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**DISTRICT IV**

September 26, 2024

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

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2023AP527-CR

State of Wisconsin v. Robert L. Adams (L.C. # 2019CF2340)

Before Blanchard, Graham, and Taylor, 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).**

Robert Adams appeals his judgment of conviction and an order denying his postconviction motion for resentencing. 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).<sup>1</sup> We summarily affirm.

The State charged Adams with one count of first degree reckless homicide, two counts of delivery or manufacture of heroin, and one count of possession of heroin with intent to deliver.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version.

The criminal complaint alleged that Adams caused the overdose death of a person in September 2018 by the delivery or manufacture of heroin. The complaint also alleged that, in February 2019, special agent Michael Mansavage of the Dane County Narcotics and Gang Task Force directed two controlled buys in which Adams sold heroin to a confidential informant. The complaint further alleged that Adams possessed heroin with intent to deliver, based upon a search of his person at the time of his arrest that yielded two phones, four hundred dollars, a digital scale, and a bag containing around 4 grams of suspected heroin.

Adams pled guilty to one count of possession of heroin with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(d)2. The State dismissed the other charges pursuant to the negotiated plea agreement. In May 2022, Adams was sentenced to two years of initial confinement and two years of extended supervision, and the sentencing court found him ineligible for the Substance Abuse Program (SAP) and the Challenge Incarceration Program (CIP).<sup>2</sup>

Adams filed a postconviction motion for an order modifying his sentence to eighteen months of initial confinement and thirty months of extended supervision, and further requested that the postconviction court find him eligible for SAP. Adams argued that he was entitled to the requested modification under *State v. Harbor*, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828, based on the existence of a new factor that was unknown to the sentencing court at the time of sentencing. Specifically, Adams identified testimony that Mansavage gave at a May 2019 hearing for the revocation of Adam's probation in another case. At that hearing,

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<sup>2</sup> The same circuit court judge presided over the sentencing and postconviction proceedings in this case. To distinguish between these two phases of the proceedings, we refer to the court as either the "sentencing court" or the "postconviction court."

Mansavage testified that he had listened to the February 2019 controlled buys that allegedly involved Adams on a recording device. On cross-examination, Mansavage testified that, although he heard a male voice on the recording device, he could not positively identify the voice. Adams' postconviction motion argued that the sentencing court had not been aware of Mansavage's testimony at the 2019 revocation hearing, and that the testimony constituted a new factor entitling Adams to sentence modification. The postconviction court denied the motion, and Adams appealed.

A defendant seeking sentence modification based on a new factor must make a threshold showing of the existence of a new factor by clear and convincing evidence. *Id.*, ¶36. A new factor is defined as a fact or a set of facts that is “highly relevant to the imposition of sentence, but not known to the [sentencing court] 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 the fact or facts put forth by the defendant constitutes a new factor is a question of law that we review independently. *Id.*, ¶33. If the postconviction court determines that the fact or facts put forth by the defendant do not constitute a new factor, it need go no further in its analysis. *Id.*, ¶38. If the court determines that a new factor is present, the next step is to determine whether that new factor justifies modification of the sentence. *Id.*, ¶¶36-37. We review the court's determination of whether a new factor justifies sentence modification for an erroneous exercise of discretion. *Id.*, ¶33.

Here, the postconviction court determined that Adams had not established the existence of a new factor. For reasons we now explain, we reach the independent conclusion that Adams has failed to show by clear and convincing evidence that a new factor exists.

First, the alleged new factor, the testimony given by Mansavage at Adam's 2019 revocation hearing, was in existence at the time of Adams's sentencing in 2022. Even if the sentencing court "may have 'unknowingly overlooked'" facts in existence at the time of sentencing, the facts are not new factors if the defendant does not claim to have been unaware of them as well. *State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (quoting *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997)). "[A] fact in existence at the time of sentencing is 'new' only if 'unknowingly overlooked by all of the parties.'" *Id.* Adams does not allege that he was unaware of Mansavage's testimony at the time he was sentenced in 2022. Nor can Adams reasonably make such an allegation, given that he was present with his counsel at the 2019 revocation hearing at which Mansavage testified.

Second, Adams has failed to show that Mansavage's 2019 revocation hearing testimony is highly relevant to the imposition of sentence. In its order denying Adams's postconviction motion, the postconviction court stated that its "sentence here did not stand alone or even primarily on those dismissed charges" pertaining to the controlled buys directed by Mansavage. The court stated that it relied on "the longer, older history of drug distribution and future danger to the community posed by Mr. Adams that the Court identified as primary factors for the two years of confinement ordered."

The sentencing transcript is consistent with the postconviction court's determination that Mansavage's 2019 revocation hearing testimony was not highly relevant to the sentence it imposed. Although the sentencing court mentioned the dismissed counts related to the controlled drug buys in its sentencing remarks, the court did not spend a great deal of time discussing them or weigh them heavily. The court discussed Adams's history of drug convictions in criminal cases going back to 2013. The court stated that Adams had been put on probation in the past and

had been given opportunities to attend counseling, but did not successfully avail himself of the chances he was given. The court also discussed Adams’s recent drunk driving citation while on bail, and the need for consequences for his criminal conduct. Ultimately, the court concluded that there was a need for incarceration to protect the public. The court stated that it imposed the “minimum amount necessary” to achieve the primary goal of protecting the public, while also deterring more criminal behavior. Having reviewed the sentencing record, we agree that the facts discussed in Mansavage’s 2019 revocation hearing testimony were not highly relevant to the imposition of sentence and, therefore, do not constitute a new factor warranting sentence modification.

Having determined that Mansavage’s 2019 revocation hearing testimony does not present a new factor, we need go no further in our analysis. *See Harbor*, 333 Wis. 2d 53, ¶38.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*