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DISTRICT I

September 8, 2021

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Electronic Notice

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
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Jacob J. Wittwer
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Levelt Dewarren Musgraves 251988
McNaughton Corr. Center
8500 Rainbow Rd.
Lake Tomahawk, WI 54539-9558

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

2020AP2089-CR

State of Wisconsin v. Levelt Dewarren Musgraves
(L.C. # 1991CF911251)

Before Brash, C.J., Dugan 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).

Levelt Dewarren Musgraves appeals an order of the circuit court denying his motion for sentence modification. He also appeals from the circuit court order denying his motion for reconsideration. Musgraves contends that he is entitled to sentence modification on the basis of a new factor. Upon our 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).¹ We summarily affirm.

In 1992, a jury found Musgraves guilty of first-degree intentional homicide while armed. Musgraves was sixteen years old at the time of the offense. At sentencing, the circuit court imposed the mandatory sentence of life imprisonment and ordered Musgraves eligible for parole in the year 2020. As relevant to this appeal, in September 2020, Musgraves filed a motion for sentence modification arguing that the COVID-19 pandemic and allegedly mitigating information contained in a December 1990 psychological evaluation were new factors warranting sentence modification. Musgraves also noted that some inmates who, like him, had been sentenced to life imprisonment for offenses committed as juveniles, had been identified for relief from their sentences by the Public Interest Justice Initiative.² Musgraves believed that he would be eligible for the program, but had not been selected as of the date of his motion.

The circuit court denied the motion, stating that neither the pandemic nor information contained in the 1990 psychological evaluation constituted new factors warranting sentence modification. The circuit court stated that even if the pandemic constituted a new factor, it was not highly relevant to the imposition of Musgraves's sentence. The circuit court did not address Musgraves's claim about the Public Interest Justice Initiative.

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

² The Public Interest Justice Initiative is a joint project between the Milwaukee County District Attorney's office and the Legal Aid Society of Milwaukee to review cases of persons sentenced to life imprisonment for offenses committed as juveniles. *See* <https://wislawjournal.com/2019/11/27/milwaukee-da-legal-aid-society-review-juvenile-life-sentences> (last visited Aug. 23, 2021).

Musgraves subsequently moved for reconsideration, arguing that he was entitled to have his motion decided by the judge who sentenced him,³ that the circuit court made multiple errors in denying his motion, and that the circuit court failed to address his argument that he was entitled to selection for the Public Interest Justice Initiative.

The circuit court denied the motion but again did not address Musgraves's argument as to the Public Interest Justice Initiative. This appeal follows.

On appeal, Musgraves contends that the circuit court failed to address his argument as to the Public Interest Justice Initiative. As this court best construes his argument, he contends that the program has successfully argued for sentence modifications for other juveniles serving life sentences and could do so for him; Musgraves contends that he is eligible for the program and that the Milwaukee County District Attorney's Office's failure to recognize his eligibility (thus far) constitutes a new factor warranting sentence modification. Musgraves is mistaken.

A circuit court may modify a defendant's sentence upon the showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor consists 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.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). A defendant seeking sentence modification "must demonstrate both the existence of a new factor and that the new factor

³ The Honorable Jeffrey A. Wagner sentenced Musgraves, the Honorable Frederick C. Rosa denied Musgraves's motion for sentence modification, and Judge Wagner denied Musgraves's motion for reconsideration.

justifies modification of the sentence.” *Harbor*, 333 Wis. 2d 53, ¶38. The defendant “has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.*, ¶36 (citing *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989)).

Whether the facts presented constitute a new factor is a question of law, which we review independently of the circuit court. *See Harbor*, 333 Wis. 2d 53, ¶33. However, “[t]he determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court,” and that decision is reviewed for an erroneous exercise of discretion. *Id.*

Musgraves is correct that the circuit court did not address his contention about the Public Interest Justice Initiative; however, we may affirm a correct circuit court decision on grounds other than those relied upon by the circuit court. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). Our *de novo* review persuades us that Musgraves’s belief about his eligibility for the initiative is not a new factor warranting sentence modification. Although the initiative was not known to the circuit court at the time of sentencing, it was not highly relevant to the imposition of his sentence. Rather, the circuit court focused on the gravity of the offense, Musgraves’s attitude and demeanor, the impact Musgraves’s actions had on the victim’s family, and the need to deter others from the same type of offense. Accordingly, we agree with the circuit court that sentence modification was not warranted.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the orders 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