

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 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 Nos. 2011AP2279-CR
2011AP2280-CR**

**Cir. Ct. Nos. 2010CM250
2010CF80**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN G. MILLER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Ryan Miller appeals judgments convicting him of one count of homicide by intoxicated use of a motor vehicle and one count of causing injury by operating a vehicle while intoxicated. He also appeals an order

denying his motion to modify the sentences. He contends his statutory ineligibility for the Earned Release Program and Challenge Incarceration Program constitutes a new factor warranting sentence modification. We reject that argument and affirm the judgments and order.

¶2 Miller pled no contest to the charges and the court imposed consecutive terms totaling eleven years' initial confinement and ten years' extended supervision. The court declared Miller eligible for the Earned Release Program and Challenge Incarceration Program. Miller filed a postconviction motion, showing he was ineligible for these programs and arguing that his ineligibility constitutes a new factor justifying sentence reduction. The trial court denied the motion, and instead modified the judgments of conviction to remove eligibility from those programs.

¶3 The State contends the circuit court correctly treated the original sentence as an "illegal sentence," and this is not a "new factor" case. We need not address the State's argument because we conclude Miller failed to establish a new factor as a matter of law.

¶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. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether the proffered facts constitute a new factor is a question of law that this court reviews de novo. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828.

¶5 Miller's ineligibility for the programs satisfies part of the new factor test because the sentencing court and the parties overlooked Miller's statutory

ineligibility. However, it fails the remaining part of the test because it was not “highly relevant” to the sentence imposed. Miller contends eligibility for these programs was highly relevant to the court’s objective of rehabilitating Miller. That argument fails for two reasons. First, the court did not link Miller’s rehabilitation to either of these programs. Second, rehabilitation was one of many objectives the court considered. The court mentioned rehabilitation only after considering the need to protect the community, the need to punish Miller, general deterrence, Miller’s prior convictions and undesirable behavior, his personal characteristics including his employment history and educational attainment, and his culpability. Only after listing all of these considerations did the court mention Miller’s rehabilitation, and the court made no attempt to discuss how Miller’s eligibility for the programs might affect his rehabilitation. Miller’s eligibility for the programs was barely considered and was not a highly relevant factor in the sentencing court’s analysis.

By the Court.—Judgments and order affirmed.

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

