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DISTRICT I

December 6, 2022

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
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George Christenson
Clerk of Circuit Court
Milwaukee County
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Richard J. Perekovich 168203
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You are hereby notified that the Court has entered the following opinion and order:

2021AP19-CR

State of Wisconsin v. Richard J. Perekovich (L.C. # 2001CF6022)

Before Brash, C.J., Dugan and White, 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).

Richard J. Perekovich, *pro se*, appeals the order denying his postconviction motion for sentence modification.¹ Based upon our review of the briefs and record, we conclude at

¹ The Honorable M. Joseph Donald presided over Perekovich's plea and sentencing hearings. The Honorable Stephanie Rothstein issued the order denying Perekovich's postconviction motion.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).² We affirm.

In November 2001, Perekovich shot two men outside of a Milwaukee tavern, killing one. He ultimately entered no-contest pleas to one count of first-degree reckless homicide while armed and one count of first-degree reckless injury while armed.³

At sentencing, Perekovich told the circuit court that he entered no-contest pleas because he did not believe he would be able to persuade a jury that he acted in self-defense given the number of shots he fired. As mitigating factors, defense counsel argued that an investigator had identified independent witnesses who said that individuals at the crime scene were armed and firing guns and that this should reduce Perekovich's culpability. Perekovich told the court that a man who was at the scene was armed and provoked Perekovich into firing his weapon. Perekovich said that the other man went for his gun first and that Perekovich believed in his heart he was defending himself. Perekovich told the court that he never intended to hit anyone when he decided to fire back. The circuit court imposed sentences totaling thirty years of initial confinement and ten years of extended supervision.

Eighteen years after his conviction, Perekovich filed a *pro se* motion for sentence modification based on a new factor. He argued that the results of a polygraph he took shortly

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

³ The plea hearing transcript and the plea questionnaire and waiver of rights form reflect that Perekovich entered no-contest pleas. However, the judgment of conviction indicates that Perekovich pled guilty to the charges. This amounts to a scrivener's error, and upon remittitur, we direct that the judgment of conviction be amended to reflect Perekovich's no-contest pleas. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (holding that the circuit court may correct clerical errors at any time).

before filing his motion constituted a new factor warranting sentence modification. According to Perekovich, the polygraph results prove his version of what happened, which would have impacted the trial court's consideration of his culpability. The postconviction court denied Perekovich's motion without a hearing.

On appeal, Perekovich continues to assert that a new factor warrants sentence modification. See *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. In the circuit court, he argued that the results of his August 2020 polygraph examination constituted a new factor. In an effort to workaroud the inadmissibility of such results, see *State v. Dean*, 103 Wis. 2d 228, 279, 307 N.W.2d 628 (1981), he now asserts that *Dean* is inapplicable to a motion for sentence modification. This argument fails because our case law makes clear that "*Dean* stands for a blanket exclusion of polygraph evidence in criminal proceedings on public policy grounds." See *State v. Ramey*, 121 Wis. 2d 177, 180-81, 359 N.W.2d 402 (Ct. App. 1984) (footnote omitted).

Consequently, we turn to Perekovich's argument that the fact that he offered to take the polygraph test should have been considered as a new factor. See *State v. Pfaff*, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562 (explaining that "an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose"). 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." *Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). A circuit court has inherent authority to modify a sentence upon a showing of a new factor. See *id.*, ¶35. To prevail, a defendant must satisfy a two-prong test that requires the defendant: (1) to demonstrate by clear and convincing evidence that a new factor

exists; and (2) to show that the alleged new factor justifies sentence modification. *See id.*, ¶¶36-38. The court may consider either prong first, and if a defendant fails to satisfy one prong of the new factor test, the court need not address the other. *See id.*, ¶38.

Whether a fact or set of facts constitutes a new factor is a question of law that this court considers *de novo*. *See id.*, ¶33. Whether a new factor warrants sentence modification rests in the circuit court's discretion. *See id.*

In this appeal, we need not determine whether Perekovich satisfied the second prong of the new factor test. We conclude that Perekovich has not established a new factor.

Perekovich's contention that he was acting in self-defense at the time of the shooting was known to the court at the time of his sentencing. Given that the polygraph results are inadmissible, Perekovich's new factor argument hinges on his willingness to take a polygraph, a fact that he believes would have bolstered his credibility and changed the outcome of his sentencing. Perekovich's willingness to take a polygraph so as to further support a version of events that he previously presented to the circuit court during sentencing does not amount to a new factor for purposes of sentence modification. On this point, we agree with the summation offered by the postconviction court: "The polygraph test is not a new factor; it is a reiteration of the defendant's sentencing argument under the guise of a legally unaccepted science."

Moreover, Perekovich's claim that the circuit court at sentencing "gave absolutely no credence to [his] version of evidence and relied on the State[] and [its] witness's testimony" is belied by the record. In actuality, the record reflects that the circuit court declined to adopt either side's version of events presented at sentencing, stating:

I'm not really sure what happened out there or what made you feel so afraid, so overcome with anxiety and fear, that you had to just start opening up and firing on a street, and although you tell this court that you were not intending to shoot directly at anyone, it appears that an innocent person, someone who is doing nothing more than probably saying goodnight to his friends after an evening of socializing, he, too, was probably doing nothing more than trying to go home and be with his family.

As evidenced by these remarks, the moments leading up to the shooting and which version of events was true were not “highly relevant to the imposition of the sentence” in the case. *See id.*, ¶40 (citation omitted).

IT IS ORDERED that the order is summarily affirmed. *See* 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