive relationship with Ronald Pollack (her boyfriend and the individual who supplied her with the heroin she sold that ultimately cost Lutz her life) was described and detailed. PSI, at 9. As was Heinz's drug use history that had begun, sadly enough, when she was fourteen years old. *Id.*, at 10. The Pre-Sentence Investigation Report provided, under the Marital Relationship section, that Defendant Heinz has known Mr. Pollack since they were fourteen years old, and stated the following:

> The defendant stated that overall they got along; but she explained that Ronald [Pollack] was abusive and her family was not happy with their relationship. She indicated that while she would end the relationship after abusive incidents, she would eventually return to him after a short period of time.

Id., at 9.

Additionally, the PSI reported that:

> Emotional Health: The defendant indicated that she has never met with a counselor, psychiatrist or psychologist. She stated that she has never been diagnosed with a mental illness and she has never been prescribed any psychiatric medications. She reported that she has never attempted suicide and never thinks about hurting herself.

Id., at 11.

The PSI concluded with a sentencing recommendation of five to six years' initial confinement with three to four years' extended supervision.[1] *Id.*, at 15. This was in excess of the five years' initial incarceration recommended by the State in their plea agreement and letter detailing the same.

Prior to her sentencing on March 27, 2014, Heinz submitted two character letters in her support. A victim impact statement by Ms. Lutz's father (a former police officer) was also filed for consideration by the Court. The prior Court had reviewed those letters, the victim impact statement, and the Pre-Sentence Investigation Report before the sentencing that morning. The prior Court began the sentencing by inquiring whether the Defendant sought to make "any corrections, additions, deletions, or objections to the contents of the presentence investigation." Transcript of Sentencing, March 27, 2014, at 3. The Defendant indicated that there was "nothing substantial." *Id.*

At the sentencing, the Deputy District Attorney indicated that Defendant had cooperated to the extent that she admitted she was a heroin user, using one gram a day, and that "she would sell heroin to about three to four customers per day." *Id.* While Defendant Heinz had no prior criminal record, she admitted to acting as a go-between, distributing heroin to others in the community. *Id.* at 9. The Deputy District Attorney asserted that, pursuant to Defendant's telephone records, it appeared that she provided heroin to up to eight or nine people; Defendant Heinz asserts that it was only three or four. *Id.* at 10. Based upon that aggravated fact, and even though there was a potential maximum penalty of forty years, the State recommended a sentence of five years' initial confinement and took no position on the extent of extended supervision, stating:

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[1]There were other recommendations with respect to the terms of Heinz's extended supervision, including 100 hours of community service, but they are not relevant to this motion. *See* PSI at 15. In fact, the prior Court declined to impose any hours of community service.

> A five-year prison sentence for a 20-year-old woman who has never even spent a night in jail I think is a significant penalty to her in her circumstances. I think it takes into account the cooperation that she did provide. She did not lie to the authorities, and she did give a statement that was consistent with other known facts in the case. So, in that regard, Judge, I do feel that a prison sentence is warranted. I recommend five years of initial confinement.

Id. at 11.

Several victims also spoke prior to sentencing, including Ms. Lutz's aunt, father, and sister. Mr. Lutz sought a twenty year period of initial confinement. Defendant Heinz's sister and mother also spoke at the sentencing seeking leniency. In addition, Defendant Heinz made a statement to the prior Court.

Defendant Heinz's counsel addressed the prior Court, and commented on the Pre-Sentence Investigation report, but did not mention her psychological or mental health. Nor were there any additions or corrections made to the report. Counsel did explain that Defendant Heinz had offered to cooperate with the police but that, due to her inability to break her heroin habit, that offer had been declined. *Id.* at 23-24. At no time did anyone—Defendant Heinz's counsel, sister, mother, or Heinz herself—make any reference to Defendant Heinz's mental health or concerns they had with respect to her admittedly abusive relationship with Mr. Pollack.

The prior Court took the time to issue a thoughtful, poignant sentencing that covered the scourge of the heroin epidemic, but also addressed the actions taken by Defendant Heinz that directly lead to Ms. Lutz's death, to wit, once Heinz's middle-man source was arrested, she went directly to the main source so that she could continue to use and deliver heroin. *Id.* at 38. The prior Court stated that Defendant was a heroin addict, but was also a dealer. *Id.* Moreover, the prior Court noted that Defendant Heinz was "an abject failure" on bond. *Id.* at 41. There was continued opiate use and even a discharge from a treatment program. That Court further noted that, due to her addiction, it was not surprising that law enforcement did not seek her cooperation. *Id.* at 41-42. The prior Court did consider the impact of Mr. Pollack on Defendant Heinz, noting that it "[d]oesn't sound like Ron was a good influence on you." *Id.* at 44.

Based upon all of the facts set forth in the letters, statements, recommendations by all parties—including the Deputy District Attorney, the Pre-Sentence Investigation report, the prior Court concluded as follows:

> Presentence author appropriated identified that you chose to act, and that's the words they use, you chose to act as mid-level seller to people that you knew. You knew the risks. You were capable of comprehending the consequences. I think that sums it up in large part. There's virtually no heroin user, heroin addict that I've seen come through court who hasn't known somebody who has overdosed themselves or known somebody who died from the use of the drug. So as I view that, Ms. Heinz, you knew the risks, you knew the potential consequences, and you made decisions despite that, and that landed you in this position here today.
>
> From this Court's perspective, clearly this is not in this Court's viewpoint a probation case. I don't think anybody has come here to court today suggesting this is a probation case. The question asked by your mother is how long in prison. I think to utilize anything other than a prison sentence in this case would unduly depreciate the seriousness of the offense, and clearly you have significant treatment needs that at this time are only served, in this Court's opinion, by treating those in a confined setting.
>
> This Court has to look at the least restrictive disposition that's appropriate, and under the circumstances, it's clear to this Court that a prison disposition is the only appropriate disposition. So in balancing out all of those different factors that the Court has to address here, looking at the seriousness of the offense, looking at your character, addressing the issues of your rehabilitation but also addressing the issue of punishment and putting new perspective, which I think was the message that was being communicated by the district attorney when they made their recommendation to put you in perspective, this Court is going to sentence you, Ms. Heinz, to a term in the Wisconsin State Prison System that is going to be identified by seven years of initial confinement followed by five years of extended supervision.

Id. at 45-47.

Thus, Defendant Heinz's sentence was twelve years: seven years' initial confinement, and five years' extended supervision. She was afforded 226 days of pre-conviction incarceration credit.

When she reported to prison, Defendant Heinz—as is statutorily-required—underwent a prison assessment and evaluation and a Mental Health Screening Interview was conducted on April 14, 2014. In the Screening Interview form, Defendant Heinz, again, noted her abusive relationship with Mr. Pollack, and the screener checked off a box indicating that Heinz had been the victim of violence or assault, described as "physical and verbal abuse by ex-boyfriend of 2 yrs."[2] Because

[2]This is somewhat contradictory as Defendant Heinz (a twenty year old in 2014) self-reported to the drafter of the Pre-Sentence Investigation Report that she had been in an abusive relationship with Mr. Pollack since she was fourteen. In the Court's math, that adds up to six years.

of these answers, the screener identified that Defendant Heinz had a problem with "trauma abuse in previous relationship" and indicated that Heinz had a mental health need. This was then translated to a diagnosis of "post traumatic stress disorder" that same date. The screener also diagnosed Defendant with "opioid use disorder, severe." Both of these were MH-1 mental health classifications.

Defendant Heinz was then seen by Dr. Holloway on October 17, 2014, for an initial psychiatric evaluation. On June 16, 2016, there was a Psychologist Minimum Security Placement Recommendation that, also, mentioned the MH-1 mental classifications noted above; Defendant Heinz was found to be "psychologically stable and eligible for any minimum security facilities." A Psychological Services Intake File Review report was prepared on July 7, 2016; it too, mentioned the two mental health diagnoses.

PROCEDURAL HISTORY

On February 19, 2015, Defendant filed an appeal of the Judgment of Conviction seeking to withdraw her plea after sentencing; it also addressed the alleged impropriety of the sentence imposed, as well as addressing whether the DNA surcharge was appropriate.

The Court of Appeals, District Two, on December 2, 2015, issued an opinion and order (hereinafter "Ct. App. Dec.") summarily affirming the Judgment of Conviction. With respect to the guilty plea, the appellate court, citing to *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), held that Defendant Heinz would "be unable to make a prima facie case that the court did not comply with the procedural requirements of Wis. Stat. § 971.08 and that she did not understand or know the information that should have been provided." Ct. App. Dec. at 3. The Court further held, pursuant to *State v. Gallion*, 2004 WI 42, ¶ 39, 270 Wis. 2d 535, 678 N.W.2d 197, that the trial court exercised discretion and that it had provided a "rational and explainable basis" for the sentence. *Id.* Moreover, citing to *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975), due to the fact that the maximum possible sentence was twenty-five years' initial confinement and fifteen years' extended supervision, the sentence actually imposed was not "so excessive, unusual, or disproportionate to the offense committed as to shock the public sentiment." Ct. App. Dec. at 4. The Court of Appeals finally determined that the DNA surcharge, that was discretionary at the time, was not punitive in effect. *Id.*

On August 2, 2017, a little more than three years into her initial incarceration portion of her sentence and about one year after the Psychological Services Intake File Review report, Defendant Heinz filed this Motion to Modify Sentence, or Alternatively, for Re-Sentencing based, in part, upon that MH-1 mental health classification of post-traumatic stress disorder. Defendant Heinz asserts that both the post-conviction diagnosis and her post-conviction cooperation with the State constitute new factors warranting a modification of her sentence. In the alternative, Defendant Heinz seeks a re-sentencing upon either of these "new" factors.

THE LAW

PRE-SENTENCE INVESTIGATION REPORTS AND PRISON ASSESSMENT AND EVALUATIONS

An important question with respect to this Motion is the distinction, if any, between the Court-ordered Pre-Sentence Investigation Report and the Psychological Services Intake File Review conducted as part of the statutorily-required prison assessment and evaluation. Each derives from the statutes.

First, Wis. Stat. § 972.15 outlines the procedures by which a Pre-Sentence Investigation is to be ordered and how it is to be conducted. After a conviction of a felony (and before sentencing), a court may order a pre-sentence investigation. Wis. Stat. § 972.15(1). The purpose of a pre-sentence investigation report is to provide the court with as much pertinent information about the defendant prior to sentencing. It does not supplant the obligations of the defendant, on her own or through counsel, to bring relevant and mitigating information to the attention of the court.

The standard pre-sentence investigation report is prepared by the Wisconsin Department of Corrections and contains certain categories of information, including, but not limited to, a description of the offense (also with the defendant's version of the offense, and a victim statement, if any); the defendant's prior record; the defendant's family background (where stability and values are noted); the defendant's personal history (where chemical usage, emotional health, physical health and mental ability are some of the sub-categories); and a section of Summary and Conclusions.

The use of a pre-sentence investigation report is constitutional. *See Williams v. N.Y.*, 337 U.S. 241, 252 (1949). The Wisconsin State Supreme Court has, likewise,

declared that the use of such a report does not deprive a defendant of his constitutional rights. *State v. Carli*, 2 Wis. 2d 429, 440, 86 N.W.2d 434 (1957). However, there is no requirement as to what shall—or must—be included in a pre-sentence investigation report. In *Hanson v. State*, 48 Wis. 2d 203, 210, 179 N.W.2d 909 (1970), the Court declined to hold that a trial court was not able to rely upon a pre-sentence investigation report because a psychiatric evaluation (as requested by the defendant's counsel) had not been conducted. The defendant in *Hanson* argued that the report was just a category of prior offenses and no more. The *Hanson* Court did not fault the trial court for issuing a sentence based upon the pre-sentence investigation report as it stood or for failing to order a psychiatric evaluation.

Once a defendant is sentenced to prison, there are additional assessments and evaluations conducted. *See* Wis. Admin. Code ch. DOC 302, wherein the Legislature grants authority to DOC. These are done to assist DOC in classifying "every inmate based upon risk factors relative to public safety, institutional security, and staff and inmate safety, as well "[t]o the extent possible, match inmate need to institution resources." Wis. Admin. Code § DOC 302.02(2)(c)-(d). One of the purposes of the assessment and evaluation is to "evaluate an inmate's academic, vocational, medical, social, and treatment needs." *Id.* at § DOC 302.11(5). An assessment and evaluation is, normally, more extensive than a pre-sentence investigation and covers some different areas.

In both cases (for the pre-sentence investigation and the assessment and evaluation), much of the information is provided directly by the defendant. Thus, a defendant's own thoroughness or truthfulness in responding to DOC's inquiries could play a part in either report. Self-reporting has its deficiencies.

SENTENCE MODIFICATION

It is well-established that a trial court "has the 'inherent power' to modify a previously imposed sentence after the sentence has commenced." *State v. Grindemann*, 2002 WI App. 106, ¶ 21, 255 Wis. 2d 632, 648 N.W.2d 507. This does not mean, however, that a trial court may reduce a sentence merely upon "reflection" or "second thoughts." *State v. Wuensch*, 69 Wis. 2d 467, 480, 230 N.W.2d 665 (1975); *Scott v. State*, 64 Wis. 2d 54, 59, 218 N.W.2d 350 (1974). Rather, this modification may only be done if there are "new factors" brought to the court's attention, or the original sentence was "unduly harsh or unconscionable." *Grindemann*, 2002 WI App 106, ¶ 21; *Wuensch*, 69 Wis. 2d at 479. Only the first prong is alleged in this Motion.

The Court in *State v. Vaughn*, 2012 WI App. 129, ¶ 35, 344 Wis. 2d 764, 823 N.W.2d 543, sets out what it means to have a "new factor," to wit:

> Under established law, a "new factor" may justify a circuit court's exercise of its sentence-modification discretion. 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975); *see also Harbor*, 2011 WI 28, ¶52, 333 Wis. 2d at 78, 797 N.W.2d at 840 (reaffirming *Rosado*'s definition).

The defendant bears the burden of demonstrating the existence of a new factor by clear and convincing evidence. *Vaughn*, 2012 WI App. 129, ¶ 35; *State v. Ninham*, 2011 WI 33, ¶ 89, 333 Wis. 2d 335, 797 N.W.2d 451. Once that burden has been met, the defendant must then show that sentence modification is warranted; there is no automatic entitlement to a sentence modification. *Ninham*, 2011 WI 33 at ¶37. The decision on whether to modify a sentence in the light of an established new factor is committed to the circuit court's discretion. *Id.*

DISCUSSION

Defendant Heinz's Motion for Modification based upon both the post-conviction diagnosis of post-traumatic stress disorder and the allegations of post-conviction cooperation or assistance to law enforcement must be denied for several reasons. First, there was no post-conviction cooperation. Second, no new factors have been established and the arguments presented by Heinz regarding the new diagnosis are mere reflections. Next, the diagnosis is not newly discovered evidence; rather it is newly discovered importance of evidence previously known and not used. And, finally, the "new" evidence does not relate to the crime at issue.

I. There was no post-conviction cooperation or assistance.

The State aptly argues that there can be no modification of the sentence or re-sentencing due to post-conviction cooperation because there was no post-conviction cooperation agreement between Defendant and the State, much less any actual assistance. Defendant doesn't dispute there was no agreement. The State did agree, that as the prior Court said, once Defendant Heinz was arrested, she was honest and forthright. That was the extent of the "cooperation" because, even though she offered her assistance, Defendant Heinz's drug addiction led law enforcement to decline her offer. And, as a sidenote, Ms. Lutz's sister testified that Heinz was not

willing to provide information as to her boyfriend and dealer, Mr. Pollack, so her claims of cooperation ring a little hollow.

The Court agrees with Defendant Heinz that, pursuant to *State v. John Doe*, 2005 WI App 68, ¶ 10, 280 Wis. 2d 731, 697 N.W.2d 101, "a trial court, in appropriate cases, [may] modify a sentence after substantial assistance has been given to authorities." This however, presupposes that there is assistance, much less substantial assistance given to law enforcement authorities. In this case, no such assistance was given—either in reality or in conformity with a cooperation agreement. The offers of cooperation or assistance made by Defendant Heinz were simply that—offers that were not accepted.

Finally, Defendant Heinz's argument that her offer to testify, following her own conviction, and the subsequent production of her in Waukesha County to testify against Co-Defendant Jennifer Schroeder caused Ms. Schroeder to accept a plea agreement is unsubstantiated and does not, in and of itself, constitute a new factor or warrant re-sentencing. And, as noted above, Defendant Heinz bears the burden of proof in this regard. She has failed to meet her burden regarding post-conviction cooperation or assistance. Accordingly, that part of the Motion is denied.

II. The post-conviction diagnosis is not a new factor.

In order to prevail on the remainder of her Motion, Defendant Heinz had to prove that there was a "new factor" and that it was one that required consideration by the Court. This "new factor" has to be highly relevant to the imposition of Defendant Heinz's sentence for first degree reckless homicide by delivery of a controlled substance. It must also *not* have been known by the original sentencing Court at the time of sentencing in March, 2014, either because it was not in existence on that date or it had been unknowingly overlooked by all parties. Thus, Defendant Heinz has to establish not only that she had post-traumatic stress disorder in March, 2014 and she should have been so diagnosed, but that that diagnosis would have been relevant to the sentencing Court.

