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DISTRICT III

June 13, 2023

To:

Hon. Melissia R. Mogen
Circuit Court Judge
Electronic Notice

Gregory Bates
Electronic Notice

Jacqueline Baasch
Clerk of Circuit Court
Burnett County Courthouse
Electronic Notice

Daniel J. O'Brien
Electronic Notice

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

2022AP535-CR

State of Wisconsin v. Donald E. Neumann II
(L. C. No. 2019CF6)

Before Stark, P.J., Hruz and Gill, 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).

Donald Neumann II, appeals from an amended judgment convicting him of possession of methamphetamine with intent to deliver and from an order denying his postconviction motion for resentencing. Neumann contends that he is entitled to sentence modification based upon a new factor¹—namely, that the circuit court learned after the sentencing hearing that it had awarded Neumann 618 days of duplicative sentence credit in error. Based upon our review of the briefs

¹ In his postconviction motion, Neumann claimed that he had been sentenced based upon inaccurate information regarding his sentence credit. Neumann has modified his sentence credit argument on appeal into the framework of a new sentencing factor, and we will address the merits of his claim as he now presents it.

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

A circuit court has inherent authority to modify a previously imposed sentence based upon a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new sentencing factor is a fact or set of facts “highly relevant” to the imposition of sentence but not known to the circuit court at the time of sentencing, either because the fact was not then in existence or because it was unknowingly overlooked by all the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A defendant bears the burden of establishing a new factor by clear and convincing evidence. *Harbor*, 333 Wis. 2d 53, ¶36.

Whether a particular fact or set of facts constitutes a new factor is a question of law subject to de novo review. *Id.*, ¶¶33, 36. However, whether a new factor warrants a modification of sentence is a discretionary determination, to which we will defer. *Id.*, ¶¶33, 37. If this court determines that a fact or set of facts does not constitute a new factor, we need not examine the circuit court’s exercise of discretion. *Id.*, ¶38. Conversely, if the circuit court has determined that a particular set of facts would not warrant sentence modification, we need not determine whether those facts constitute a new factor as a matter of law. *Id.*

In *State v. Vesper*, 2018 WI App 31, ¶7, 382 Wis. 2d 207, 912 N.W.2d 418, the circuit court issued an amended judgment of conviction removing sentence credit after the Department of Corrections informed the court that the awarded credit was duplicative. This court determined that the amount of sentence credit awarded was not highly relevant to the sentence in that case—and thus its removal did not constitute a new factor—because the court had announced the sentence before addressing the issue of sentence credit. *Id.*, ¶41.

Neumann’s case is not a situation such as that in *State v. Armstrong*, 2014 WI App 59, ¶¶4-5, 354 Wis. 2d 111, 847 N.W.2d 860, where the circuit court took the amount of sentence credit into account when determining the length of the sentence by noting that the defendant would not be confined for long. Rather, it is plain from the record that the court based Neumann’s sentence upon: (1) the severity of the offense and read-in offenses, which the court noted involved a “significant amount” of narcotics; (2) Neumann’s prior history of selling methamphetamines; (3) the need to protect the public from Neumann’s drug dealing, which did a lot of damage to people in the community, “emotionally, physically, [and] financially”[;] (4) Neumann’s treatment needs; and (5) deterring others. In short, the court made its sentence determination based upon other appropriate sentencing factors and did so before it considered sentence credit. It follows that the amount of sentence credit was not highly relevant to the sentence. Therefore, as in *Vesper*, we conclude that the removal of sentence credit did not constitute a new factor as a matter of law.

Neumann does not separately develop on appeal his prior, related claim that he was sentenced based upon inaccurate information as to his amount of sentence credit. Nonetheless, we note that substantially the same analysis that supports our conclusion that sentence credit was not “highly relevant” to sentencing also supports the conclusion that the circuit court did not “rely” on the inaccurate amount of sentence credit it awarded when deciding the length of Neumann’s sentence. See *State v. Tjepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that actual reliance requires a showing that the court gave explicit attention or consideration to the information, such that it “formed part of the basis for the sentence” (citation omitted)).

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21 (2021-22).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals