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DISTRICT II

June 21, 2023

To:

Hon. Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Leo Draws
Electronic Notice

Kelsey Jarecki Morin Loshaw
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Daniel J. O'Brien
Electronic Notice

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

2022AP1439-CR State of Wisconsin v. Freddy A. Colon (L.C. #2018CF830)

Before Gundrum, P.J., Neubauer 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).

Freddy A. Colon appeals from his judgment of conviction and the circuit court's order denying his postconviction motion asserting he is entitled to sentence modification due to a "new factor." 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 (2021-22).[1] Because we conclude there is no "new factor" justifying sentence modification, we affirm.

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

Colon was originally charged with first-degree reckless homicide under WIS. STAT. § 940.02(1) in connection with the death of C.A.P.C. On the day of the plea hearing, the State filed an amended information instead charging Colon with neglecting a child under WIS. STAT. § 948.21(2) and (3)(a). That amended information stated that Colon, "being a person responsible for the welfare of a child, CAPC, DOB 01/17/2018, through *his action* … did negligently *fail to provide necessary care* so as to seriously endanger the … health of the child, and the child suffered death as a consequence." (Emphasis added.)

At the plea hearing held before the Honorable Barbara Hart-Key on the same day the amended information was filed, the State agreed to an "oral amendment" to the amended information, so that the charge would be that Colon "through his *failure to take action* … did negligently *fail to provide necessary care* so as to seriously endanger the … health of the child, and the child suffered death as a consequence"—thereby changing "through his action" to "through his failure to take action." (Emphasis added.) Colon then pled no contest to the charge as amended.

In his postconviction motion, Colon claims he is entitled to sentence modification because of a new factor. Specifically pointing out that his sentencing hearing was presided over by a different judge than the judge who presided over the plea hearing, he asserts that when the circuit court sentenced him, it was not aware that Colon's "role and conviction pertained to his 'failure to take action', not for his direct action causing death." Colon adds that "when the court sentenced Mr. Colon to the maximum penalty, the court was unaware that the state and Mr. Colon had entered into a negotiated plea agreement amending the charge from neglect 'through his actions' to neglect 'through his failure to take action.'" He further summarizes that

the new factor at issue is "that he had agreed to enter a plea with the state orally amending the charge based on Mr. Colon's 'failure to take action.'"

A defendant seeking sentence modification based upon a new factor bears the burden of showing the existence of the new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. 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*.

State v. Crockett, 2001 WI App 235, ¶13, 248 Wis. 2d 120, 635 N.W.2d 673 (emphasis added); ***Harbor***, 333 Wis. 2d 53, ¶57.

Colon has failed to show the existence of a new factor because even though the sentencing court may have been unaware of the oral amendment at the plea hearing modifying the language of the charge from neglect "through his actions" to neglect "through his failure to take action," Colon, his counsel, and the prosecutor were all aware of this modification at the time of sentencing—as they were all present and discussed it at the plea hearing. Thus, the fact of this modification was not "unknowingly overlooked by *all* of the parties." As we stated in ***Crockett***, 248 Wis. 2d 120, ¶14, even if a sentencing court "unknowingly overlook[s]" certain facts at the time of sentencing, if a defendant was aware of the facts, "these facts are not new factors. *See* [***State v.***] ***Kluck***, 210 Wis. 2d [1, 7, 563 N.W.2d 468 (1997)] (holding that a fact in existence at the time of sentencing is 'new' only if 'unknowingly overlooked by *all* of the parties') (emphasis added)."

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals