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DISTRICT II

October 25, 2017

To:

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

2017AP34-CR

State of Wisconsin v. Joseph J. Dull (L.C. #2006CF537)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joseph J. Dull appeals pro se from an 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 (2015-16).¹ We conclude that the circuit court properly denied Dull's motion. Accordingly, we affirm its order.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

In 2006, Dull was convicted following a jury trial of armed robbery as a party to the crime and retail theft. The circuit court imposed an aggregate sentence of fifteen years of initial confinement and fifteen years of extended supervision.

Eight years later, in December 2014, the department of corrections completed a COMPAS² assessment for Dull as part of a statewide implementation of the instrument. That assessment concluded that Dull had a low risk for recidivism.

In September 2016, Dull filed a motion for sentence modification, arguing that the information about recidivism in his COMPAS assessment constituted a new factor. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

A circuit court may modify a sentence upon a defendant's showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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 (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 reviews independently. *See Harbor*, 333 Wis. 2d 53, ¶33.

Here, we are not persuaded that Dull has demonstrated the existence of a new factor. The fact that Dull was considered a low risk for recidivism in 2014 does not mean that he would have been considered a low risk for recidivism eight years earlier at the time of sentencing. Moreover,

² “COMPAS’ stands for ‘Correctional Offender Management Profiling for Alternative Sanctions.’” *State v. Loomis*, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

the circuit court did not mention Dull's risk for recidivism in its sentencing comments, choosing instead to focus upon his character and the seriousness of the offenses. Finally, our supreme court has made clear that courts may not rely upon COMPAS risk scores in determining the severity of a sentence or whether an offender is incarcerated. *State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749. For these reasons, we cannot say that the information about recidivism in Dull's COMPAS assessment was highly relevant to the imposition of sentence. Accordingly, we are satisfied that the circuit court properly denied Dull'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.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals