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DISTRICT II

June 1, 2016

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

2015AP1750-CR	State of Wisconsin v. Jeffrey Holzemer (L.C. # 1992CF708)
2015AP1751-CR	State of Wisconsin v. Jeffrey Holzemer (L.C. # 1992CF763)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

In these consolidated appeals, Jeffrey Holzemer appeals pro se from a circuit court order denying his motion for sentence modification. Based upon 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 order of the circuit court.

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

In 1993, Holzemer was convicted of numerous crimes arising from a string of armed robberies. The circuit court sentenced him to eighty-five years in prison. This court affirmed his convictions. *State v. Holzemer*, Nos. 1994AP2015-CR/1994AP2016-CR, unpublished slip op. (WI App Sept. 13, 1995).

In May 2010, Holzemer filed a motion for sentence modification, arguing that a change in parole policy and his rehabilitation in prison constituted new factors that warranted a reduction in his sentence. The circuit court denied both that motion and a subsequent motion for reconsideration. This court affirmed. *State v. Holzemer*, Nos. 2010AP1868-CR/2010AP1869-CR, unpublished op. and order (WI App Mar. 2, 2011).

In May 2015, Holzemer filed another motion for sentence modification based upon the existence of a new factor. This time, he argued that the dismissal of a pending robbery charge in Illinois that was discussed in his presentence investigation report was a new factor that warranted a reduction in his sentence.² Again, the circuit court 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. *Id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.* 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

² Holzemer alleged other new factors as well. However, he elected not to pursue them on appeal. Thus, we deem those claims abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the circuit court but not raised on appeal are deemed abandoned).

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 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 Holzemer has demonstrated the existence of a new factor. The dismissal of a pending robbery charge that was discussed in his presentence investigation report is not, by itself, a fact highly relevant to the imposition of sentence. That is because we do not know the circumstances of that dismissal. As noted by the circuit court, Holzemer has not shown that the charge was dismissed on grounds of actual innocence or absence of proof. A defendant need not be charged with an offense for a court to consider it at sentencing. *See State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (“A sentencing court may consider uncharged and unproven offenses ...”). Accordingly, we are satisfied that the circuit court properly denied Holzemer’s motion.

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