



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

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To:

Hon. Jeffrey A. Wagner
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Elizabeth A. Longo
Assistant District Attorney
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Robert N. Meyeroff
Robert N. Meyeroff, S.C.
633 W. Wisconsin Ave., #605
Milwaukee, WI 53203-1918

John W. Kellis
Wisconsin Department of Justice
P.O. Box 7857
17 W. Main Street
Madison, WI 53707-7857

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

2019AP1614-CR State of Wisconsin v. Nicholas Alexander Lee
(L.C. # 2006CF6238)

Before Dugan, Donald and White, 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).

Nicholas Alexander Lee appeals an order of the circuit court denying his postconviction motion to modify his sentence. Based upon our review of the briefs and the record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2017-18).¹ We summarily affirm the order.

On November 21, 2016, Lee was charged with first-degree intentional homicide for the shooting death of Vincent Alvaro. According to the criminal complaint, on November 15, 2006, Lee and Alvaro had an argument inside of a restaurant. A restaurant employee asked them to leave. M.H., who was with Alvaro, told police that he broke up a fight between Lee and Alvaro outside of the restaurant and then both men retreated to their respective vehicles. A few minutes later, Alvaro exited his vehicle and started walking towards a nearby Jeep Cherokee. M.H. saw Lee walking on a sidewalk in the same area, with his head down, approaching Alvaro. Lee took one or two steps past Alvaro, pulled out a gun, and fired three times at Alvaro's back before shooting the Jeep Cherokee vehicle twice, causing the windshield to shatter.

The complaint further states that an autopsy revealed that Alvaro died as a result of multiple gunshot wounds, three of which were entrance wounds. One bullet entered Alvaro's left elbow, while the other two entered Alvaro's back.

The complaint further states that Lee told police that he was in possession of a black semi-automatic pistol at the time of the shooting. Lee also admitted to walking past Alvaro, taking out his gun, turning around, and firing shots. Lee told police that Alvaro's back was facing Lee when he (Lee) started shooting. Lee also told police that he fired until the gun would not fire anymore.

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

Lee pled guilty to an amended charge of first-degree reckless homicide. At the sentencing hearing, defense counsel alerted the circuit court to an error in the presentence investigation report (PSI), telling the court that a portion of the PSI “where [Lee] denies a gun. That’s, in, fact, Judge, true. The gun was brought to the scene ... [f]rom someone with the street name of ‘Unc.’” The State told the court that after the altercation in the restaurant, Lee “called someone to bring a gun,” and “[a]pparently that person came, gave the defendant a gun.” During Lee’s allocution, Lee told the court that “when I made the phone call it wasn’t to call to get a pistol or anything. It was just to see if the person I called was hungry.” The court clarified, “But you called your uncle and he ended up bringing you a nine -- a nine Luger pistol, correct?” Lee answered, “Yes.”

The circuit court sentenced Lee to a total of thirty-five years, consisting of twenty-five years’ initial confinement and ten years’ extended supervision.

Lee appealed, and counsel filed a no-merit report on his behalf. Lee did not file a response. After our independent review of the record, we concluded that there were no issues of arguable merit and summarily affirmed the conviction. Lee then filed a *pro se* WIS. STAT. § 974.06 motion. The circuit court denied the motion and we affirmed. Lee, *pro se*, then filed a writ of *habeas corpus* pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We denied the petition.

Lee then brought the motion for sentence modification, or alternatively, resentencing, that underlies this appeal. Lee’s motion alleged that he was either entitled to sentence modification on the basis of a new factor, or, that he was entitled to resentencing because the circuit court

relied on inaccurate information in issuing his sentence. The circuit court aptly summarized the crux of Lee's motion as follows:

The substance of the defendant's motion is that although he, himself, told the PSI writer and the court at the time of sentencing that he had called someone to bring a gun to the scene of the homicide, he had actually brought the gun himself. He places the blame for his purported misrepresentation on his attorney, who allegedly advised him not to contradict the police reports or the ADA. The defendant also seeks to explain that the reason the victim was shot in the back was that he turned after the defendant fired the first shot, and the second and third shots then entered his back. He states that he "never intended to shoot him in the back."

Lee attached multiple affidavits to support his motion. As relevant here, Lee attached an affidavit from Ezra French, stating that French planned to meet Lee on the evening of the shooting at the respective restaurant in order to purchase a gun from Lee. The affidavit stated that when French pulled up in front of the restaurant, he saw Lee surrounded "by a group of guys with someone pointing his hand in [Lee's] face." French drove away.

Lee also attached an affidavit from Kendall Richardson, stating that Richardson saw a gun in Lee's waistband just prior to the shooting. An affidavit from Shontrevious Harmon stated that he was at the restaurant with Lee when Alvaro approached them and behaved in a threatening manner. Alvaro left the restaurant, but returned with a group of ten to twelve other people and told Lee that they would "catch" him outside of the restaurant. Harmon's affidavit further states that he "did not see the shooting, but [he] heard the shots. The person who was shot was the person who came in to the restaurant initially in a threatening manner and was also one of 10 or 11 people in the group that was threatening ... Lee."

Lee argued that the contents of the affidavits constituted new factors warranting sentence modification. He also argued that trial counsel advised him "to say he called someone to bring

him a gun during sentencing” so as “not to contradict the police reports.” Lee also argued that “the [circuit] court was unaware of and never considered ... that Lee and Alvaro were facing one another when the first shot was fired and that Lee did not intentionally shoot Alvaro in the back.” Lee’s motion argued that all of these factors constituted new factors warranting sentencing modification.

The circuit court denied the motion, stating,

all of the information the defendant presents as “new” was *known to him at the time of sentencing*, and the defendant admits that *he provided* the purportedly inaccurate information. The defendant’s own alleged omissions and misrepresentations are not new factors ... and to the extent that he seeks to place the blame for those alleged omissions and misrepresentations on the advice of trial counsel, that is an ineffective assistance of counsel claim that he was obliged to raise in response to appellate counsel’s no merit report.

(Emphasis in original.) The court further stated that Lee could not evade the procedural bars of *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), by “denominating his current claims as ‘new factors.’”

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 analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37.

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 ... 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 that this court decides independently. *See 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.

On appeal, Lee maintains that the following are new factors warranting sentence modification: affidavits stating that Lee was already in possession of a gun at the time of the shooting and did not call someone to bring him a gun; trial counsel’s advice to tell the circuit court that he called someone to bring a gun; and the circuit court’s misunderstanding about how Alvaro was shot. We agree with the circuit court that none of these factors are “new” and therefore do not warrant sentence modification.

Affidavits stating that Lee was already in possession of a gun at the time of the shooting do not support Lee’s new factor argument. Whether or not Lee called someone to bring him a gun prior to the shooting would have been a fact known to Lee at the time of sentencing. Indeed, trial counsel told the circuit court that “a gun was brought to the scene” by someone known as “Unc,” and Lee himself confirmed counsel’s statement. Lee cannot now contend that affidavits contradicting what *he himself* told the circuit court constitute new factors.

This leads to Lee’s next contention, which is that trial counsel instructed him to tell the circuit court he called “Unc” to bring a gun because counsel believed the statement would be beneficial to Lee at sentencing. Lee’s attempt to blame trial counsel for his statements and/or omissions at sentencing are essentially an allegation of ineffective assistance of counsel. Lee had an opportunity to raise an ineffective assistance of counsel claim in response to appellate counsel’s no merit motion, but failed to do so. He has not provided a sufficient reason for this

failure and is thus barred from raising an ineffective assistance of counsel claim now. *See Tillman*, 281 Wis. 2d 157, ¶26.

Lee also contends that the circuit court misunderstood the manner in which Alvaro was shot. Specifically, Lee contends that the autopsy report shows that the first shot fired entered Alvaro's left elbow, suggesting that Lee was facing Alvaro, and that shots to Alvaro's back resulted from Alvaro turning his body after the initial shots were fired. In other words, Lee argues that the autopsy report shows that he and Alvaro were facing each other and that Lee did not intentionally shoot Alvaro in the back.

We agree with the State that “the information concerning [Alvaro's] injuries was not new to the parties or the court: the prosecutor specifically informed the sentencing court that only two of the three bullets fired by Lee entered [Alvaro's] back ... and the court confirmed its understanding of the same.” Lee's interpretation of the autopsy report is just that—his interpretation. The report does not actually conclude that Alvaro was facing Lee when he was first shot, or that Alvaro turned his body away from Lee, resulting in the shots to Alvaro's back. Moreover, the circuit court sentenced Lee for first-degree reckless homicide. Therefore, whether Lee intended to shoot Alvaro specifically in the back was irrelevant to the court's sentencing decision.

Alternatively, Lee argues that he is entitled to resentencing because the circuit court relied upon inaccurate information. Lee's request is predicated upon the same arguments underlying his request for sentence modification. Because we have already concluded that Lee's arguments are meritless, we conclude that the circuit court did not err in denying his motion for resentencing.

IT IS ORDERED that the order is summarily affirmed. *See* 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