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**DISTRICT II**

June 6, 2018

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

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2017AP1507-CR                      State of Wisconsin v. Froilan Avila-Romo (L.C. #2014CF321)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).**

Froilan Avila-Romo appeals from a judgment convicting him, upon his guilty plea, of delivery of cocaine, 15 to 40 grams, as party to a crime (PTAC) and from an order denying his postconviction motion seeking sentence modification. Upon reviewing the briefs and the 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 affirm.

The State charged Avila-Romo with four felony drug counts after he and another were arrested for their parts in controlled drug buys. As part of a plea agreement, the State dismissed and read in three of the counts in exchange for Avila-Romo's guilty plea to one count of PTAC delivery of cocaine, 15 to 40 grams. The court accepted his guilty plea and followed the joint sentencing recommendation of three years' confinement plus three years' extended supervision.

Two months after sentencing, the Department of Homeland Security entered an order of deportation against him, the effect of which will be his deportation upon completing the confinement portion of his sentence. Avila-Romo filed a postconviction motion, arguing that the deportation order was a new factor justifying sentence modification. The circuit court held that the deportation order was not a new factor and did not justify sentence modification and thus denied the motion. Avila-Romo appeals.

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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *State v. Ralph*, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citation omitted). Whether a particular fact or set of facts constitutes a new factor is a question of law, subject to de novo review. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). We

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

review whether an existing new factor justifies sentence modification for an erroneous exercise of discretion. *State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828.

Avila-Romo argues that the deportation order is a new factor because it was unknowingly overlooked by all of the parties at sentencing. We disagree. Avila-Romo told police when he was arrested that he had been living in the country illegally for ten years. During the plea hearing, the court provided Avila-Romo the standard warning that if he was not a United States citizen, his conviction could result in deportation, exclusion, or denial of naturalization. Avila-Romo confirmed that he understood this and that he had discussed the matter with his attorney.

In *Rosado v. State*, 70 Wis. 2d 280, 234 N.W.2d 69 (1975), the sentencing court did not learn about certain information known to the defendant because he elected not to testify. *See id.* at 288-89. Postconviction, the defendant claimed the information was a new factor warranting a reduced sentence. *Id.* at 288. The court rejected the claim, explaining that the information was not a new factor because the defendant had the information at the time of sentencing but chose not to reveal it until many months later. *See id.* at 288-89.

Likewise here, Avila-Romo knew his immigration status but did not divulge it to the sentencing court. His decision to withhold that information does not transform it into a new factor warranting postconviction relief. A new factor must have been unknowingly overlooked at sentencing by *all* of the parties. *Ralph*, 156 Wis. 2d at 436. Although the circuit court may not have been aware of the information at issue, Avila-Romo was. It thus is not a new factor. *See State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (information known to the defendant at the time of sentencing is not a new factor).

For another reason, Avila-Romo has not shown that his immigration status is a new factor. Even if he somehow forgot about it at sentencing, the possibility—now reality—of his deportation was not “highly relevant” to his sentence. The court properly considered the three primary sentencing factors—protection of the public, the gravity of the offense and the character and rehabilitative needs of the defendant—and imposed a sentence commensurate with his crime. At no point did the court premise the length or conditions of his sentence on a belief that he would remain in this state or this country on his release from confinement.

Because Avila-Romo has not shown a new factor, the circuit court properly denied his motion for sentence modification. Therefore,

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.

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