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DISTRICT II

September 28, 2022

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

2021AP830-CR

State of Wisconsin v. David G. Koch (L.C. #1997CF398)

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).

David G. Koch appeals from a judgment of conviction after revocation of his probation. He also appeals from an order denying his postconviction motion seeking sentence modification. He claims his advanced age and health conditions are new factors. 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 1998, Koch pled no contest to first-degree sexual assault of a child and incest with a child, contrary to WIS. STAT. §§ 948.02(1) and 948.06(1) (1999-2000). The circuit court sentenced Koch to twelve years in prison on the incest charge and withheld sentence on the sexual assault charge—instead placing him on probation for twenty years, consecutive to the incest sentence. Koch served the twelve years and was released to probation. In 2018, while still on probation, Koch’s probation was revoked as a result of his physically abusive conduct toward his then-wife.

In February 2020, the circuit court ordered Koch to serve a twenty-year sentence for his first-degree sexual-assault-of-a-child conviction. Koch filed a postconviction motion asserting that his advanced age and health conditions constitute new factors warranting sentence reduction. Specifically, Koch argued his age and health made “his term of incarceration tantamount to a life sentence,” which he claimed he “does not deserve[.]” The circuit court denied the motion, finding neither Koch’s age nor health conditions to be new factors. The court explained it was aware of his age both because the defense pointed it out to the court at sentencing and because the court could see from Koch’s presence in court that “he is of advanced age[.]” The court also found: “The health conditions Mr. Koch faced were well known to this court in imposing sentence.” The court explained that it had “a tremendous amount of information about Mr. Koch ... about his physical health” and “was very well aware that he had a lot of significant health concerns.” Koch now appeals.

The issue on appeal is whether the circuit court erred in denying Koch’s sentence modification motion. Koch acknowledges that the sentencing court knew about his advanced age and health conditions, but he asserts the failure to have an “in depth discussion” about the specifics—or explicitly state that these factors reduce his life expectancy—somehow

makes these facts new. We conclude Koch failed to prove that he is entitled to sentence modification based on new factors.

“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. Whether a “fact or set of facts” “constitutes a ‘new factor’ is a question of law.” *Id.* 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, 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). The defendant bears the burden of establishing the existence of a new factor “by clear and convincing evidence[.]” *Harbor*, 333 Wis. 2d 53, ¶36.

If a new factor exists, the defendant is not automatically entitled to sentence modification. *Id.*, ¶37. “Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.* Whether a new factor justifies sentence modification is within the circuit court’s discretion. *Id.* When the circuit court concludes as a matter of law that there is no new factor, it is unnecessary to “determine whether, in the exercise of its discretion, the sentence should be modified.” *Id.*, ¶38. “[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification,” it is unnecessary for the court to “determine whether the facts asserted by the defendant constitute a new factor as a matter of law.” *Id.* A new factor is defined as a fact unknown at the time of sentence that is highly relevant to the imposition of the sentence. *Rosado*, 70 Wis. 2d at 288.

Koch has failed to prove the existence of any new factor. The information he submitted about his advanced age and health conditions does not meet the definition of a new factor because the circuit court knew about his advanced age and his health conditions at the time it imposed his sentence. The record reflects that when it sentenced Koch, the circuit court knew he was seventy-three years old, that he had multiple health conditions, and that he may not outlive the twenty-year sentence imposed. The court obtained some of this information because of Koch's physical presence in the courtroom and some of it because this information appeared in reports in the record or because Koch's lawyer specifically asked the sentencing court to take "into account his age," emphasizing to the court that a fifteen-year sentence "could very well be a life sentence for" Koch. Even the prosecutor acknowledged in her sentencing remarks that Koch was "elderly[.]" The circuit court stated at sentencing that it was "cognizant of [Koch's] age and [his] medical conditions, but [those] cannot override what [the court] think[s] is a compelling need for lengthy incarceration for the purpose of, hopefully, getting you some treatment that you will finally internalize, and take responsibility for, and take advantage of, and protecting the community from your continued pattern of behavior."

Koch concedes the circuit court knew that his advanced age and health conditions could cause the imposed twenty-year prison term to be a life sentence. He admits the court referenced both factors. The record also shows that the sentencing court explained its extensive knowledge of Koch's advanced age and health conditions when it denied the postconviction motion. Despite all of this, Koch still contends these are new factors. Nevertheless, Koch thinks these facts are new because the sentencing court failed to address his advanced age "in depth" or identify in "detail" his particular medical conditions. The law, however, does not define "new factor" by how many details a sentencing court lists about a defendant's health conditions or by

the “depth” of the court’s discussion on his advanced age. Rather, the law defines a new factor as a fact relevant to the sentence that was *unknown* at the time of sentencing. Koch’s age and health conditions were known when the court imposed its sentence. The sentencing court’s failure to discuss Koch’s age in depth or explicitly list each of his health conditions does not somehow make them unknown. Koch’s advanced age and health conditions—both of which no one disputes increase Koch’s chance of dying in prison—were known at the time of the sentencing and do not qualify as new factors.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court 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