

Santos-Rivera's argument, and we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2017-18).¹

In November 2014, Santos-Rivera pleaded guilty to one count of burglary, as a repeater. As part of a plea agreement, one count of criminal damage to property, as a repeater, was dismissed and read in. Consistent with the parties' joint recommendation, the circuit court withheld sentence and placed Santos-Rivera on three years' probation. Santos-Rivera's probation was later revoked. On the date initially scheduled for his post-revocation sentencing, the parties sought an adjournment, with the State explaining: "The state was set, in anticipation we would have an agreement. It's my understanding we do not. I would ask this be rescheduled for a time when we have the ability to do an argued sentencing after revocation hearing."

It is undisputed that at the time of the originally scheduled sentencing after revocation hearing, the State was prepared to jointly recommend with Santos-Rivera a four-year sentence, comprised of two years' initial confinement and two years' extended supervision. At the rescheduled hearing two days later, the State recommended an eight-year sentence, consisting of three years' initial confinement followed by five years' extended supervision. Out of a maximum possible sentence of sixteen and one-half years, the circuit court imposed an eight-year sentence consistent with the State's recommendation.² Santos-Rivera moved to modify his sentence, arguing that the State's decision to double its sentence recommendation for no articulable reason was a new factor justifying sentence modification. The court denied the

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

motion, concluding Santos-Rivera had failed to demonstrate the existence of a new factor. This appeal follows.

A circuit court may modify a defendant’s sentence upon a showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37. 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 in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law this court decides independently. *Id.*, ¶33. Whether a new factor justifies sentence modification is subject to the circuit court’s exercise of discretion. *Id.* If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *Id.*, ¶38.

Here, the circuit court acknowledged that at the time of the sentencing after revocation hearing, it did not know the specifics of the parties’ sentencing negotiations. Thus, the State’s initial willingness to recommend a four-year sentence was not known to the judge at the time of sentencing. Santos-Rivera, however, has not established that the information was “unknowingly overlooked” by *him* at sentencing. See *State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (even if the circuit court may have unknowingly overlooked certain facts,

² The offense carried a maximum possible penalty of twelve and one-half years, and the repeater enhancer allowed the sentence to be increased “by not more than 4 years” because the prior conviction was for a felony.

they do not constitute new factors if the defendant was aware of them, as facts are new only if “unknowingly overlooked by *all* of the parties”). Santos-Rivera could have provided this information in his sentencing argument, and he offers no reason for failing to do so. We therefore conclude the State’s initial recommendation offer does not constitute a new factor for sentence modification purposes. In the absence of a new factor, we need go no further in the analysis. *See Harbor*, 333 Wis. 2d 53, ¶38.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals