

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 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. 2016AP1871-CR

Cir. Ct. No. 2012CF918

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDGAR MONTANO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JENNIFER R. DOROW and LEE S. DRYFUS, JR., Judges.
Affirmed.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Edgar Montano appeals from a judgment of conviction and an order denying his postconviction motion.¹ He contends that he is entitled to a new trial due to ineffective assistance of trial counsel. Alternatively, he seeks sentence modification based upon a new factor. We reject Montano's arguments and affirm the judgment and order.

¶2 In the early morning hours of July 21, 2012, Montano drove a car while under the influence of an intoxicant and crashed into another car. The car he hit had run out of gas and was being pushed down a darkened highway by a woman and her daughter. As a result of the crash, the woman, Jean Feagles, was killed, and her daughter, N.P., was injured. Montano drove away without identifying himself or rendering aid.

¶3 Eventually, police apprehended Montano, and he was charged with several crimes. The matter proceeded to trial, where a jury found Montano guilty of: (1) homicide by negligent operation of a vehicle; (2) homicide by intoxicated use of a vehicle; (3) hit and run resulting in death; and (4) hit and run resulting in injury. The circuit court imposed an aggregate sentence of fifteen years and nine months of initial confinement and ten years of extended supervision.

¶4 After sentencing, Montano filed a postconviction motion seeking a new trial. He alleged that his trial counsel had rendered ineffective assistance by not procuring an expert witness to testify about Feagles' impairment at the time of

¹ The Honorable Jennifer R. Dorow presided over trial and entered the judgment of conviction. The Honorable Lee S. Dreyfus, Jr., entered the order denying Montano's postconviction motion.

the crash.² Montano also maintained that evidence of Feagles' impairment was a new factor warranting sentence modification. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶5 On appeal, Montano renews the arguments in his postconviction motion, beginning with the claim of ineffective assistance of counsel. Again, Montano faults his trial counsel for not procuring an expert witness to testify about Feagles' impairment at the time of the crash. Montano believes such evidence was relevant to his defense that Feagles would have been killed even if he were not under the influence of an intoxicant and had been exercising due care. That defense was available by statute to the charge of homicide by intoxicated use of a vehicle. *See* WIS. STAT. § 940.09(2)(a) (2015-16).³

¶6 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. To show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. We need not

² A postmortem toxicology report showed that Feagles had low levels of alcohol and alprazolam (Xanax) in her system when she died. According to the expert witness that Montano retained for postconviction proceedings, the combination of alcohol and alprazolam "can and does cause impairment in most people."

³ All references to the Wisconsin Statutes are to the 2015-16 version.

address both components of the analysis if the defendant fails to make a sufficient showing on either one. *Id.* at 697.

¶7 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *See id.* at 634.

¶8 Here, we are not persuaded that Montano has shown that he was prejudiced by counsel's failure to procure an expert witness to testify about Feagles' impairment at the time of the crash. As noted by the State, Montano was still able raise his defense at trial. That is, he was still able to argue that Feagles would have been killed even if he were not under the influence of an intoxicant and had been exercising due care.⁴ Evidence presented to support that defense included Feagles' dangerous conduct of pushing a car down a darkened highway in the early morning hours.

⁴ The jury was properly instructed on the defense. The circuit court told the jury in relevant part:

Evidence has been received relating to the conduct of Jean Feagles at the time of the alleged crime. Any failure by Jean Feagles to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of Jean Feagles in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.

¶9 Expert testimony about Feagles’ impairment would have added little to the defense. It would not have changed Feagles’ location at the time of the crash. Likewise, it would not have changed the conditions of the highway. Montano’s suggestion that Feagles may have been able to “move out of the way” if not impaired is both speculative and unsupported by the record. After all, Feagles’ daughter, N.P., was not impaired and was unable to “move out of the way” in time. It was, as the circuit court observed, only “for chance” that she suffered injuries instead of death.

¶10 Montano next seeks sentence modification based upon a new factor. He cites evidence of Feagles’ impairment as a justification for a reduction in sentence.

¶11 A circuit court may modify a sentence upon a defendant’s showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is “a 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 ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law we review independently. *See Harbor*, 333 Wis. 2d 53, ¶33.

¶12 Again, we are not persuaded that Montano has demonstrated the existence of a new factor. The fact that Feagles had low levels of alcohol and alprazolam in her system when she died was known to the trial judge at the time of original sentencing by virtue of the postmortem toxicology report, which trial counsel had sought to introduce as evidence. Any resulting impairment from that combination is not a fact highly relevant to the imposition of sentence. Such

impairment has nothing to do with Montano's culpability for driving while intoxicated, killing/injuring two people in a crash, and leaving the scene without identifying himself or rendering aid.

¶13 For these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

