



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](http://www.wicourts.gov)

**DISTRICT II**

March 19, 2014

To:

Hon. James K. Muehlbauer  
Circuit Court Judge  
Washington County Courthouse  
P.O. Box 1986  
West Bend, WI 53095

Theresa Russell  
Clerk of Circuit Court  
Washington County Courthouse  
P.O. Box 1986  
West Bend, WI 53095-1986

Mark Bensen  
District Attorney  
Washington County  
P.O. Box 1986  
West Bend, WI 53095-7986

Sarah Burgundy  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Bettyjean Gross 564003  
Robert Ellsworth Corr. Cntr  
21425-A Spring Street  
Union Grove, WI 53182-9408

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

---

2013AP1647-CR

State of Wisconsin v. Bettyjean Gross (L.C. #2012CF378)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Bettyjean Gross appeals pro se from an order denying her motion for sentence modification. Based on 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 (2011-12).<sup>1</sup> We affirm the order of the circuit court.

---

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

Gross was convicted following a guilty plea to operating while intoxicated (OWI), fifth or sixth offense, with an alcohol fine enhancer. The charge stemmed from Gross's arrest in October 2012 for driving while intoxicated.

At the time of her arrest, Gross was on extended supervision for a prior OWI conviction. Her extended supervision in that case was revoked, and she was sentenced to eighteen months of confinement.

In the present case, the circuit court sentenced Gross to two years of initial confinement and three years of extended supervision to run consecutively to the revocation sentence. The court further designated Gross to be eligible for the substance abuse program (SAP) but required her to first serve one year on the sentence in the present case before she could become eligible.

Shortly after sentencing, Gross wrote a letter to the circuit court asking that it reduce the restriction on her SAP eligibility from one year to six months. She explained that prison staff had informed her that the one-year restriction would leave her remaining sentence too short for her to participate in the program. The court granted her request.

Gross subsequently wrote several other letters to the circuit court seeking additional sentence modification. She explained that due to the SAP restriction, institutional rules prevent her from participating in work release and other treatment programs while she serves her revocation sentence and first six months of her consecutive sentence. The court denied her requests.

Gross eventually filed a formal motion for sentence modification, reiterating the same reasons she had stated in her letters. The circuit court again denied the motion. This appeal follows.

On appeal, Gross contends that she is entitled to sentence modification on the basis of a new factor. Specifically, she maintains that her discovery that institutional rules prevent her from participating in other programming during her revocation sentence and first six months of her consecutive sentence constitutes a new factor.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶37-38. 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 ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See id.*, ¶33. If the fact or set of facts do not constitute a new factor as a matter of law, we need go no further in our analysis. *Id.*, ¶38.

Upon review of the record, we conclude that Gross's inability to participate in other programming during her revocation sentence and first six months of her consecutive sentence does not constitute a new factor. At sentencing, the circuit court's overriding concern was that Gross continued to drink and drive after having received substantial counseling and treatment.

The court wanted Gross to spend significant time in confinement to think about her life and decide whether she wants to stop drinking. The only programming the court discussed and authorized was SAP, and the court specifically conditioned that authorization upon Gross first serving a specified time of confinement. In light of the foregoing, Gross cannot demonstrate her inability to participate in other programming during her revocation sentence and first six months of her consecutive sentence is a fact highly relevant to the imposition of her sentence.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

---

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