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**DISTRICT II**

September 8, 2021

*To*:

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Circuit Court Judge
Electronic Notice

Hon. Bruce K. Schmidt
Circuit Court Judge
Electronic Notice

Hon. Donald A. Poppy
Circuit Court Judge
Electronic Notice

Melissa M. Pingel
Clerk of Circuit Court
Winnebago County
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You are hereby notified that the Court has entered the following opinion and order:

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2019AP2425-CR State of Wisconsin v. Mark H. Price (L.C. #1994CF285)

Before Gundrum, P.J., Neubauer and Reilly, 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).**

Mark H. Price appeals from a circuit court order denying his motion to modify his sentence. 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 determine that the circuit court erred in deciding that there was no new factor which could justify sentence modification. Accordingly, we reverse and remand to the circuit court for further proceedings.

The parties do not dispute the following facts pertinent to this appeal. In August 1994, the State filed a complaint against Price alleging drug distribution charges as a repeat offender. In February 1995, the State amended the complaint to additionally include solicitation of first-degree intentional homicide and named Winnebago County District Attorney Joseph Paulus as the intended victim. The complaint detailed the testimony of a witness who stated that Price wanted to sell marijuana and use the proceeds (or value) to pay others to kill Paulus, who successfully prosecuted a first-degree intentional homicide case against Price.

Ultimately, Price entered a plea agreement on the charges in exchange for a lessened second count; he pled no contest to (1) drug delivery as a repeat offender and (2) threatening to injure a public official.

The sentencing court considered both counts in tandem: "[T] hese crimes … are serious. But when one looks at the circumstances surrounding the offenses, they become even more serious and have more concern to, to at least this Court." The sentencing court reasoned that maximum sentences were warranted for both charges because "the profits that were to be generated by [the drug delivery] were to be used for the commission of additional criminal activities." Price was sentenced to fourteen years in prison, including the maximum nine-year

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

sentence on the drug delivery count, which was to be served consecutively to the threat to injure count, and consecutive to "any other prison sentence that [Price was] serving" at the time, which included a first-degree homicide conviction.[2]

Several years after sentencing, it was revealed that Paulus and Price's special prosecutor, Outagamie County District Attorney Vince Biskupic, withheld exculpatory evidence from Price and his counsel while pursuing the above charges. In light of this finding, then-District Attorney William M. Lennon investigated Price's prosecution and concluded that significant prosecutorial misconduct had occurred.[3]

Consequently, in 2006, Price filed a motion to withdraw his plea. In light of the new facts that had come to light since Price's sentencing, the prosecution and defense reached a stipulation to withdraw Price's plea to the threaten to injure a public official charge but agreed that Price "would withdraw his motion as to the other count (delivery of a controlled substance)." In support of its request that the circuit court adopt the stipulation, the State argued that it lacked evidence to support the original charge of threat to injure and extensively detailed the withheld material exculpatory evidence from Price, both of which the State acknowledges. The State also recognizes, as it did before the circuit court in 2007, that prosecutorial misconduct enticed Price to enter his plea to threatening a public official.

[2] The Honorable Bruce K. Schmidt presided over the original proceedings in this case, including sentencing. The Honorable Donald A. Poppy presided over the plea withdrawal hearing. The Honorable Mark T. Slate presided over the sentence modification hearing and motion to reconsider that are at issue in this appeal.

[3] In his motion to withdraw his plea, Price also cited to the fact that Paulus was convicted in 2004 of bribery, tax evasion, and various other crimes. It is unclear from the record whether this fact also contributed to Lennon's decision to investigate Price's prosecution.

After the 2007 hearing, the circuit court implemented the stipulation and vacated Price's plea and sentence on the threat to injure a public official count and dismissed the charge. The stipulation was silent as to modifying the sentence on the drug delivery conviction, and neither the parties nor the court addressed sentence modification in 2007.[4]

In 2019, Price filed a pro se motion to modify his sentence, which the circuit court denied. The court recounted that, in 2007, "the count regarding the plot to kill District Attorney Paulus, which had been reduced, was vacated and dismissed as there was ample evidence that crime did not occur." The court reasoned that although this new factor was not known to the original sentencing court, it was known to the court at the 2007 hearing. It further reasoned that the parties had entered into a stipulation to withdraw Price's motion to withdraw his plea on the drug delivery count, an "agreement" Price now sought to change. The court also denied Price's pro se motion for reconsideration, in which Price argued the new information which surfaced during the 2005 investigation by Lennon required new sentencing. Price appeals.[5]

Price seeks sentence modification based on a new factor. Whether a new factor exists presents a question of law that we review independently. ***State v. Scaccio***, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. To prevail in modifying his or her sentence, a "defendant

[4] The stipulation, which was set forth in a stipulation and order signed by the circuit court and the parties, reflected the agreement that Price would withdraw his plea withdrawal motion as to the drug delivery charge. However, in the same stipulation and order, the court stated that it was denying Price's motion to withdraw the plea on the drug charge on the merits. That the motion to withdraw was apparently both withdrawn and denied does not impact our analysis, as neither outcome addressed sentencing on that conviction.

[5] Price first appeared pro se before the circuit court in 2019 and on appeal. We subsequently requested a recommendation for appointment of pro bono appellate counsel through the Appellate Practice Section of the State Bar of Wisconsin, and appellate counsel for Price agreed to provide representation.

must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828; *see also* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

"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.'" ***State v. Boyden***, 2012 WI App 38, ¶5, 340 Wis. 2d 155, 814 N.W.2d 505 (citation omitted). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***Harbor***, 333 Wis. 2d 53, ¶36.

When part of the underlying basis for a sentence no longer exists, this may be a new factor if it is highly relevant to the sentence. *See* ***State v. Norton***, 2001 WI App 245, ¶¶13-16, 248 Wis. 2d 162, 635 N.W.2d 656 (holding that revocation of probation in another case was a new factor when circuit court had believed during sentencing that probation would not be revoked and considered this fact in imposing sentence); ***State v. Verstoppen***, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994) (noting that acquittal of charge which formed the basis for probation revocation was a new factor for the purpose of modification of sentence for underlying crime).

As we explain below, there is no question that the dismissal of the charge on the threat to injure a public official count is "new" in the sense that it was not in existence at the time Price was sentenced on the drug delivery conviction in 1994. Further, Price's conviction and sentence on the threat to injure count was highly relevant to the circuit court's determination of the sentence on the drug delivery count. As to whether the new factor would justify sentence

modification, the circuit court in 2019 denied Price's motion to modify on the ground that the dismissal of the charge was not a new factor and, consequently, it did not reach the issue of whether sentence modification is justified.

First, in explaining its rationale for denying Price's motion in 2019, the circuit court essentially determined that there was no new factor because Price had already been granted relief from the prosecutorial misconduct in terms of having the threat to injure charge dismissed in 2007. The court reasoned that it "d[id] not dispute that the new factor was not known to the sentencing judge in this case, but the new factor was known at the July 25, 2007, hearing" and concluded that "[t]here has been no new factor since then." The State embraces this rationale on appeal, arguing that Price has been granted relief in the form of the court dismissing the threat to injure charge. Price notes that neither the parties nor the court addressed sentence modification in 2007, a point which the State concedes and with which we agree.

Nothing in the record shows an attempt by Price to modify his sentence—his 2007 motion and the stipulation only addressed plea withdrawal. Conversely, Price does not seek plea withdrawal now—he is not seeking to modify the stipulated judgment entered in 2007. The State provides no argument that Price's motion is untimely or that he is somehow estopped from pursuing a sentence modification motion. A defendant seeking sentence modification may make the motion at any time based on a new factor. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895. In short, the parties' 2007 stipulation was silent as to sentence modification; it was not discussed or considered at the hearing, nor was the sentence on the remaining count addressed when the court entered the judgment dismissing the threat to injure a public official charge. Indeed, as noted above, the State concedes on appeal that "Price is right that the plea withdrawal hearing did not discuss sentence modification." As such, we have been

provided with no legal basis to preclude Price from seeking modification at this time based on the new factor—dismissal of the threat to injure charge.

We also conclude that the circuit court relied on the threat to injure a public official conviction when determining Price's drug delivery sentence. In 2007, the court dismissed Price's threat to injure charge because exculpatory evidence, as well as prosecutorial misconduct, became known after sentencing. As the 2019 circuit court noted, "the count regarding the plot to kill District Attorney Paulus, which had been reduced, was vacated and dismissed as there was ample evidence that crime did not occur." The reversed conviction was highly relevant in Price's drug delivery sentencing consideration.

Namely, the original sentencing court considered the threat to injure count in tandem with the drug delivery count when imposing sentence. When analyzing the severity of Price's drug offense along with his character and risk to the community, the sentencing court reasoned, "these crimes … are serious. But when one looks at the circumstances surrounding the offenses, they become even more serious and have more concern to, to at least this Court." When justifying why the maximum nine-year sentence was warranted for Price's drug charge, the court opined, "the profits that were to be generated by [the drug delivery] were to be used for the commission of additional criminal activities." As such, the court specifically concluded and considered that the drug delivery crime was used to generate profits to commit the extremely serious "plot to kill [the] District Attorney," albeit reduced to the crime of threatening to injure a public official. The State makes *no argument* that the allegations or facts relating to the dismissed charge—that Price was selling drugs from prison in order to pay for the district attorney's murder—were appropriately relied upon by the 1994 sentencing court.

We recognize that Price is currently serving a sentence for first-degree intentional homicide, and as such, it is difficult to assign the circuit court's sentencing rationale in discussing Price's character as extremely violent, threatening and vindictive, and his denials and unwillingness to accept responsibility, to a particular crime. Nevertheless, the sentencing court extensively remarked on the seriousness of the threat to injure charge, and the need to send a strong message that this behavior would not be tolerated, then drew a clear connection between the two crimes—he committed one crime to fund the other. The facts alleged in support of the extremely dangerous but now dismissed charge undoubtedly impacted the court's view of Price's character and the drug delivery crime. Therefore, we reject the State's claim that Price failed to introduce by clear and convicting evidence a new factor highly relevant to his drug dealing sentence.

As stated above, a circuit court faced with a sentence modification motion must consider both whether there is a new factor as a matter of law, *and* whether the new factor justifies sentence modification. The circuit court maintains discretion to decide whether the new factor justifies sentence modification. ***Harbor***, 333 Wis. 2d 53, ¶37. Because the circuit court did not do so, we remand for the court to consider whether the new factor justifies sentence modification.

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21 and remanded to the circuit court for further proceedings on the sentence modification motion consistent with this opinion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*