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DISTRICT II

June 23, 2021

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

2020AP855-CR

State of Wisconsin v. Mark A. Stephens (L.C. #2002CF886)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Imprisoned at Jackson Correctional Institution, Mark A. Stephens (pro se) moved to modify his sentence on the basis that the emergence of COVID-19 placed his health at significant risk due to pre-existing health conditions of his, essentially arguing that this combination constituted a “new factor” warranting sentence modification. The circuit court denied his motion, and Stephens appeals. 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 (2019-20).¹ We affirm.

For sentence modification, a defendant “bears the burden of establishing the existence of a new factor by clear and convincing evidence.” *State v. Samsa*, 2015 WI App 6, ¶14, 359 Wis. 2d 580, 859 N.W.2d 149 (2014). 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.* (emphasis added; citation omitted). “Whether a new factor exists presents a question of law subject to de novo review.” *Id.*

At Stephens’ sentencing hearing, the circuit court sentenced Stephens based upon the great danger he posed to the community, focusing on the seriousness of his offenses in this case,² his past criminal record of violent conduct, and the great need to keep Stephens in prison in order to ensure the safety of the community. Neither Stephens’ personal health conditions nor the healthy or unhealthy nature of conditions in the prison system were in any way a consideration of the court in imposing sentence; thus, Stephens’ health conditions and the emergence of COVID-19 do not constitute “a fact or set of facts” that are “highly relevant to the imposition of sentence.” *See id.* Stephens failed to meet his burden to establish the existence of a “new factor” justifying sentence modification.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

² Based upon a plea agreement, Stephens pled to burglary, while armed with a dangerous weapon. Two other offenses—kidnapping and substantial battery, both while armed with a dangerous weapon—were dismissed but read in.

IT IS ORDERED that the order of the circuit court is hereby 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