OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 15, 2023

To:

Hon. Jodi L. Meier
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Matthew S. Pinix
Electronic Notice

Michael C. Sanders
Electronic Notice

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

2022AP123 State of Wisconsin v. Christopher M. Thayer (L.C. #2018CF17)

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

Christopher M. Thayer appeals from an order of the circuit court. He contends the court erred in denying his motion for sentence modification without a hearing. 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] For the following reasons, we affirm.

Thayer was convicted upon his no-contest pleas to homicide by intoxicated use of a vehicle and injury by intoxicated use of a vehicle based upon causing the death of a woman and

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

injury to her grandson while driving drunk. Through a letter read by the State at sentencing, Emily,[2] who is the daughter of the woman Thayer killed and mother of the boy he injured, asked the circuit court to impose the maximum sentence. Three years later, Thayer brought a motion seeking sentence modification on the basis that Emily had a change of heart and would like Thayer's sentence shortened. Thayer asserted that Emily's change of heart constituted a new factor warranting modification of his sentence. The court denied the motion without a hearing, stating that at sentencing it had "carefully and properly considered all of the necessary factors when fashioning its sentence and did not give undue weight to [Emily's] comments … when fashioning the sentence." The court concluded that Emily's change of heart "is not a new factor" and added that the court also "does not find the change of heart to be mitigating." Thayer appeals.

Our supreme court has explained:

> The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Whether the fact or set of facts put forth by the defendant constitutes a "new factor" is a question of law….
>
> ….
>
> … [I]f a court determines that the facts do not constitute a new factor as a matter of law, "it need go no further in its analysis" to decide the defendant's motion….
>
> ….
>
> … [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."

[2] A pseudonym.

State v. Harbor, 2011 WI 28, ¶¶36-40, 333 Wis. 2d 53, 797 N.W.2d 828 (citations omitted).

We have stated that "a change of heart by the sentencing court is not a new factor supporting resentencing. Further, resentencing is not required every time a victim or anyone else addressing the sentencing court has a change of heart." ***State v. Prager***, 2005 WI App 95, ¶18, 281 Wis. 2d 811, 698 N.W.2d 837 (citation omitted).

As indicated, it is Thayer's burden to show the existence of a new factor by clear and convincing evidence. He has not done so. Reading through the circuit court's sentencing comments carefully, there is no indication Emily's request that the court "giv[e] [Thayer] the maximum allowable sentence" was highly relevant to the imposition of Thayer's sentence.

Before sentencing Thayer, the circuit court discussed the need to protect the public, deterrence, Thayer's character, the severity of the offenses, and rehabilitation considerations. As mitigating factors, the court recognized that Thayer had no criminal history, accepted responsibility, was sincere in his remorse for the loss caused by his irresponsible actions, got good grades when he was in high school decades earlier, and had stable family and employment situations. As aggravating factors, the court discussed the seriousness of this offense, which took the life of one beloved member of the community and caused physical and psychological injury to another; the repeated efforts of many individuals at the bar where Thayer had been drinking to give him alternatives to driving himself home—all of which efforts Thayer rejected; and that Thayer was diagnosed with "alcohol use disorder, severe."

Before asking the court to impose the maximum sentence, Emily's letter described "[t]he devastating impact this catastrophic event is going to have on me, my son and my family for the rest of our lives …." After her letter was read, the State then read a letter from the deceased's

brother, further discussing the significant impact of the tragic loss of the deceased and asking the court to "protect the community" and "[h]and down a sentence that will be a difference maker." At one point, the court indicated that it had

> received so many letters from everyone in support of both sides. I think there were close to 70. And I can summarize really the sentiments … in support of the [deceased's] family as wanting maximum sentences, referring to Mr. Thayer as a murderer. The letters in support of Mr. Thayer … really begged for leniency, begged for mercy.

The court stated that it had read "each and every letter … [and] each and every word." Significantly, the court made no specific comments that would suggest Emily's request for the maximum sentence was "highly relevant" to the sentence it ultimately imposed. Furthermore, we note that on both sentences together, the maximum sentence would have been twenty-two and one-half years of initial confinement followed by fifteen years of extended supervision. The court sentenced Thayer to thirteen years of initial confinement followed by thirteen years of extended supervision.

As we have stated, "[sentence modification] is not required every time a victim or anyone else addressing the sentencing court has a change of heart." ***Prager***, 281 Wis. 2d 811, ¶18. Here, Thayer has not met his burden to show by clear and convincing evidence that Emily's change of heart so as to no longer desire the "maximum allowable sentence" for Thayer was highly relevant to the sentence the court imposed, especially when the court imposed a sentence far below the maximum allowable sentence.

Therefore,

IT IS ORDERED that the order of the circuit court 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