

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 3, 2012**

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. 2011AP1063-CR**

**Cir. Ct. No. 2008CF4175**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JULIUS C. COOLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Julius C. Cooley appeals from a judgment of conviction, entered upon his guilty plea, on one count of armed robbery. Cooley also appeals from an order denying his postconviction motion for sentence

modification. He contends that a new factor warrants sentence modification. We disagree and affirm.

¶2 Cooley was charged with one count of armed robbery as party to a crime; an amended information later added two more charges of the same offense. According to the criminal complaint, a group of individuals entered a wholesale grocery store, approached a cashier in the office area, placed a gun to her head, and walked her to the safe. There was no money in the safe, so the cashier was directed to open registers. A similar demand to open registers was made of another cashier, who also had a gun to her head, and a patron was robbed of his cell phone. The cashiers were able to identify Cooley because he was a regular customer in the store.

¶3 Cooley agreed to plead guilty on the first count, with the other two charges dismissed and read in for sentencing. The circuit court sentenced him to seven years' initial confinement and three years' extended supervision. Cooley later moved for sentence modification, claiming a new factor. Specifically, he alleged that co-actor Michael Chisem told a defense investigator, hired postconviction, that Cooley did not have a gun during the robbery. The circuit court denied the motion without a hearing. Cooley appeals.

¶4 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.”

*State v. Harbor*, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting and reaffirming *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

“[F]rustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor.” *Harbor*, 333 Wis. 2d 53, ¶48.

¶5 Whether something constitutes a new factor is a question of law. *See State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). If a new factor does exist, then the question of whether it justifies sentence modification is left to the circuit court’s discretion, and we will review the decision only for an erroneous exercise of that discretion. *See id.* at 546.

¶6 Cooley contends “Chisem made a statement to [investigator] Smith which is consistent with his initial police statement that confirms Mr. Cooley’s claim that Cooley did not have a gun. This information did present a new factor under the law.” We disagree with Cooley that Chisem’s statement is a new factor.

¶7 First, Chisem initially told police that Cooley did not have a gun. That means Chisem’s statement was available to Cooley early on: Cooley has not established that he was unaware of the statement such that he unknowingly overlooked it. *See Harbor*, 333 Wis. 2d 53, ¶57.

¶8 Second, the circuit court knew that Cooley always maintained he did not use a gun in the robbery, and “any fact that was known to the court at the time of sentencing does not constitute a new factor.” *See id.* The circuit court simply did not believe Cooley. Both cashiers had told police that Cooley had a gun. The circuit court had also presided over the trial of one of Cooley’s co-actors, where the first cashier testified; the circuit court noted that she was “one hundred percent positive it was [Cooley] because [he was] the customer.”

¶9 Third, the circuit court ruled that Chisem’s statement “is not something that can be argued as a new factor because it is not an uncontroverted fact that the defendant did not have a gun during the commission of the offense.” Thus, Cooley has not established that Chisem’s “confirm[ation]” of Cooley’s claim would have been highly relevant to the circuit court at sentencing.

¶10 Even if Chisem’s statement to the investigator<sup>1</sup> does constitute a new factor, we conclude the record supports an exercise of circuit court discretion sufficient for us to affirm the circuit court’s denial of resentencing. *See id.*, ¶37. The circuit court concluded that Cooley would have received the same sentence, Chisem’s statement notwithstanding, because Cooley had “primary culpability” for the crime—that is, he had planned the robbery and recruited his accomplices. We discern no erroneous exercise of discretion. *Cf. id.*, ¶¶62-63 (circuit court concluded that even had it known about the “new factor,” defendant would not have received lesser sentence).

*By the Court.*—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

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<sup>1</sup> Cooley does not offer a statement from Chisem himself. Instead, he has an affidavit from the private investigator who spoke to Chisem.

