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DISTRICT II

March 9, 2022

To:

Hon. Peter L. Grimm
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Michael J. Herbert
Electronic Notice

Eric Toney
Electronic Notice

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

2020AP1926-CR State of Wisconsin v. Sirmont T. Davis (L.C. #2018CF341)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Sirmont T. Davis appeals from an order denying his motion for sentence modification. He alleges the existence of 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 We affirm.

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

In 2018, Davis was convicted of multiple crimes arising from an incident in which he resisted arrest, threatened police, and spat in an officer's face. The circuit court imposed an aggregate sentence of four years of initial confinement and four years of extended supervision.

In 2020, Davis filed a motion for sentence modification. In it, he cited personal health conditions² and asserted that his increased risk for developing severe illness due to the COVID-19 pandemic constituted a new factor justifying sentence modification. Accordingly, Davis asked to be released from custody and have the remainder of his initial confinement converted to extended supervision. After a hearing on the matter, the circuit court denied the motion. This appeal follows.

A circuit court may modify a sentence upon a defendant's showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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 ... 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)). Whether a fact or set of facts constitutes a new factor is a question of law that this court reviews independently. *See Harbor*, 333 Wis. 2d 53, ¶33.

Here, we are not persuaded that Davis has demonstrated the existence of a new factor. Although the risk posed by COVID-19 was unknown to the circuit court at the time of original sentencing, neither prison safety conditions nor Davis' health conditions were “highly relevant to

² According to the motion, Davis was a forty-two-year-old African-American who suffered from type-2 diabetes, hypertension, neuropathy, and asthma.

the imposition of sentence.” Rather, Davis’ sentence was driven by other considerations. In particular, the circuit court cited the “aggravated” nature of the incident, Davis’ “poor character,” and his “moderate to moderate high risk of reoffending.” Thus, we are satisfied that the circuit court properly denied the motion for sentence modification.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is 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