OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 8, 2024

To:

Hon. Tricia L. Walker
Circuit Court Judge
Electronic Notice

Michelle Weber
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Sonya Bice
Electronic Notice

Laura M. Force
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP381-CR State of Wisconsin v. Aaron M. Manley (L.C. #2021CF246)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders 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).

Aaron M. Manley appeals a judgment of conviction, entered following his no-contest plea, for resisting an officer causing a soft tissue injury as a repeater. He also appeals an order denying, in part, postconviction relief. On appeal, Manley argues the circuit court erred by denying his postconviction motion for sentence modification based on a new factor and, alternatively, for resentencing based on the State's alleged breach of the plea agreement. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

The State charged Manley with battery to a law enforcement officer and resisting an officer causing a soft tissue injury, both charges as a repeater. According to the criminal complaint, as relevant, while officers were trying to arrest Manley and direct him to the ground,

> [Manley] began to physically fight with officers. [Officer C.] landed on the ground on top of [Manley] and felt [his] head hit the pavement and also felt being hit multiple times in the face near the left eye and temple area. This caused [Officer C.] pain without consent particularly in [his] face area and neck. [Officer C.] later was treated at St. Agnes Hospital and released.
>
> Officer M[.] also made [Officer C.] aware that he had scraped up his knees as well from fighting with [Manley] when he was physically resisting arrest. Officer M[.] did not consent to [Manley] injuring him. [Officer C.] then was seen as a patient at the hospital. [Officer C.] was advised by a doctor that [he] likely strained [his] neck and had a head contusion.

At the combined plea and sentencing hearing, Manley pled no contest to resisting an officer causing a soft tissue injury as a repeater. The remaining charge was dismissed and read in. The court recited the agreed-upon sentencing recommendation as: "State recommends 18 months incarceration, 24 months extended supervision. Defense is free to argue." Defense counsel, the State, and Manley all confirmed that was the agreement. The court accepted Manley's plea, found him guilty, and the case immediately proceeded to sentencing.

The State did not restate the plea agreement during its sentencing argument. Instead, it first gave a recitation of the underlying incident:

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

> This was a situation in which [S.M.] called law enforcement regarding some threatening comments, she indicated, that Mr. Manley had been making about a friend of hers. Law enforcement responded to the Kwik Trip where they located Mr. Manley who also had a probation warrant.
>
> When they attempted to take [Mr. Manley] into contact [sic], he got in a physical altercation with law enforcement. Ultimately, struck Officer C[.] multiple times in the face. The Taser had to be used ultimately to get him into custody.

The State then outlined all of Manley's criminal convictions and corresponding sentences. It argued:

> So we have somebody with a criminal history stemming back to 2002 including multiple batteries, probation revocations, and prison sentences; engaging in the physical altercation with law enforcement, ultimately striking Officer C[.] multiple times. I did speak with Officer C[.] last week regarding resolution of this case, he didn't have strong feelings about a sentence, but felt something more than probation was appropriate in order to hold the defendant accountable for the seriousness of the offense.
>
> So, I think, when we look at the situation, law enforcement is doing something in their official capacity. Mr. Manley has a probation warrant, and instead of cooperating, going into custody on the warrant, he fights with law enforcement. That's not something that they should have to deal with in their job and worrying about getting injured as part of their job, which they have to deal with enough at this point; and, ultimately, I think the seriousness of this calls for a prison sentence, Your Honor, and I'd ask the Court to go along with that.

Manley's counsel argued for "a probation term with the State's recommendation imposed and stayed." Counsel advised he "d[id]n't think that this is one of the more serious battery to law enforcement officers [cases] where somebody is seriously or permanently injured; although, [Manley's] not trying to downplay the seriousness of what did happen." Manley advised the court that "my actions were wrong, and I apologize to the Court and community for my actions."

The circuit court, in describing the gravity of the offense, noted there was an altercation where one officer was hit multiple times in the face and was injured with a neck strain and a head contusion and the other officer received scraped knees. The court explained:

> If it was just scraped knees, I would call this -- I would call it a lower-end injury. Because there is really involvement with the head, and straining, and all those things, I would call it a more medium-range offense and the fact that there were multiple hits.

The court then considered Manley's character and rehabilitive needs and the need to protect the public. Ultimately, the circuit court imposed and stayed a prison sentence of thirty months' initial confinement and twenty-four months' extended supervision and placed Manley on probation for three years with one year of conditional jail time.

Manley filed a postconviction motion. He first moved for sentence modification based on a new factor. As relevant, he argued that "during the incident that led to the charges in this case, Mr. Manley's actions were misunderstood."[2] According to Manley, he "was actually not resisting," the police had "push[ed] [him] with more force than was necessary," which resulted in Manley "flailing in an attempt to protect himself" and "inadvertently" hitting an officer. In support of his version of events, Manley attached video stills of the altercation taken from a surveillance camera and photographs of the officers following the incident. He argued that "[g]iven the lack of visible injuries to Officer C[.'s] head and face in the photograph, and the images captured by the Kwik Trip camera, the version of events that the state described at sentencing was exaggerated."

