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

2017AP2317-CR State v. Amy D. Radliff (L.C. #2016CF268)

Before Sherman, Blanchard and Fitzpatrick, 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).

Amy D. Brush¹ appeals a judgment of conviction and an order denying sentence modification. Based upon our review of the briefs and record, we conclude at conference that

¹ Brush changed her name from Radliff to Brush while this case was pending in the circuit court, and refers to herself as "Amy D. Brush" in her briefs. R-63:3. We follow suit.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).² We summarily affirm.

Brush pleaded no-contest to possession of drug paraphernalia to manufacture methamphetamine, as a repeater, and possession of methamphetamine, as a repeater. The circuit court sentenced Brush to a total of four-and-a-half years of initial confinement and five years of extended supervision. Brush moved for sentence modification, arguing that the sentencing court relied on the inaccurate information that Brush had failed to take advantage of opportunities in the community to address her treatment needs. The court denied the motion, stating that it did not rely on inaccurate information at sentencing.

A defendant seeking sentence modification must establish: (1) the existence of a new factor; and (2) that the new factor justifies sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). We independently review whether the defendant has established a new factor, and review whether that new factor justifies sentence modification for an erroneous exercise of discretion. *Id.*

A new factor is established by a “set of facts highly relevant to the imposition of sentence, but not known to the [circuit court] 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.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). We have said that “[e]rroneous or inaccurate information used at sentencing may constitute a ‘new factor’ if it was highly relevant to the imposed sentence and was relied

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

upon by the [circuit] court.”³ *State v. Norton*, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656.

Brush contends that the circuit court relied on inaccurate information at sentencing because, Brush argues, the court had relied on the inaccurate belief that Brush had failed to take advantage of outpatient treatment or seek treatment for her addiction in the community. Brush points to a letter filed with the court by Brush’s treating psychiatrist, which indicated that Brush had been in treatment with the psychiatrist since July 2013 for severe anxiety, depression, insomnia, attention deficit disorder, and opioid addiction. Brush contends that the court relied on the inaccurate belief that Brush had not taken advantage of treatment opportunities related to her opioid addiction, contrary to the psychiatrist’s letter. We are not persuaded.

The circuit court did not indicate a belief that Brush had not pursued *any* treatment for opioid addiction in the community. Rather, the court stated that Brush had done “really little ... to stabilize” her addiction issues, thus requiring “some type of drastic intervention” to prevent Brush from engaging in further criminal activity. The court noted Brush’s long history of addiction-related offenses and found that Brush “had [her] opportunity. [She] had opportunities [her] whole life to try to deal with these issues.” The court stated that it was “unfortunate ... that

³ Subsequent to *State v. Norton*, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, we observed that our decision in *Norton* conflated the concepts of sentence modification based on a new factor and resentencing based on the sentencing court’s reliance on inaccurate information. *Id.* We noted that, in *Norton*, “[w]e inadvertently muddled the linguistic and legal waters with our mixing of distinctly different concepts.” *Wood*, 305 Wis. 2d 133, ¶9. We noted that, contrary to our analysis in *Norton*, “[a] new factor analysis ... [is a] concept[] related to modification of the sentence to correct specific problems, not to resentencing when it is necessary to completely re-do the invalid sentence.” *Id.* Because we conclude that Brush has not identified any inaccurate information at sentencing, we need not resolve whether Brush should have asserted that the inaccurate information entitled her to resentencing rather than sentence modification.

there seems to be some thinking that, well, I'll let the Department of Corrections deal with that and I'll wait for the agent to direct me to some treatment program or something else," and that the court believed that motivation for treatment had to come from within Brush herself. The court also stated that it was "somewhat disappointing when defendants come in to be sentenced that little if anything has been done to deal with some of those issues." The court recognized that many defendants need treatment, but noted that "the unfortunate thing is that many people don't avail themselves of that and that is what becomes so disappointing." Finally, the court determined that a prison sentence was necessary because the court was "satisfied that with outpatient resources [Brush] ... had endless opportunities given [her] 39 years of living to try to avail [her]self of that, direct [her]self to that and get help and get treatment, try to get [her] life back in order and [she had] not done that." The court stated that Brush "had ample opportunity to avail [her]self of that in an outpatient setting in the community with community resources that [the court was] satisfied [Brush had] not been successful in achieving."

The circuit court's sentencing comments indicated that the court determined that Brush had not done enough to address her treatment needs to prevent her from engaging in further criminal activity, and thus treatment in a confined setting was necessary for Brush to adequately address her addiction issues. The psychiatrist's letter stating that Brush had been in treatment for several years for issues that included opioid addiction does not establish that the court's determination was inaccurate. Because Brush did not establish that the court relied on inaccurate information, the court properly denied Brush's motion for sentence modification.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals