



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](http://www.wicourts.gov)

**DISTRICT I**

March 16, 2021

To:

Hon. Janet C. Protasiewicz  
Circuit Court Judge  
901 N. 9th St.  
Milwaukee, WI 53233-1425

Michael C. Sanders  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

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

Howard Emmanuel Brown 568093  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

Elizabeth A. Longo  
Assistant District Attorney  
District Attorney's Office  
821 W. State St. - Ste. 405  
Milwaukee, WI 53233

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

---

2019AP1006-CR      State of Wisconsin v. Howard Emmanuel Brown  
(L.C. # 2010CF3654)

Before Brash, P.J., 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).**

Howard Emmanuel Brown, *pro se*, appeals the circuit court's order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2019-20).<sup>1</sup> He argues that: (1) his sentence should be modified based on a new factor; (2) the circuit court erroneously

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

exercised its sentencing discretion by failing to adequately consider his age, intellectual capacity, and lack of criminal history; (3) his sentence should be modified based on recent United States Supreme Court case law; and (4) he is entitled to resentencing because the circuit court relied on inaccurate information in sentencing him. After reviewing the briefs and record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. Upon review, we affirm.

In 2010, Brown was convicted after his guilty plea to the charge of first-degree reckless homicide, as a party to a crime. Brown was seventeen years old when he committed the crime. The circuit court sentenced him to twenty-two years of initial confinement and six years of extended supervision. Brown filed a postconviction motion, arguing that he should be allowed to withdraw his plea because his trial counsel was ineffective. The circuit court denied the motion, and we affirmed on appeal. In 2019, Brown filed the current motion for sentence modification. The circuit court denied the motion without a hearing. This appeal follows.

Brown first argues that his sentence should be modified based on a new factor. 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The defendant has the burden of showing by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Whether a fact or set of facts constitutes a new factor is a question of law. *Id.*

Brown contends that there is a new factor because he has a mental illness. He argues that mental health screening reports from January 2011, June 2012, October 2014, and April 2018 demonstrate that he has had psychological problems for years. We disagree. The 2011 report

indicated that Brown had no mental health needs. The 2012 report indicated that Brown had no mental health diagnosis and that he denied having any past or present mental health concerns. The 2014 report indicated that Brown had adjustment disorder with a depressed mood but was managing adequately in his current environment. The 2018 report indicated that Brown has no mental health diagnosis but was reporting insomnia. These reports do not support Brown's assertion that he suffers from a mental illness or has significant mental health needs. Therefore, we reject Brown's argument that he is entitled to resentencing based on a new factor.

Brown next argues that the circuit court erroneously exercised its discretion when it sentenced him by failing to focus on his age, intellectual capacity, and lack of criminal history. An argument that the circuit court misused its sentencing discretion by failing to adequately consider certain factors must be raised within ninety days of sentencing pursuant to WIS. STAT. § 973.19 or within the appellate time limits for direct appeal pursuant to WIS. STAT RULE 809.30. This argument is therefore untimely. Even if Brown's argument were properly before us, it would be unavailing. The circuit court considered Brown's age and his lack of criminal history. Although it did not *explicitly* consider his intellectual capacity, Brown has not demonstrated that his intellectual capacity is diminished and has not explained how, if it were diminished, it reduced his responsibility for his actions.

Brown next argues that he is entitled to sentence modification based on three recent United States Supreme Court decisions, *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). These cases are not applicable here because they involve mandatory life sentences without the possibility of parole for juvenile offenders. Brown did not face a mandatory life sentence, but a

discretionary sentence. Moreover, he was sentenced to twenty-two years of initial confinement, not life imprisonment. We reject this argument.

Finally, Brown argues he is entitled to resentencing because the circuit court relied on inaccurate information in sentencing him because the circuit court said he had no significant mental health problems. “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Here, however, Brown has not shown that he has any significant mental health problems, as explained above. Therefore, this argument is unavailing.

IT IS ORDERED that the order of the circuit court 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*