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

2018AP1609-CR	State of Wisconsin v. Jason C. Walker
2018AP1610-CR	(L. C. Nos. 2016CF777, 2017CF31)

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).

Jason Walker appeals orders denying his motion for sentence modification. Walker claims that his inability to participate in alcohol and other drug abuse (“AODA”) treatment programs in prison constitutes a new factor justifying sentence modification. Based upon our review of the briefs and records, we conclude at conference that these consolidated cases are

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We reject Walker’s arguments and summarily affirm the circuit court’s orders.

In January 2017, Walker entered into a plea agreement to resolve four separate cases against him.² In exchange for his no-contest pleas to possession of methamphetamine, misdemeanor escape, identity theft, and felony bail jumping, the State agreed to recommend that the various other charges be dismissed and read in. The State also agreed to recommend a withheld sentence and two years’ probation. The circuit court followed the State’s recommendation.

Walker’s probation was subsequently revoked following allegations that Walker violated several conditions of his probation, including methamphetamine use and failure to report to his probation agent. The Department of Corrections (“DOC”) recommended concurrent sentences of one to two years of initial confinement followed by two years of extended supervision. The State recommended a total sentence of two years of initial confinement and three years of extended supervision, and defense counsel recommended concurrent sentences resulting in no more than one year of initial confinement and two years of extended supervision. Out of a maximum possible fifteen and one-half year sentence for the three offenses, the circuit court imposed concurrent sentences resulting in a total of two years’ initial confinement followed by two years’ extended supervision.

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

² Only two of the four cases are before us on appeal. These two cases—Eau Claire County Circuit Court case Nos. 2016CF777 and 2017CF31—involve Walker’s convictions for possession of methamphetamine, party to the crime of identity theft, and felony bail jumping.

Walker filed a motion for both sentence credit and sentence modification. The circuit court denied Walker's motion for sentence modification, but it granted Walker the additional sentence credit he sought. These appeals follow.

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 (citation omitted). 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, as in his motion for sentence modification, Walker argues that his inability to obtain AODA treatment, including participation in the Substance Abuse Program ("SAP"), while in prison constitutes a new factor justifying sentence modification, both because it was not known and could not have been known to the parties at the time of sentencing, and because it was highly relevant to the imposition of his sentence. We are not persuaded on either count.

First, the circuit court knew at the time of sentencing that Walker might not be able to obtain AODA treatment in prison. The DOC noted in its sentence recommendation that Walker was not eligible for SAP or the Challenge Incarceration Program, and the circuit court

acknowledged that in its sentencing remarks. The court ultimately deemed him eligible for SAP only at the prosecutor's request. Moreover, nothing in the record suggests the court was unaware that the DOC, not the court, determines whether an inmate will receive treatment in prison. *See, e.g.,* WIS. ADMIN. CODE § DOC 302.14 (June 2018) and *State v. Lynch*, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (concluding that once a prison term is selected, the circuit court may not order specific treatment, as control over the care of prisoners is vested by statute in the overseeing department).

Second, Walker fails to establish that his ability to obtain treatment in prison was highly relevant to the sentence imposed. Walker accurately notes that the circuit court began its sentencing remarks by acknowledging that “what we all do want is ... for you to receive treatment and ... [to] leave this decade chapter of your life, or longer, behind[.]” The court, however, did not reference Walker's ability to obtain treatment *in prison* as the basis for the sentence imposed. While the court recognized Walker had addiction issues that fueled his criminal activity, the court was primarily concerned about protecting the public, noting Walker's past criminal history, his failures on probation, and “a lineage of ... witness victims.”

Walker nevertheless asserts that the circuit court considered Walker's treatment as part of its sentencing goal because it ordered a period of initial confinement consistent with the State's recommendation, which was made to ensure Walker would be able to obtain AODA treatment while confined. Regardless of the stated reasons for the State's recommendation, as noted above, the court did not reference Walker's ability to obtain treatment in prison as the basis for the sentence imposed. Moreover, in making its recommendation, the State emphasized the need for “a period of initial confinement that is long enough to ensure that [Walker] get treatment but also to ensure that the public is protected from this pattern of behavior.” The State also appeared

to recognize that treatment in prison was not a certainty, as it expressed its “sincere hope” that Walker could receive meaningful treatment in the prison system so “he doesn’t continue to victimize the community.” The possibility of Walker’s inability to obtain AODA treatment in prison was neither unknown to the court nor highly relevant to the sentence imposed, and therefore, Walker has failed to establish a new factor warranting sentence modification.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. 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