This case is somewhat similar to the facts in *State v. Prince*, 147 Wis. 2d 134, 135, 432 N.W.2d 638 (Ct. App. 1988), where, despite the defendant's contention that a post-sentencing finding that his sexually deviant behavior was, in fact, treatable, the Court held it was not considered a new factor. At sentencing the trial court was aware of Prince's sexually deviant behavior. The *Prince* Court held that "[c]hanges in attitude and prison rehabilitation are not new factors justifying sentence

modification." *Id.*, 147 Wis. 2d at 136. Moreover, the *Prince* Court found that the trial court "did not overlook the treatability of Prince's aberrant sexual behavior when sentencing him." *Id.*

And, in *Grindemann*, a more analogous case to this one, the Court held that it was not a "new factor" when the defendant—after receiving therapy in prison—first "appreciated" the impact upon him due to the fact that he had been a victim of sexual exploitation while a child. *Grindemann*, 2002 WI App 106, ¶ 23. The Court found this to be "a classic example of the 'mere reflection' or 'second thoughts' which cannot form the basis for a sentence reduction." *Id.* at ¶ 24. Like in the present case where the prior Court had knowledge of the abusive relationship Defendant had with Mr. Pollack, the facts of Grindemann's childhood sexual assault were also known to the sentencing court and did not form a basis to support a motion to modify the sentence.

Therefore, based upon *Prince* and *Grindemann*, Defendant Heinz's post-traumatic stress disorder diagnosis is not a "new factor." It would not have been highly relevant to the imposition of Heinz's reckless homicide sentence; it would not have explained why Defendant Heinz *chose*—as the prior Court ruled—to deliver heroin. It would not have mitigated the seriousness of delivering heroin, a drug well-known to lead to overdoses and/or death. The prior Court was fully aware of Defendant Heinz's abusive relationship with her dealer and boyfriend, Mr. Pollack. Defendant Heinz has failed to prove that she had not only suffered from that abusive relationship, but that she also suffered from post-traumatic stress disorder due to the relationship, and had the prior Court known of that diagnosis it would have altered the imposition or length of the sentence.

Not only has Defendant Heinz failed to establish that her post-conviction diagnosis is a new factor, but she has failed to establish that it is newly discovered evidence that was either unknown or overlooked by all of the parties at sentencing. Therefore, for all of these reasons, the remainder of the Motion must be denied. The Motion must also be denied for the following, additional reasons.

III. The information upon which the post-conviction diagnosis was not newly discovered; it was known to all parties at the time of sentencing.

The Court in *State v. Fosnow*, 2001 WI App 2, ¶¶ 9-13, 240 Wis. 2d 699, 624 N.W.2d 883, albeit in the context of a plea withdrawal, considered the concept of newly discovered evidence. While not directly on point, these deliberations are of

assistance to this Court when considering what may or may not be a "new factor" warranting sentence modification. The *Fosnow* Court explained that "[n]ewly discovered evidence, however, does not include the 'new appreciation of the importance of evidence previously known but not used.'" *Id.*, 2001 WI App at ¶ 9 (quoting *State v. Bembenek*, 140 Wis. 2d 248, 258, 409 N.W.2 432 (Ct. App. 1987). This concept is persuasive in this Motion's context as well.

Fosnow, like Defendant Heinz, received a post-conviction diagnosis (his was for Dissociative Identity Disorder—formerly known as Multiple Personality Disorder). Fosnow's attempt to use this new post-conviction diagnosis was not deemed to be newly discovered evidence sufficient to warrant withdrawal of his plea. *Fosnow*, 2001 WI App at ¶ 12. Instead, the *Fosnow* Court concluded that the new psychiatrist opinion and new diagnosis 'were not 'new evidence' at all, but merely the 'newly discovered importance of existing evidence.'" *Id.* (quoting *State v. Krieger*, 163 Wis. 2d 241, 256,471 N.W.2d 599 (Ct. App. 1991)).

This same issue—whether a post-conviction mental health diagnosis constitutes newly discovered evidence—was also addressed in *Vara v. State*, 56 Wis. 2d 390, 393-94, 202 N.W.2d 10 (1972). In *Vara*, the defendant's brain injury was known at the time of sentencing, but a new counsel later sought to use it to change a plea following trial. The *Vara* Court acknowledged that the theory concerning "the importance of the brain injury was not realized until after trial." *Id.*, 56 Wis. 2d at 394. The Court, however, held that "newly discovered evidence does not include newly discovered importance of evidence previously known and not used." *Id.*

