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DISTRICT II

April 20, 2022

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Electronic Notice

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Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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Christopher William Rose
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You are hereby notified that the Court has entered the following opinion and order:

2021AP147-CR

State of Wisconsin v. Everett Sennholz (L.C. #2012CF97)

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

Everett Sennholz appeals from an order denying his 2020 postconviction motion seeking sentence modification. Sennholz alleged that the COVID-19 pandemic and his health conditions constituted a new factor warranting 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 Because neither the pandemic nor Sennholz's health conditions constitute a new factor, we affirm.

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

In September 2013, a jury found Sennholz guilty of four counts of first-degree sexual assault of a child under age thirteen. The presentence investigation reports noted Sennholz's medical problems, and defense counsel asked the sentencing court to consider Sennholz's advanced age in imposing sentence. The sentencing court acknowledged that Sennholz was eighty-four years old. It saw his advanced age and health conditions as mitigating factors, noting that Sennholz had "a lot of major health issues[.]" After expressing how serious Sennholz's crimes were and the need for punishment, however, the court sentenced Sennholz to twenty years in prison despite his advanced age and health issues.

Sennholz's 2014 postconviction motion was denied, and we affirmed his convictions on direct appeal. In November 2020, Sennholz filed the sentence modification motion underlying this appeal. He alleged that COVID-19 and his "extraordinary health conditions," including his age, heart issues, diabetes, and recent stroke, created a new factor warranting sentence modification. He sought release from prison, as he believed the conditions of his confinement created a substantial risk of death or extreme bodily harm.

In January 2021, the circuit court² held a hearing on his sentence modification motion. In its oral decision, the circuit court explained that although COVID-19 was not known at the time it imposed sentence, Sennholz's medical issues were "nothing new." The circuit court explained it had considered the health conditions during sentencing, but due to the seriousness of the crime and the need to punish Sennholz, a lengthy sentence was necessary. The circuit court concluded

² The Honorable Anthony Milisuskas presided over the trial, sentencing, 2014 postconviction motion, and the current motion for sentence modification.

that, as a result, “there’s no new factor here” and denied Sennholz’s sentence modification motion. Sennholz appeals.

A circuit court may modify a sentence based on 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”” that is not known to the sentencing court, ““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)). Whether the defendant has shown a new factor justifying sentence modification is a question of law reviewed de novo. *State v. Samsa*, 2015 WI App 6, ¶14, 359 Wis. 2d 580, 859 N.W.2d 149. The defendant bears the burden of establishing the existence of a new factor “by clear and convincing evidence[.]” *Harbor*, 333 Wis. 2d 53, ¶36.

Sennholz has failed to demonstrate the existence of a new factor. Sennholz’s medical issues were known to the sentencing court at the time it imposed sentence. The sentencing court took Sennholz’s age and chronic health conditions into account but still chose to impose a lengthy prison sentence because of the seriousness of Sennholz’s crimes and the need to punish Sennholz for his conduct. Although the COVID-19 pandemic was unknown to the court at the time of Sennholz’s sentencing, it was not ““highly relevant to the imposition of sentence[.]”” *See Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). The sentencing transcript reflects that the seriousness of Sennholz’s crimes and the need to punish him were the driving factors for the sentencing court.

Moreover, to the extent Sennholz argues that COVID-19 adversely impacts him as an elderly inmate with medical issues, he presents a challenge to his specific conditions of confinement—a matter redressed through means other than a sentence modification motion. *See State v. Krieger*, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991) (prisoners may challenge conditions of confinement by appropriate writs, “not by seeking a modification of their sentence”); *State v. Gibbons*, 71 Wis. 2d 94, 98-99, 237 N.W.2d 33 (1976) (a sentencing court lacks authority to order specific conditions of confinement; “[p]risoners are entitled to, and do, challenge the conditions of their confinement by appropriate writs such as habeas corpus”).

Because Sennholz fails to establish that the COVID-19 pandemic and his health issues constitute a new factor, we affirm the circuit court’s decision denying his motion for sentence modification.

Therefore,

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