[2] Manley raised two other new factor claims in the circuit court that he did not pursue on appeal.

Alternatively, Manley moved for resentencing on the basis that the State breached the plea agreement. Manley argued the State breached the plea agreement by failing to explicitly make the required sentencing recommendation on the record and by undercutting its agreed-upon recommendation.

The circuit court denied Manley's postconviction motion on these issues. As to Manley's request for sentence modification, the court determined Manley had not established the existence of a new factor. The court stated it was aware there was an altercation and the officers were not severely injured. The court also determined the State did not breach the plea agreement. The court found that it accurately put the plea agreement on the record and all parties confirmed the agreement. The court also found the State's argument did not undercut the agreed-upon sentencing recommendation. Manley appeals.

On appeal, Manley first renews his argument related to sentence modification. A court may modify a defendant's sentence if the defendant can show, by clear and convincing evidence, both that a new factor has arisen since sentencing, and that this new factor justifies modification of the sentence. ***State v. Harbor***, 2011 WI 28, ¶36, 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (citation omitted). Whether a set of factors constitutes a new factor is a question of law. ***Id.***, ¶33.

Manley argues the State's "incorrect recitation of the underlying facts" at sentencing is a new factor that justifies sentence modification. He contends the video stills and photographs of

the officers "correct[] the state's sentencing argument." Manley, however, overlooks that the State's recitation of the version of events at sentencing is substantially similar to the allegations in the criminal complaint. The criminal complaint, which Manley's counsel confirmed could be used as a factual basis to support his plea, establishes that Manley resisted officers, hit one officer multiple times in the face, causing a neck strain and head injury, and caused another officer to scrape his knees. That he is now trying to reinterpret the version of events to which he pled is not a new factor.

Further, after reviewing Manley's postconviction photograph evidence, the circuit court stated that it was generally aware of everything shown in these photographs at the time of sentencing. The circuit court explained it was aware there was an altercation between Manley and officers, which was depicted in the video stills. It was aware the officers were not severely injured, as depicted in the photographs; however, the court was concerned about the officer's head injury. "[A]ny fact that was known to the court at the time of sentencing does not constitute a new factor." ***Harbor***, 333 Wis. 2d 53, ¶57.

Finally, to be a new factor, this evidence must have been "unknowingly overlooked by all of the parties." Manley does not claim he overlooked this evidence at sentencing. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 ("a fact in existence at the time of sentencing is 'new' only if 'unknowingly overlooked by *all* of the parties'" (citation omitted)). Based on the above, we conclude Manley has failed to demonstrate by clear and convincing evidence the existence of a new factor to justify sentence modification.

Manley next renews his argument that the State breached the plea agreement by failing to explicitly make the required sentencing recommendation and by undercutting its agreed-upon

recommendation. "[A] defendant who alleges the State has breached a plea agreement must show, by clear and convincing evidence, that a breach occurred and that the breach is material and substantial." ***State v. Campbell***, 2011 WI App 18, ¶7, 331 Wis. 2d 91, 794 N.W.2d 276. "A breach is material and substantial if it 'violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained.'" ***Id.*** (citation omitted).

Manley first argues the State breached the plea agreement by failing to explicitly recommend eighteen months' initial confinement during its sentencing argument. However, the circuit court correctly recited the plea agreement on the record, and all the parties agreed the court's statements were accurate. Manley cites no authority for the proposition that the State must explicitly recite the terms of an agreement that has been accurately read into the record. *But see* ***Campbell***, 331 Wis. 2d 91, ¶11 ("There is no requirement that a plea agreement be presented to the court in any particular way.") More importantly, because the circuit court accurately recited the State's sentencing recommendation, the court was "clearly aware of the plea agreement's terms, rendering any breach by the State merely technical, not material and substantial." *See* ***id.***, ¶13. We conclude Manley has failed to prove that the State's conduct in this regard materially and substantially breached the plea agreement.

Manley next argues the State's sentencing comments suggested Manley deserved more than "the eighteen-month initial confinement recommendation that the state was bound to make." Manley points to two specific statements by the State in support of his argument. The first is the State's assertion that "we have somebody with a criminal history … including multiple batteries, probation revocations and prison sentences …." Manley argues the State "suggested that Mr. Manley had been sentenced to prison multiple times, and for previous battery convictions."

The second is the State's comment at the conclusion of its argument: "I think the seriousness of this calls for a prison sentence."

We reject Manley's arguments. First, in context, the plural word "sentences" was a misstatement that contradicted the actual list of convictions and sentences the State provided to the court. Immediately prior to the statement that included the comment "prison sentences," the State had outlined all of Manley's prior convictions and sentences, and that list accurately included only one prison sentence. This misstatement did not undermine the sentencing recommendation. As for the State's ultimate recommendation of a "prison sentence," the plea agreement called for a prison sentence, and, as the circuit court determined at the postconviction hearing, it was well aware of the State's eighteen-month initial confinement recommendation. We conclude Manley has failed to prove the State's sentencing comments materially and substantially breached the plea agreement.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals