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**DISTRICT IV**

November 4, 2021

To:

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John G. Dahlk 274597  
John C. Burke Correctional Inst.  
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Waupun, WI 53963-0900

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

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2020AP1896-CR

State of Wisconsin v. John G. Dahlk (L.C. # 1995CF66)

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).**

John Dahlk, pro se, appeals the circuit court's order denying his motion for sentence modification. Dahlk argues that the circuit court erred in concluding that he failed to show the existence of a new factor. He also argues that the circuit court judge who decided the motion should have recused himself. Based on our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).<sup>1</sup> We affirm.

Dahlk was convicted of solicitation to commit first-degree intentional homicide. The circuit court sentenced him to the maximum prison term of ten years, consecutive to any other sentence.<sup>2</sup> The court concluded that a sentence less than the maximum would not adequately reflect the serious nature of Dahlk’s crime or adequately protect society. The court stated that it considered Dahlk to be extremely dangerous.

In his motion for sentence modification, Dahlk contended that COVID-19 and related circumstances constituted a new factor that justified the modification of his sentence. As noted, the circuit court denied the motion and concluded that Dahlk had not shown the existence of a new factor.

“Deciding a motion for sentence modification based on a new factor is a two-step inquiry.” *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, “[t]he defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* “Whether the fact or set of facts put forth by the defendant constitutes a ‘new factor’ is a question of law.” *Id.* Second, “if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.*, ¶37. A “‘new factor’” is defined as “‘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

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

<sup>2</sup> The Honorable Patrick J. Fiedler imposed Dahlk’s sentence. The Honorable Frank D. Remington decided Dahlk’s motion for sentence modification.

because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (quoted source omitted).

In arguing that he established a new factor under the first step of the two-step inquiry, Dahlk points out that the COVID-19 pandemic was unknown at the time of his sentencing. He asserts that the COVID-19 virus has lethal consequences for individuals such as himself who have underlying health conditions, and he further asserts that the department of corrections has not been capable of protecting inmates from the virus.

We agree with the circuit court’s conclusion that Dahlk has not met his burden to show the existence of a new factor. Assuming that Dahlk has faced serious health risks in prison due to the COVID-19 pandemic and his underlying health conditions, Dahlk has not demonstrated that these risks are highly relevant to the imposition of his sentence. Dahlk contends that the risks are highly relevant to his sentence because he was not given a life sentence. By this logic, any unanticipated circumstance that seriously threatens a prisoner’s health would constitute a new factor for most prisoners. Dahlk presents no authority to support such a broad interpretation of what constitutes a new factor.

We emphasize that we do not conclude generally that neither COVID-19-related circumstances nor an individual’s health conditions could ever constitute new factors in the context of particular sentences. Rather, we conclude only that Dahlk has not shown that the health risks he asserts that he faces due to the COVID-19 pandemic are highly relevant to the imposition of his particular sentence.

Dahlk argues that the circuit court “missed the issue” and erroneously relied on *State v. Johnson*, 210 Wis. 2d 196, 565 N.W.2d 191 (Ct. App. 1997), in which a defendant’s medical

condition was considered at the time of sentencing. *See id.* at 201-03. As noted above, however, the issue of whether a new factor exists is a question of law. *See Harbor*, 333 Wis. 2d 53, ¶36. As such, we review the question de novo, independent of the circuit court’s reasoning. *See State v. Torres*, 2003 WI App 199, ¶6, 267 Wis. 2d 213, 670 N.W.2d 400. We need not agree with all of the circuit court’s reasoning in order to agree with its conclusion that Dahlk has not shown the existence of a new factor.

We turn finally to Dahlk’s argument that the circuit court judge who decided Dahlk’s motion should have recused himself. Dahlk argues that the judge was biased. “We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable.” *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Dahlk asserts that the circuit court judge was biased because the judge ruled against him on prior motions and because, according to Dahlk, the judge appeared “tough” and made inconsistent statements regarding the sentencing proceedings. None of these assertions rebuts the presumption that the circuit court judge acted fairly, impartially, and without bias. Accordingly, we reject Dahlk’s recusal argument.

Therefore,

IT IS ORDERED that the circuit court’s order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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*