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DISTRICT I/IV

December 7, 2018

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

2017AP2135-CR

State of Wisconsin v. Edwin Morales (L.C. # 2010CF6113)

Before Blanchard, Kloppenburg 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).

Edwin Morales, pro se, appeals circuit court orders denying Morales's motions for postconviction relief. Morales seeks relief from his sentence. 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(1).¹ We affirm.

Morales was convicted of a felony theft crime in 2011. The circuit court sentenced Morales to a five-year term of imprisonment, consecutive to any other sentence. In 2017 and early 2018, Morales filed a series of pro se postconviction motions, including challenges to his sentence. The circuit court denied each of the motions. On appeal, Morales seeks relief from his sentence on two grounds.

First, Morales argues that the sentencing court erroneously exercised its discretion by failing to sufficiently set forth its reasoning and its consideration of relevant sentencing factors as required by *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, and related case law. However, Morales fails to reply to or otherwise address the State's argument that Morales's challenge to his sentence on this ground is untimely. Accordingly, we take the point as conceded and decline to consider whether the sentencing court erroneously exercised its discretion under *Gallion*. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

Second, Morales seeks modification of his sentence based on a new factor. Case law defines a new factor as:

[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,

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

even though it was then in existence, 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 (quoted source omitted). Morales has the burden to demonstrate “both the existence of a new factor and that the new factor justifies modification of the sentence.” *Id.*, ¶38. We agree with the State that Morales has not met this burden because Morales’s briefing does not identify any new factor satisfying the case law definition.

Therefore,

IT IS ORDERED that the circuit court’s orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals