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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  
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**DISTRICT II**

June 28, 2017

To:

Hon. Michael J. Piontek  
Circuit Court Judge  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

Samuel A. Christensen  
Clerk of Circuit Court  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

Patricia J. Hanson  
District Attorney  
730 Wisconsin Avenue  
Racine, WI 53403

Lisa E.F. Kumfer  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Catherine Malchow  
Asst. State Public Defender  
P.O. Box 7862  
Madison, WI 53707-7862

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

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2016AP948-CR

State of Wisconsin v. Gerell D. Rogers (L.C. # 2013CF1721)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Gerell D. Rogers appeals from a judgment of conviction entered upon his guilty plea to one count of theft from person and from an order denying his postconviction 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 (2015-16).<sup>1</sup> We conclude that the previously-imposed sentence of Rogers' codefendant was not a new factor warranting sentence modification and we affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

While walking down the street at night, Rogers and codefendant Trey Moody approached the victim and demanded his property. Rogers asked the victim if he had ever been shot before and threatened the victim by telling him he had a gun. Both defendants were charged with armed robbery; Rogers was also charged with two counts of bail jumping. Ultimately, both pled guilty to a reduced charge of theft from person as a party to the crime; Rogers' bail jumping counts were dismissed but read in. Moody was sentenced first and received four years of imprisonment bifurcated into two years of initial confinement followed by two years of extended supervision. Several months later, Rogers appeared before the same circuit court judge and received a sentence totaling six years, with two years of initial confinement followed by four years of extended supervision. In imposing Rogers' sentence, the court stated that Rogers appeared to be the principal actor and was the one who had or pretended to have a gun. The court considered Rogers' cooperation, stating: "I would have given you a lot more on this, to be honest, if you weren't cooperative. I've never given someone two years for what I perceive to be an armed robbery on the street."

Rogers filed a postconviction motion alleging that Moody's sentence constituted a new factor warranting modification of Rogers' sentence. Rogers asserted that the court's statement that it had "never given someone two years" for what was essentially "an armed robbery on the street" showed the court unknowingly overlooked Moody's two-year term of initial confinement. The circuit court denied the motion in a written decision which emphasized the individualized nature of the sentences and pointed out that Rogers threatened the use of a firearm and was also out on bail at the time of the offense. Rogers appeals.

A trial court may modify a sentence based on the existence of a new factor, which 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Deciding a new-factor sentence modification motion is a two-step inquiry. *Id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶38. Second, if there is a new factor, the circuit court determines whether it justifies modification of the sentence. *Id.*, ¶37.

We conclude that Rogers failed to demonstrate the existence of a new factor. *See id.*, ¶36 (whether the set of facts put forth by the defendant constitutes a new factor is a question of law). Moody’s sentence was known to the circuit court at the time of Rogers’ sentencing; the same court sentenced both defendants and made mention of each codefendant at the other’s sentencing hearing. Rogers has not established that Moody’s pre-existing sentence was unknown to the circuit court at the time of Rogers’s sentencing.<sup>2</sup>

Further, Rogers has failed to establish that Moody’s sentence length was highly relevant to his own. In fashioning Rogers’ sentence, the trial court focused on his role in the offense, his cooperation with the State, and his individual characteristics and social and criminal history. Though Rogers highlights that the State considered him less culpable and recommended a lesser sentence than it recommended for Moody, this does not support an inference that Moody’s sentence was highly relevant to the trial court’s sentencing of Rogers. The court was charged

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<sup>2</sup> In support of his assertion that the court unknowingly overlooked the length of Moody’s sentence, Rogers points to the sentencing court’s statement that it had “never given someone two years,” as well as the postconviction court’s failure to affirmatively state in its written decision that it knew about Moody’s sentence at the time of Rogers’s sentencing. We agree with the State that these assertions fail to establish the lack of knowledge required to satisfy the new-factor test.

with imposing what it considered an appropriate sentence regardless of the parties' recommendations or the sentence Moody received. Moody's sentence was not highly relevant to the factors the court considered in sentencing Rogers.

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.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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