



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

June 29, 2021

To:

Hon. Michael J. Hanrahan
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

John D. Flynn
Milwaukee County District Attorneys Office
821 W State St Rm 405
Milwaukee, WI 53233-1427

Hon. Carolina Stark
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

Leon W. Todd III
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4116

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

Jacob J. Wittwer
Attorney Generals Office
Post Office Box 7857
Madison, WI 53707-7857

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

2020AP362-CR

State of Wisconsin v. Miguel A. Bernal (L.C. # 2016CF3268)

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).

Miguel A. Bernal appeals a judgment of conviction entered upon his guilty plea to one count of possession with intent to deliver more than forty grams of cocaine, by use of a dangerous weapon, as a party to a crime. He also appeals an order denying postconviction

relief.¹ He claims that a new factor warrants sentence modification or, alternatively, that he was sentenced on the basis of inaccurate information and should be resentenced. Both claims stem from his contention that the circuit court sentenced him in light of an allegedly erroneous belief that, at some point before he committed the crime in this case, he delivered a kilogram of heroin. Upon review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).² We affirm.

According to the criminal complaint, Milwaukee police arrested Bernal on an outstanding warrant during a traffic stop on July 22, 2016. A search of his car uncovered a loaded pistol in the glove compartment and two packages of cocaine, one weighing 996.10 grams and the other weighing 5.32 grams. Bernal admitted that he possessed the firearm and the cocaine, and he said that he was waiting for instructions from a third party to tell him where to deliver the cocaine. The State charged him with one felony count of possession with intent to deliver more than forty grams of cocaine by use of a dangerous weapon, as a party to a crime, and one misdemeanor count of carrying a concealed weapon.

Bernal resolved the case with a plea agreement. Pursuant to its terms, he pled guilty as charged to the felony count, and the State moved to dismiss and read in both the misdemeanor count in this case and a separate criminal case pending against Bernal in which he faced a charge

¹ The Honorable Carolina Stark presided over the plea and sentencing and entered the judgment of conviction. We refer to Judge Stark both as the circuit court and as the sentencing court. The Honorable Michael J. Hanrahan presided over the postconviction proceedings and entered the order denying postconviction relief. We refer to Judge Hanrahan as the postconviction court.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

of conspiracy to distribute cocaine. .Additionally, the State agreed to recommend a substantial prison sentence without specifying the duration of the term.

At sentencing, the State supported its recommendation by emphasizing the quantity of cocaine found with Bernal when he was arrested, and the State said that it had reason to believe that Bernal had also delivered a kilogram of cocaine earlier on the day of his arrest. Further, the State said that Bernal had given statements to investigating officers in which he admitted that for a period of nearly a year, he had transported from Chicago at least one kilogram of cocaine every week for distribution in Wisconsin. The State next advised that images found on Bernal's cellphone showed him in possession of a kilogram of cocaine in August 2015, and, calculating from that timeframe and relying on Bernal's admissions, the State estimated that Bernal had distributed approximately 50 kilograms of cocaine. The State qualified its estimate, however, by noting that the amount did not include the "approximately fifteen to thirty kilograms of cocaine" that Bernal, by his own admission to police, had stolen from his supplier. The State added that Bernal "also admitted to officers that at some point during this time, he also delivered a kilo of heroin to someone in this area ... but we don't have any additional information about that."

The State went on to discuss the facts underlying the charge of conspiracy to distribute cocaine that was dismissed and read in for sentencing purposes. The State explained that after Bernal's arrest, he made calls from the jail to his girlfriend, directing her "to continue selling the cocaine and/or running his operation[,]... to meet with individuals to collect cash for him, ... [and to] dump his cell phone." Finally, the State discussed images found on Bernal's cell phone, including pictures of grenades and of Bernal posing with machine guns and other firearms.

Bernal, by counsel, recommended an evenly bifurcated ten-year term of imprisonment. In support, counsel discussed Bernal's work history and minimal criminal record, and counsel explained that Bernal's involvement in drug trafficking stemmed from his addiction to cocaine.

The circuit court spoke at length, emphasizing the substantial quantity of cocaine at issue and the harm that cocaine causes in the community. In this regard, the circuit court considered a letter from Bernal's girlfriend, who indicated that the crime Bernal committed in this case was a single mistake that he now regretted. The circuit court rejected that characterization of Bernal's criminal activity, finding that the offense "was not a one-time incident, a one-time mistake." In support of that finding, the circuit court described Bernal's admission that he transported and distributed a kilogram of cocaine each week, "beginning sometime in 2015," and the circuit court stated that he had pictures on his phone showing a significant quantity of cocaine along with various weapons. Further, the circuit court found that his arrest had not deterred him and that instead he gave "instructions to commit conspiracy to deliver more cocaine or things involved with it like collecting money[.]" The circuit court then added that Bernal:

also admitted to officers delivering a kilo of heroin which, again, I think goes to show that this is not a one-time mistake on July 22, not a one-time incident[. He is] deep, really deep into this. So for all of these reasons, I think that this particular conviction ... is a particularly aggravated offense.

The circuit court ultimately imposed a twenty-five-year term of imprisonment, bifurcated as twenty years of initial confinement and five years of extended supervision. The circuit court found that the length of the sentence was "the minimum necessary in great part, in disrupting the contacts and connections that [Bernal] has in addition to punishment and deterren[ce]."

Bernal moved for postconviction relief, claiming that he was entitled to sentence modification or resentencing in light of allegedly inaccurate information presented at sentencing regarding delivery of heroin. Bernal admitted that, a few months after his arrest, he made a proffer of information to police regarding his past deliveries of controlled substances. He denied, however, that his proffer included an admission that he sold heroin, and he denied that he sold heroin.

The State filed a response that included two affidavits from law enforcement officers. Both officers averred that they attended a debriefing session with Bernal during which he admitted delivering a kilogram of heroin to a male known to him only by a nickname. According to both officers, “Bernal admitted ... that he sold this kilogram of heroin for \$50,000 to \$55,000.” Additionally, Bernal admitted “that a female known to him as ‘Prima’ dropped off a kilogram of heroin to Bernal in an older model aqua blue Chevy Trailblazer.” In reply, Bernal disputed the truth of the affidavits filed by the State, and he reiterated his contentions that he neither delivered heroin nor admitted delivering it.

The postconviction court denied Bernal’s motion for postconviction relief without a hearing, concluding that his claim was “patently self-serving” and unsupported by anything beyond his own assertions. Bernal appeals, renewing his claims for both sentence modification and resentencing.³

³ The State argued in the postconviction proceeding that Bernal forfeited both of his substantive claims by failing to raise them at sentencing. The postconviction court disagreed, concluding that the claims were preserved when Bernal raised them in his postconviction motion. In this court, the State advises that “it declines to argue forfeiture.” We deem the forfeiture argument abandoned, and therefore we do not address it. See *State v. Schiller*, 2003 WI App 195, ¶6, 266 Wis. 2d 992, 669 N.W.2d 747.

We begin with Bernal’s claim for sentence modification based on the alleged new factor that the circuit court relied on false information at sentencing. A new factor for purposes of sentence modification 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.” *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant’s sentence upon a showing of a new factor. *See id.*, ¶35. To prevail, the defendant must satisfy a two-prong test. *See id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See id.* This presents a question of law, which we review *de novo*. *See id.*, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. *See id.*, ¶37. This determination rests in the circuit court’s discretion. *See id.* If a defendant fails to satisfy one prong of the test, a court need not address the other. *See id.*, ¶38.

Bernal’s claim does not satisfy the first prong of the new factor test. Specifically, Bernal does not show that at the time of sentencing, he “unknowingly overlooked” the facts about his alleged delivery of heroin. *See id.*, ¶40. Although the sentencing court did not know that Bernal denied delivering heroin in the past, Bernal himself knew at the time of sentencing whether or not he had delivered heroin and whether or not he had admitted to police that he had made such a delivery. Therefore, his postconviction claim that he neither delivered heroin nor admitted delivering it does not amount to a new factor. *See State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (explaining that information known to the defendant at the time of sentencing is not a new factor).

We turn to the claim that Bernal is entitled to resentencing because his original sentence was based on inaccurate information. To establish a denial of the due process right to be sentenced upon accurate information, the defendant must show both that the sentencing court received inaccurate information and that the sentencing court actually relied on the inaccurate information. *See State v. Tjepelman*, 2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied the right to be sentenced on accurate information is a constitutional question that we review *de novo*. *See id.*, ¶9.

Bernal does not show that the circuit court received inaccurate information at his sentencing. Specifically, he does not point to any objective data supporting his postconviction allegation that he did not deliver heroin. Rather, he disputes the sworn statements of two law enforcement officers who aver that he admitted delivering heroin and who describe his detailed confession to that delivery. Our case law, however, reflects that a circuit court may consider disputed information at sentencing, including unproven allegations and crimes for which the defendant has been acquitted. *See State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Accordingly, Bernal’s mere denial of another person’s contentions does not demonstrate that he was sentenced on the basis of inaccurate information. *Cf. State v. Walker*, No. 2010AP83-CR, unpublished slip op. ¶¶13-15 (WI App Dec. 14, 2010) (holding that defendant’s “bare denial” of allegations presented at sentencing is insufficient to raise a claim that the sentencing court relied on factually inaccurate information).⁴

⁴ Pursuant to WIS. STAT. RULE 809.23(3), unpublished authored opinions issued on or after July 1, 2009, are citable for their persuasive value.

Moreover, assuming for the sake of argument that Bernal could show that his request for resentencing rests on a claim of inaccurate information—and we reiterate that he has not made that showing—he fails to demonstrate that the circuit court relied on the information at issue. “A circuit court actually relies on incorrect information when it gives ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *State v. Coffee*, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579 (citations and some quotation marks omitted). The sentencing remarks here show that the circuit court viewed the information about heroin distribution as merely illustrative of a conclusion that the circuit court had already reached, namely, that the offense of conviction “was not a one-time mistake.” As the State accurately points out, this conclusion was amply supported by an overwhelming amount of information that the circuit court summarized on the record and that Bernal does not currently dispute, including his admission that he delivered one kilogram of cocaine every week for nearly a year, images on his cellphone showing him with a kilogram of cocaine many months before his arrest, and his jailhouse conversations reflecting his ongoing involvement in cocaine trafficking after his arrest. In short, the sentencing transcript shows that the circuit court did not rely on information about an alleged heroin delivery to conclude that Bernal’s crime of conviction was “not a one-time mistake,” and the information was not a basis for his sentence. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are 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