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DISTRICT II

May 17, 2023

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2021AP260-CR State of Wisconsin v. Augustus E. Dillon (L.C. #2018CF545)

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).

Augustus E. Dillon appeals from a judgment entered after he pled no contest to possession of cocaine with intent to deliver as a second or subsequent offense. He also appeals from an order denying his postconviction motion wherein he sought sentence modification on the basis that COVID-19[1] constituted a new factor. Based upon our review of the briefs and Record,

[1] The World Health Organization declared a global pandemic of Coronavirus Disease 2019 (COVID-19) on March 11, 2020, due to widespread human infection worldwide.

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[2] We affirm.

In November 2019, Dillon pled no contest to one count of possession of between 15 and 40 grams of cocaine with intent to deliver as a second or subsequent offense, contrary to WIS. STAT. §§ 961.41(1m)(cm)3 and 961.48(1)(a). The circuit court accepted Dillon's plea and sentenced him to four years of initial confinement followed by five years of extended supervision, concurrent to the sentence he was then serving.

A year later, in November 2020, Dillon filed a postconviction motion contending that COVID-19 constituted a new factor that warranted modifying the initial confinement portion of his sentence to time served. Dillon based his argument on the fact that he had uncontrolled diabetes, which increased his risk of contracting the virus, having severe symptoms, and dying from the virus. Dillon asserted that "the prison environment *per se* puts [him] at unnecessary risk" and that "[t]he only way to protect [him] was to get him out of that environment."

After a hearing, the circuit court denied Dillon's motion, concluding that COVID-19 was not a new factor and that even if it was a new factor, "it does not justify modification of sentence in this case" because "[t]his was clearly a case where Mr. Dillon needed to be punished." The court noted that it remembered imposing Dillon's sentence, and "the crux of [Dillon's] sentence ... was to hold Mr. Dillon accountable and to punish him for his behavior[.]" It stated that "overall, punishment was one of the overriding factors to the court in imposing sentence."

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

"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 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.***

Dillon asserts the circuit court erred when it ruled that COVID-19 was not a new factor. We disagree. Although COVID-19 was certainly unknown to the court at the time of Dillon's sentencing, it was not "highly relevant to the imposition of sentence[.]" *See* ***Rosado***, 70 Wis. 2d at 288. As the court explained at the postconviction motion hearing, punishing Dillon was the

overriding factor when it imposed sentence. The court knew about Dillon's health issues before it imposed sentence. Even so, the court imposed the sentence after reviewing Dillon's criminal record and the choices he made to associate with drug dealers despite repeated chances to conform his conduct to lawful behavior. The court saw Dillon's commission of the crime as aggravated because he was on extended supervision at the time, and it wanted to hold him accountable. The court went so far as to say that even if it had known about COVID-19 when it sentenced Dillon, it would not have altered the sentence. Dillon has failed to meet his burden of demonstrating that COVID-19 is a new factor for purposes of sentence modification.[3]

Although Dillon says he is not challenging his conditions of confinement, the circuit court addressed this specifically because he sought release from prison on the basis that COVID-19 in the prison setting puts him at greater risk due to his diabetes. In denying his motion, the court explained that "a prisoner is entitled to treatment for serious medical needs which of course, Mr. Dillon has," but that is "a concern of the custodial agency[,]" not the sentencing court. The court told Dillon it was "mindful of the health conditions you face[,]" and though it is "frightening" "to be in a custodial setting and to have the pandemic swirling about[,]" it trusted the Department of Corrections would take seriously its duty to "meet your diabetic needs[.]"

[3] Because the circuit court did not err in concluding that COVID-19 was not a new factor, it is not necessary for us to address Dillon's second argument—that the circuit court erroneously exercised its discretion when it decided sentence modification was not warranted. If COVID-19 is not a new factor, there is no reason for us to move to the second part of the new factor test. *See* ***Hussey v. Outagamie County***, 201 Wis. 2d 14, 17 n.3, 548 N.W.2d 848 (Ct. App. 1996) ("If a decision on one point disposes of the appeal, we will not consider other issues raised.").

The circuit court was correct. We have said many times that conditions of confinement cannot be redressed in a sentence modification motion. *See* ***State v. Krieger***, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991) (explaining that prisoners may challenge conditions of "'confinement by appropriate writs,'" "not by seeking a modification of their sentence") (citation omitted); ***State v. Gibbons***, 71 Wis. 2d 94, 98-99, 237 N.W.2d 33 (1976) (stating that a sentencing court lacks authority to order specific conditions of confinement; however, "[p]risoners are entitled to, and do, challenge the conditions of their confinement by appropriate writs such as habeas corpus").

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