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October 1, 2014

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

2013AP1760-CR

State of Wisconsin v. Robert J. Smothers (L.C. #1996CF180)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Robert Smothers appeals pro se from a circuit court order denying his motion to modify his sentence due to new factors. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

In 1996, Smothers received a forty-year sentence after he was convicted of second-degree intentional homicide by use of a dangerous weapon. We affirmed his conviction in 1998. *State v. Smothers*, No. 1997AP2542-CR, unpublished slip op. (WI App Aug. 5, 1998). In 2013, Smothers moved the circuit court pro se to modify his sentence due to the following new factors: at sentencing, the circuit court was unaware that Smothers had expressed remorse over the victim's death and was unaware that the victim had a propensity for violence which supported Smothers' claim of self-defense. Smothers alleged that his self-defense claim would have been supported by testimony from the victim's sister that was never presented during trial or at sentencing. The sister's views became known when she wrote a victim's statement as part of Smothers' 2011 parole proceedings. In that statement, she described the victim's violent nature and did not object to parole for Smothers.

At a hearing on the sentence modification motion, the circuit court applied the legal standards governing new factors and concluded that the record revealed that the sentencing court was aware that Smothers had expressed remorse. Therefore, the court concluded, remorse was not a new factor warranting sentence modification.

With regard to the victim's alleged propensity for violence, the circuit court, after reviewing the sentencing transcript, concluded that the sister's testimony would not have been highly relevant to the sentencing court's rationale.

On appeal, Smothers argues that remorse was a new factor. We agree with the State and the circuit court that it was not. 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, 52, 333 Wis. 2d 53, 797 N.W.2d 828. We independently determine whether the facts offered by Smothers constitute a new factor. *Id.*, ¶33.

The record indicates that a detective testified about Smothers’ remorse, and Smothers expressed remorse in a presentencing letter to the sentencing court. Smothers also expressed remorse at sentencing, which the sentencing court acknowledged but upon which it did not place great weight.² Smothers’ remorse was known to the circuit court at the time of sentencing and cannot constitute a new factor. *Id.*, ¶¶40, 52.

Smothers argues that the sentencing court was unaware of the victim’s propensity toward violence. We disagree. In support of his self-defense claim, Smothers sought to introduce at trial evidence that the victim, Jay Meyer, was violent toward his wife and child. *Smothers*, No. 1997AP2542-CR, unpublished slip op. at 4. In upholding the circuit court’s decision to exclude such evidence, we stated:

Smothers claims that the evidence was relevant to corroborate, through a disinterested witness, Meyer’s proclivity to use violence. However, evidence of specific violent conduct by a homicide victim is not admissible to support an inference about the victim’s actual conduct during the incident which resulted in death but only to show the accused’s state of mind about the danger the victim posed. Thus, only conduct which the accused is aware of at the time of the incident is admissible. Meyer’s wife called the juvenile crisis center sometime after Meyer’s death. At the time of the fight, Smothers was not aware of the wife’s phone call that confirmed his belief that Meyer could be physically abusive.

² The weight given to sentencing considerations is for the circuit court to decide. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.

We further conclude that if it was error to exclude the evidence, it was harmless error. ...

Smother's had already testified that he observed a "punch mark" in the wall of Meyer's home and that Meyer indicated he had hit the wall rather than hit his wife. Smother's further testified that although Meyer had never said he beat or hit his wife, Meyer had said "he threw her around." Smother's said that within the last year Meyer said that he beat his son. Smother's had seen Meyer spank his son once.... Further, the implication that Meyer abused his wife has no direct connection to Meyer's acts against Smother's. The evidence was that Meyer had his hands around Smother's throat. This was far more probative of self-defense than the supposition that Meyer had abused his wife.

Id. at 5-7 (citations omitted).

When we affirmed Smother's conviction, we observed that the jury was aware that during the confrontation, the victim had his hands around Smother's throat. Evidence of the victim's violent nature was before the court at the time of sentencing.

We agree with the circuit court that further evidence of the victim's propensity toward violence would not have been highly relevant to the sentencing court. The sentencing court considered the jury's verdict that while Smother's acted in self-defense, he exceeded the amount of force necessary to defend himself.³ The court noted that Smother's did not express significant remorse and considered the gravity of the offense, Smother's character and substance abuse issues. That the victim's sister later characterized the victim as violent would not have changed the circuit court's focus at sentencing.

Upon the foregoing reasons,

³ The victim had twenty-three stab and other knife wounds as a result of his encounter with Smother's.

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