To assist in its deliberations, the *Fosnow* Court looked to two cases from other jurisdictions to support a denial of a motion for a new trial based upon a post-conviction psychiatric opinion or diagnosis: *State v. Harper*, 823 P.2d 1137 (Wash. App. 1992) and *State v. Blasus*, 445 N.W.2d 535 (Minn. 1989). In *Harper*, a new expert, (post-conviction) relying upon facts known to the prior expert, issued a new opinion that Harper suffered from depersonalization disorder. *Harper*, 823 P.2d at 293-94. That Court did not consider this newly discovered evidence. *Id.* And, in *Blasus*, more on point with the instant case, the defendant sought a new trial based upon the results of neuropsychological tests performed at the prison after Blasus was incarcerated. *Blasus*, 445 N.W.2d at 543. The trial court's refusal to grant a new trial on this new diagnosis was upheld. *Id.*

Granted *Harper* and *Blasus* are not precedential, they are merely persuasive. And, even though these cases and *Fosnow* concern motions for new trials and not

sentence modifications, they can still be analogized to, and lend authority with respect to, the present Motion.

Here, the prior Court—and more importantly, Defendant Heinz and her counsel—knew of Heinz's abusive relationship with Mr. Pollack prior to sentencing. The impact of that abusive relationship was taken into account in the sentencing deliberations. The prior Court even recognized that Defendant Heinz had treatment needs and mentioned the same in his sentencing. Defendant Heinz has not established the difference to the prior Court if the "diagnosis" had been made prior to sentencing.

Defendant Heinz stated to the DOC agent preparing the Pre-Sentence Investigation Report that she had not met with a counselor, psychiatrist, or psychologist. She could have chosen to do so. If the Court grants this Motion and declares that this post-conviction diagnosis is a "new factor" warranting a sentence modification, there will be an avalanche of incarcerated defendants seeking to "add" more information during their prison assessment and evaluation in order to shorten their prison sentences. As it is often said, there is a benefit to finality.

Had Defendant Heinz sought to delve more deeply into her mental health condition, she could have done so pre-sentence. She cannot now claim that she has newly learned facts that substantiate a sentence modification. In reality, Defendant Heinz has recently discovered the importance of evidence previously known to her and not used. That is not a sufficient basis upon which to grant her Motion. Thus, had the Court not already determined that the Motion was to be denied, it would also be denied upon this ground.

IV. The post-conviction diagnosis does not relate to the offense at issue or frustrate the sentence.

Even assuming, *arguendo*, that the post-conviction post-traumatic stress disorder diagnosis was a new factor, this Court "may still, however, consider whether the new factor frustrates the original sentencing scheme." *Vaughn*, 2012 WI App. 129 at ¶ 36. This Court concludes that if this was indeed a new factor, it did not frustrate the prior Court's sentencing objectives. That Court carefully and methodically outlined the sentencing objectives at issue and how the sentence imposed met all of them. The prior Court determined that Defendant Heinz was a heroin addict *and* a heroin dealer. It noted that she had been in relationship with her dealer, Mr. Pollack, that was not good for her, and it relied upon the Pre-Sentence Investigation

Report that detailed that this relationship was both abusive and viewed with disfavor by Heinz's family. It also knew that Defendant Heinz had some treatment needs.

Defendant Heinz has not established why this post-conviction diagnosis relates to or mitigates her culpability for this serious offense in which Ms. Lutz lost her life. Under *Rosado* and *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 78, 797 N.W.2d 828, any "new factor" must be "highly relevant to the imposition of sentence." The prior Court knew of the abusive relationship with Mr. Pollack and that Heinz had some treatment needs. Nothing has been shown to establish that the prior Court would have reduced the sentence had this post-traumatic stress disorder diagnosis been made *before* sentencing. And, that is the key point. The diagnosis does not relate to the offense. Nor does it reduce Defendant Heinz's culpability in choosing to support her addiction by delivering heroin to the community. Accordingly, had this Court not already determined that there was no "new factor" warranting modification, the Court would nonetheless find that Defendant Heinz's motion must, likewise, be denied upon this ground.

CONCLUSION

Based upon the foregoing discussion, the Court concludes that there are no new factors warranting either sentence modification or re-sentencing. Accordingly, Defendant Erin A. Heinz's Motion to Modify Sentence or, Alternatively, for Re-Sentencing is hereby DENIED.

Dated this 14th day of November, 2017.

BY THE COURT:

Maria S. Lazar
Circuit Court Judge

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

c: Dist. Atty. Susan Opper (by ecf)
James Rebholz (by ecf)
Erin A. Heinz (by regular mail)