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

**DISTRICT IV**

October 12, 2015

*To*:

Hon. John R. Storck
Circuit Court Judge
Justice Facility
210 West Center St.
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Katherine Desmond Lloyd
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Larry P. Esser
3001 West Layton Avenue
Greenfield, WI 53221

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

---

2013AP1773-CR State of Wisconsin v. Larry P. Esser (L.C. # 2002CF57)
2013AP2426 State of Wisconsin v. Larry P. Esser (L.C. # 2002CF57)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Larry Esser, pro se, appeals an order denying a motion for sentence modification and an order denying a WIS. STAT. § 974.06 motion for postconviction relief. Based upon our review of the brief and record, we conclude at conference that this case is appropriate for summary disposition. We reject Esser's arguments, and summarily affirm the orders. *See* WIS. STAT. RULE 809.21.[1]

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

The State charged Esser with theft by false representation, arising from allegations that Esser wrote Clement Hahn several thousand dollars in checks that were returned for insufficient funds, and executed a promissory note to Hahn for $75,000 using property that did not belong to Esser as collateral. In August 2003, Esser was convicted upon his no contest plea of the crime charged. The court imposed and stayed a sentence consisting of eighteen months of initial confinement and eighteen months of extended supervision, and placed Esser on probation for eight years. The court also ordered $58,250 in restitution, with the judgment of conviction reflecting that the circuit court did "not oppose early termination of probation if restitution is paid in full and all other conditions of supervision have been successfully completed."

In 2010, Esser moved for sentence modification, claiming that substantial assistance he gave police constituted a new factor justifying sentence modification. After a hearing, the court amended Esser's sentence, reducing his imposed and stayed term of initial confinement to twelve months, but increasing the imposed and stayed term of extended supervision to sixty months. Esser subsequently filed the underlying motion for sentence modification based on a purported new factor. Esser also filed a pro se WIS. STAT. § 974.06 motion alleging that he was deprived of the effective assistance of counsel; that the prosecutor engaged in misconduct; and that he was denied his right to be present for the restitution hearing. Both motions were denied without a hearing and these appeals follow.

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: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶36-37. 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. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

Here, Esser argues that Hahn was "made whole by virtue of a loan that was satisfied through an auction" that occurred prior to Esser's conviction. Esser cites a loan agreement for $115,000 between Esser and Hahn, dated September 4, 2001, and argues that the document is proof that the money he owed Hahn "was entered into a loan," and that the loan was satisfied by the sale of collateral used to secure the loan. Although Esser describes the existence of the loan agreement as a new factor, the record shows that the cited loan agreement was an exhibit admitted at Esser's 2003 restitution hearing. The problem, however, is that Esser has failed to provide this court with either the sentencing or restitution hearing transcripts.

It is an appellant's responsibility to provide this court with a record sufficient to allow review of issues raised, including any necessary transcript. *See* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546 (2006). The scope of our review on appeal is necessarily confined to the record before us, and we assume that any missing transcript would support the circuit court's findings of fact and discretionary decisions. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979); *see also* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). In the absence of transcripts, it is not clear what arguments were made relative to the loan agreement, but we must assume that the circuit court was aware of its existence in 2003, and that nothing in the agreement altered Esser's

conviction, sentence, or the amount of restitution owed. Esser, therefore, has failed to establish the loan agreement constitutes a new factor justifying sentence modification.

Esser's alternative claims of ineffective assistance of counsel and prosecutorial misconduct likewise fail. To establish ineffective assistance of counsel, Esser must show that his counsel's performance was deficient and that the deficiency prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Esser argues that his trial counsel was ineffective by failing to investigate and present the loan agreement to prove restitution was satisfied. As noted above, the loan agreement was admitted as an exhibit at the restitution hearing. The loan agreement alone, however, does not establish that Esser's restitution obligation was satisfied. Esser argues that the loan agreement "pays off any and all prior loans, agreements, and all bad checks." The section of the loan agreement with that quoted language, however, was crossed out and replaced with handwritten language that appears to state: "This loan pays after bills debt is paid in full. L.E." Without the restitution hearing transcript to provide context to any discussion regarding the loan agreement, Esser has failed to establish any deficiency on the part of trial counsel.

Esser also alleged ineffective assistance of the attorneys who represented him in the two collateral motions for sentence modification. There is no constitutional right to counsel in collateral proceedings after a direct appeal. ***Pennsylvania v. Finley***, 481 U.S. 551, 555-56 (1987). Because an ineffective assistance of counsel claim is premised upon the right to counsel, *see* ***Strickland***, 466 U.S. at 686, it follows that there is no right to effective assistance of counsel in a collateral context.

Finally, Esser argues that prosecutors engaged in misconduct by charging him without probable cause despite knowledge of the loan agreement. We are not persuaded. The State does not dispute that prosecutors were aware of the loan agreement's existence. The loan agreement, however, does not establish that the original charge was unsupported by probable cause or that Esser's restitution obligation was satisfied.[2]

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

---

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

[2] Because Esser raises no argument on appeal regarding his allegation that he was denied his right to be present at the restitution hearing, that argument is deemed abandoned. *See* ***Post v. Schwall***, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990) (arguments raised but not briefed or argued are deemed abandoned by this court). Moreover, we note that according to electronic docket entries, Esser appeared in person for the December 2003 restitution hearing.