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DISTRICT II

February 25, 2015

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

2014AP1343-CR

State of Wisconsin v. Charles H. Knoebel, Jr. (L.C. #2013CF887)

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

Charles H. Knoebel, Jr., appeals from a judgment of conviction and an order denying his 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 (2013-14).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

In September 2013, Knoebel was convicted following a guilty plea of operating a motor vehicle while intoxicated as a sixth offense. The circuit court imposed the maximum sentence of three years of initial confinement followed by three years of extended supervision.

In April 2014, Knoebel filed a motion for sentence modification on the ground that a new factor existed. He complained that his sentence was based in part on misleading information about his arrest record, namely a reported 1995 arrest for first-degree intentional homicide. Although police reports reflect that charge, Knoebel noted that no one died from the incident and he ultimately pled no contest to misdemeanor charges of battery and reckless driving.² Knoebel argued that this corrected information about his 1995 arrest constituted a new factor.³ The circuit court disagreed and denied the motion. This appeal follows.

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

² It is not clear why police reports reflect that Knoebel was arrested for first-degree intentional homicide. According to the complaint of the incident, Knoebel was in a vehicle with his girlfriend, who was driving, when they purposefully knocked down a man who was walking along the side of the road. The man was very much alive when he talked to police at the scene and appeared to suffer only contusions and abrasions to his legs and feet.

³ Knoebel also argued that the efficacy of repeated alcoholism treatment constituted a new factor. The circuit court indicated that it was aware of that information, and Knoebel does not challenge that ruling on appeal.

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 *Harbor*, 333 Wis. 2d 53, ¶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.

Here, we are not persuaded that the corrected information about Knoebel’s 1995 arrest constitutes a new factor. Although the State briefly mentioned Knoebel’s arrest for first-degree intentional homicide in its sentencing argument, there is no indication that such information was highly relevant to the imposition of sentence. Indeed, the circuit court made no mention of the arrest or the alleged homicide in its comments, focusing instead on Knoebel’s repeated conduct as it related to driving under the influence, as well as the fact that prior attempts to rehabilitate him had failed. Accordingly, we are satisfied that the court properly denied Knoebel’s motion.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals