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**DISTRICT III**

May 15, 2018

To:

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

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2017AP500-CR

State of Wisconsin v. Thomas S. Yourchuck  
(L. C. No. 1996CF398)

Before Stark, P.J., Hruz and Seidl, JJ.

**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).**

Thomas Yourchuck, pro se, appeals orders denying his postconviction motion for sentence modification and his motion for reconsideration. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We

reject Yourchuck's arguments, and summarily affirm the orders. *See* WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup>

In 1996, Yourchuck was convicted upon his no-contest pleas of two counts of first-degree sexual assault of a child, both as a repeater. Defense counsel recommended nine years' imprisonment on one count, consecutive to Yourchuck's parole revocation sentences, and twenty years of consecutive probation on the other count. Relevant to this appeal, the circuit court stated the following during its discussion of the sentencing factors:

I don't know about these sex offender programs and whether they work or what the risk or failure rate—I mean whether the success or failure rate, how they compare and I understand that if I adopted [defense counsel]'s sentence, there are other barriers but the thing[] that makes me very nervous about those are sometimes people succeed at various things and at least convince others that they have been successful and they get around or over the barriers and then we're right back putting people at risk, young people, children at risk.

Out of a maximum possible 100-year sentence, the circuit court imposed concurrent fifty-year sentences, consistent with the State's recommendation.<sup>2</sup> Yourchuck did not directly appeal his conviction. In September 2007, Yourchuck filed a postconviction motion "to dismiss for lack of subject matter jurisdiction." The circuit court denied that motion and, on appeal, we affirmed. *See State v. Yourchuck*, No. 2007AP2448, unpublished slip op. (WI App Apr. 29, 2008).

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

<sup>2</sup> Because the offenses occurred in 1996, the court imposed indeterminate sentences. "Truth-in-sentencing" revisions were enacted in 1998 and apply to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

In December 2016, Yourchuck filed the underlying motion for sentence modification, alleging two new factors: (1) that the sentencing court was not educated about how the Department of Corrections (DOC) conducted sex offender treatment programs, including the length of programs, how long it would take to get into a program, and the success or failure rate of programs; and (2) that he received an excessive sentence not authorized by statute, based on his belief that the circuit court did not exercise proper discretion when sentencing him under the repeater statute. The circuit court denied Yourchuck's motion, concluding that the alleged "new facts" were not new. The court also denied Yourchuck's motion for reconsideration. 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 defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the [circuit court] 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 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. The existence of a new factor, however, does not automatically entitle a defendant to sentence modification. *Id.*, ¶37. If a new factor is present, the circuit court, in the exercise of its discretion, determines whether the new factor justifies sentence modification. *Id.*

On appeal, Yourchuck reasserts that the sentencing court's lack of knowledge about the DOC's sex offender treatment programs constitutes a new factor justifying sentence modification.<sup>3</sup> We are not persuaded. As the State notes, the sentencing court explicitly acknowledged that it did not know "about these sex offender programs." Therefore, the sentencing court's lack of knowledge about the programs was not "unknowingly overlooked" by the parties. Because Yourchuck fails to identify a "new factor" as defined above, the circuit court properly denied the motion for sentence modification and the motion for reconsideration.

Upon the foregoing,

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>3</sup> Although Yourchuck alleged two new factors in his sentence modification motion, he has pursued only this claim on appeal. Thus, we deem his other new factor claim 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).