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DISTRICT I

October 5, 2021

To:

Hon. Lindsey Canonie Grady
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County Courthouse
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William Edwards 432595
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P.O. Box 36
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You are hereby notified that the Court has entered the following opinion and order:

2020AP787-CR

State of Wisconsin v. William Edwards (L.C. # 2002CF6979)

Before Brash, C.J., Dugan and Graham, 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).

William Edwards, *pro se*, appeals from an order of the circuit court that denied his motion seeking sentence modification based on a new factor. 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 The order is summarily affirmed.

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

In 2003, Edwards was convicted on five counts of armed robbery as a party to a crime. He was sentenced to thirteen years of initial confinement and ten years of extended supervision on each count, to be served concurrently with each other, but consecutive to a twenty-five-year sentence from Washington County. On April 2, 2020, Edwards filed the underlying motion for sentence modification, alleging that the COVID-19 pandemic constituted a new factor. He asked to have his sentence modified to time served. The circuit court denied the motion.

A new factor is a fact or set of facts that is “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.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *State v. Harbor*, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden of proving a new factor by clear and convincing evidence. *See Harbor*, 333 Wis. 2d 53, ¶36. Whether the facts presented by the defendant constitute a new factor is a question of law that this court reviews *de novo*. *Id.*, ¶33.

On appeal, Edwards first asserts that the circuit court failed to “clearly make a ruling” on whether he had demonstrated a new factor. However, because the existence of a new factor is a question of law, the lack of any express explanation from the circuit court is not necessarily fatal. Edwards further argues that he has shown by clear and convincing evidence that COVID-19 is a new factor that frustrates the purpose of his original sentence because he was not sentenced “to possibly die in prison.” We disagree with Edwards’ assertion that he has shown the existence of a new factor by clear and convincing evidence.

It is indisputable that, when Edwards was sentenced in 2003, the COVID-19 pandemic was not then in existence. However, while a new factor must be “highly relevant to the imposition of sentence,” *see id.*, ¶40 (citation omitted), “frustration of the purpose of the original sentence is not an independent requirement” for showing a new factor, *see id.*, ¶48.

The sentencing transcript reflects that the sentencing court was concerned by Edwards’ anti-social behaviors, lack of remorse, and “serious juvenile record” that included an alleged sexual assault when he was eleven years old. The sentencing court was also concerned with protecting the community in light of Edwards’ character and the seriousness of his crimes. Nothing about the COVID-19 pandemic relates to those elements of sentencing, and Edwards does not demonstrate, in either his motion or on appeal, how a pandemic or other health crisis in the prison system was highly relevant to the imposition of his sentence. We, therefore, conclude that Edwards has failed to show the existence of a new factor and, thus, the circuit court did not err when it denied his motion for sentence modification.²

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

² It appears that the circuit court may have assumed without deciding that COVID-19 was a new factor, because its comments in the order denying Edwards’ motion reflect that the circuit court did not believe sentence modification was warranted in any event. *See State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828 (“[I]f a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.”). The circuit court “recognize[d] the threat that COVID-19 presents,” but explained that Edwards “is in no different position than any other DOC inmate. The DOC is at the front lines of addressing this threat If there [are] additional measures to be taken to protect the prison population, it must come from another authority.” We discern no erroneous exercise of discretion.

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

Sheila T. Reiff
Clerk of Court of Appeals