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**DISTRICT III/IV**

December 3, 2013

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

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2012AP1096-CR

State of Wisconsin v. Kray Avril Burkart (L.C. # 2009CF258)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Kray Burkart appeals a judgment convicting him of possessing a firearm in violation of a court order, fleeing a police officer, and carrying a concealed weapon. *See* WIS. STAT. § 941.29(2)(d) (2011-12).<sup>1</sup> On appeal, Burkart argues that he is entitled to sentence modification based on a new factor. Based upon our review of the briefs and record, we conclude at

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Burkart was sentenced after a jury trial, with certain conditions, and was ordered to serve two years and three months of initial confinement and five years of extended supervision. Burkart filed a motion for sentence modification based on a new factor. He asserted that he was not receiving mental health therapy or counseling while incarcerated and that his mental and physical health had worsened. He also asserted that he had received a new diagnosis of chronic borderline personality disorder and adjustment disorder. The circuit court denied the motion after a hearing, concluding that the changes in Burkart's physical and mental health were not a new factor for the purpose of sentence modification. Burkart filed a motion for reconsideration, which was denied. Burkart now appeals.

A new factor must be "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing[.]" *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). We are not persuaded that that is the case here. Although Burkart did receive a new mental health diagnosis after being incarcerated, our review of the sentencing transcript indicates that the circuit court was well aware of Burkart's other mental health problems, which were significant, as well as his physical health issues at the time of sentencing. The court stated at sentencing that it hoped that mental health treatment, cognitive intervention, AODA assessment, and other services would be helpful. However, the court was careful to say that Burkart "maybe" would benefit from such services, and that it could "only hope" that these types of treatments and assessments would assist him.

The sentencing transcript shows that the circuit court recognized that Burkart had significant needs with respect to his mental and physical health, but was uncertain whether he would show improvement once taken into the custody of the Department of Corrections. Our supreme court has held that “information concerning rehabilitation cannot be a new factor for sentence modification” and that “consideration of such information is more properly considered by the parole system.” *State v. Kluck*, 210 Wis. 2d 1, 8, 563 N.W.2d 468 (1997); *Jones v. State*, 70 Wis. 2d 62, 72, 233 N.W.2d 441 (1975). Therefore, we agree with the circuit court that the changes in Burkart’s physical and mental health, and the Department of Corrections’ asserted failure to provide treatment that the circuit court believed he might benefit from, are not new factors warranting sentence modification. If Burkart is dissatisfied with the treatment he is receiving for his mental and physical health issues while incarcerated, those concerns are more properly addressed to the Department of Corrections or through an action filed under 42 U.S.C. § 1983.

Burkart also argues on appeal that the judgment of conviction should be amended to remove, as a condition of extended supervision, the requirement that he refrain from having any contact with the mother of his daughter. He argues that his daughter’s mother is not a victim in this case. We note that circuit courts have broad discretion in imposing conditions of extended supervision as long as the conditions are reasonable and appropriate. *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499. A circuit court has authority pursuant to WIS. STAT. § 973.049(2) to restrict contact with co-actors and victims. However, the court’s authority is not limited to restricting contact between a defendant and co-actors or victims. *See, e.g., State v. Trigueros*, 2005 WI App 112, ¶¶10-14, 282 Wis. 2d 445, 701 N.W.2d 54 (upholding a prohibition on contact with the “drug community”); *State v. Simonetto*, 2000 WI App 17, ¶7,

232 Wis. 2d 315, 606 N.W.2d 275 (upholding a prohibition on defendant not to go where children congregate).

As the State points out in its brief, the circuit court took judicial notice at the preliminary hearing of an injunction against Burkart on behalf of the mother of his daughter, effective from June 10, 2009 through June 10, 2013. The circuit court ordered Burkart not to have contact with the mother as a condition of his bond. Although his daughter's mother was not a victim or co-actor in this case, we are satisfied that the court was within the proper exercise of its discretion when it included a no contact provision as a condition of Burkart's extended supervision.

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*