



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 IV

October 28, 2021

To:

Hon. Mark L. Goodman
Circuit Court Judge
Electronic Notice

Sarah Marie Skiles
Electronic Notice

Shirley Chapiewsky
Clerk of Circuit Court
Monroe County Courthouse
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Jeremy Newman
Electronic Notice

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

2020AP1790-CR

State of Wisconsin v. Kim M. Erickson (L.C. # 2015CF340)

Before Blanchard, P.J., Fitzpatrick, 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).

Kim Erickson appeals a judgment of conviction and an order denying her postconviction motion for sentence modification. 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 summarily affirm.

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

In August 2015, Erickson was charged with burglary, criminal damages to property, and three counts of misdemeanor theft. Pursuant to a diversion agreement with the State, Erickson pled no contest to burglary and the remaining counts were dismissed and read in for purposes of sentencing. The State subsequently moved to revoke the diversion agreement. The State alleged that Erickson had failed to comply with the agreement because, among other things, Erickson had been charged with misdemeanor theft of moveable property in a new La Crosse County case. The court revoked the agreement on the parties' stipulation. At sentencing in March 2019, the court noted that Erickson had convictions from an Adams County case that included theft of moveable property from September 2015, which was near in time to the August 2015 offenses charged in this case. The court also noted the pending La Crosse County case, acknowledging that a competency hearing had been scheduled for Erickson in that matter. The court sentenced Erickson to nine months in jail, explaining that the jail time was necessary to protect the public from Erickson's "penchant to commit thievery."

In August 2020, Erickson moved for sentence modification. She asserted that, after sentencing in this case, the charges against her in the La Crosse County case were dismissed on the State's motion. Erickson cited the State's motion to dismiss the La Crosse County case, which stated that, "given the mental health status of the defendant, both currently and at the time of the offense, the State no longer believes that prosecution is in the interests of justice," and also that Erickson had "remained law-abiding since the inception of this case with no additional violations or charges." Erickson argued that the dismissal of the La Crosse County theft charge, and the State's motion asserting that Erickson had not committed any additional offenses since 2015, established a new factor for sentence modification purposes because it contradicted the court's opinion that Erickson had a "penchant to commit thievery." After a hearing, the circuit

court denied the motion. The court determined that Erickson had not established a new factor, and also that “the sentence was fair when it was pronounced in March of 2019, and it remains fair today.”

A circuit court may, in its discretion, modify a sentence if the defendant shows that a new factor exists. *State v. Vaughn*, 2012 WI App 129, ¶35, 344 Wis. 2d 764, 823 N.W.2d 543. A “new factor” is a fact or 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.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts presented by the defendant constitutes a “new factor” is a question of law that we review de novo. *State v. Harbor*, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

“The existence of a new factor does not automatically entitle the defendant to sentence modification. Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence. In making that determination, the circuit court exercises its discretion.” *Id.*, ¶37 (citations omitted). If a court determines that the asserted facts do not constitute a new factor, the court need not determine whether the sentence should be modified. *Id.*, ¶38. “Alternatively, if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law.” *Id.*

Erickson argues that the dismissal of her La Crosse County case, together with the State’s motion in that case asserting that Erickson had remained law-abiding since 2015, constitutes a new factor by contradicting the court’s stated belief that a jail sentence was necessary based on

Erickson’s “penchant to commit thievery.” She contends that the circuit court denied her motion for sentence modification based entirely on its determination that she had not established a new factor, and therefore did not consider whether sentence modification was warranted. Erickson contends that the court’s statement that the sentence was and remained “fair” did not answer the question of whether sentence modification was warranted. She asserts that, just as a new factor need not frustrate the purpose of the original sentence, *see id.*, ¶48, whether sentence modification is warranted is not a question of whether the original sentence was “fair.” She asserts further that the court did not reach the question of whether sentence modification was warranted because, to do so, the court would have had to address the hypothetical question of whether, if the court were wrong that Erickson had failed to present a new factor, that new factor justified sentence modification. We disagree.

We will assume, for purposes of this opinion, that Erickson established a new factor. We conclude, however, that the circuit court properly determined, after considering all of the facts before it, that sentence modification was not warranted. The court first addressed the facts known to the court at the time of sentencing and the facts asserted in the postconviction motion and explained that, in the court’s view, Erickson had not established a new factor. The court then went on to explain that Erickson’s sentence was “fair” when imposed and remained “fair” at the time of the postconviction motion hearing, and denied sentence modification on that basis. Thus, the court determined that, after considering the facts at the time of sentencing and the facts asserted in the postconviction motion, the court found no basis to modify the sentence.

We give deference to the court’s discretionary determination that modification was not warranted. *See State v. Verstoppen*, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994). We will sustain a discretionary decision if it is reasonably based on the facts of record and an

appropriate application of the law. *Id.* Moreover, our role as an appellate court is to search the record for reasons to sustain a circuit court’s discretionary decision. See *State v. Thiel*, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388. Here, the court properly considered the facts in the record and determined that, in light of all of the facts, the sentence imposed remained the fair sentencing disposition. Accordingly, we conclude that the circuit court properly exercised its discretion to determine that, after considering the facts alleged as a new factor, sentence modification was not warranted.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to 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