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August 22, 2019

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

2018AP1402-CR State of Wisconsin v. Demiris Martez Bryant (L.C. # 2015CF1651)

Before Brash, P.J., Kessler and Brennan, 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).

Demiris Martez Bryant appeals a judgment convicting him after a guilty plea of first-degree sexual assault of a child under the age of thirteen. He also appeals the circuit court's order denying his motion for postconviction relief. Bryant argues that there are new factors that

warrant sentence modification. Based on the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

A new factor is “a fact or set of facts” that is “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. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a new factor exists is a question of law that this court reviews independently. *Id.*, ¶36.

Bryant argues that there are new factors because the circuit court unknowingly overlooked certain factual information during sentencing. He contends that the circuit court incorrectly believed that Bryant had sexual intercourse with the victim, rather than sexual contact, and was not fully aware of inconsistent statements made by the victim.

Bryant’s claim is meritless for several reasons. First, the circuit court did not unknowingly overlook factual information, or consider mistaken information, when it imposed the sentence. The prosecutor informed the circuit court at sentencing that this case involved intercourse and that DNA consistent with Bryant’s DNA profile was found on vaginal swabs and on the victim’s thighs. Although the young victim gave conflicting accounts of the assault, alternately stating that Bryant had touched her inappropriately and that he had “humped her” causing her pain, Bryant admitted that he had intercourse with the victim. At the sentencing hearing, the circuit court properly described this case as a violent sexual assault that included

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

intercourse. Moreover, the record clearly establishes that the circuit court was well aware of the various statements made by the child victim.

Second, a “new factor” argument cannot be premised on a claim that the circuit court did not adequately consider certain *known* facts during the sentencing hearing. A new factor exists when a material fact comes into existence after sentencing or is unknowingly overlooked by all of the parties. *See id.* Neither of these situations apply here. The facts to which Bryant points did not come into existence after sentencing. And, as explained above, the circuit court did not unknowingly overlook the information. Bryant’s claim is, in essence, that the circuit court should have characterized or weighed the facts differently, which is not a cognizable new factor argument.

Bryant next argues that a report written by Dr. Anthony Jurek after sentencing is a new factor. In the report, Dr. Jurek opines that certain portions of the child victim’s forensic interview may have provided reliable information, but other portions of her forensic interview are of more questionable reliability based on the interview techniques used. Dr. Jurek’s report is not a new factor. It is an expert *opinion* based on previously known facts. *See State v. Sobonya*, 2015 WI App 86, ¶8, 365 Wis. 2d 559, 872 N.W.2d 134. Had the report been prepared before sentencing, it would have simply provided another opinion for the circuit court to consider in framing its sentence. In sum, then, there are no new factors as a matter of law.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* 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