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

December 13, 2023

To:

Hon. Jeffrey S. Froehlich
Circuit Court Judge
Electronic Notice

LeAnne Karls
Clerk of Circuit Court
Calumet County Courthouse
Electronic Notice

Erica L. Bauer
Electronic Notice

John D. Flynn
Electronic Notice

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

2022AP1755-CR State of Wisconsin v. Codi J. Miller (L.C. #2018CF168)

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).

Codi J. Miller appeals from a judgment of conviction and an order denying his postconviction motion for sentence modification based on 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] For the following reasons, we affirm.

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

Background

Following a tragic crash in which Miller was operating his motorcycle while intoxicated, his passenger was killed and a child who had been riding a bicycle was seriously injured. Due to prior operating while intoxicated convictions, Miller had a .02 blood alcohol concentration (BAC) restriction. Because of his own injuries, Miller received treatment at a local hospital.

Miller was charged with several felony offenses related to the crash. At the trial on the charges, evidence was introduced that a blood sample drawn from Miller for law enforcement at 10:32 p.m. the night of the crash showed a .153 BAC. A jury ultimately found Miller guilty of homicide by intoxicated use of a vehicle, knowingly operating a motor vehicle with a revoked license, causing death, causing great bodily harm to another by intoxicated use of a vehicle, and knowingly operating a motor vehicle with a revoked license, causing great bodily harm.

Prior to the sentencing hearing, the Department of Corrections filed a presentence investigation report (PSI) with the circuit court. The "Description of Offense" section of the PSI states that at the hospital on the night of the crash, Miller "asked the ER doctor what his blood alcohol content was," and in the presence of a deputy, "the doctor stated .210." This stated PSI BAC mirrored what was in the criminal complaint, which states, "[Miller] while in the presence of Deputy Menzel asked the ER doctor what his blood alcohol content was and the doctor stated .210." The "Summary and Conclusions" section near the end of the PSI states, "Not only did Mr. Miller operate his motorcycle with a passenger with a blood alcohol content of .210, he was operating with a revoked license and failed to have the ordered Ignition Interlock Device" and, three paragraphs later, states, "On the evening of the offense Mr. Miller was operating a

motorcycle with a passenger, with no ignition interlock, no valid driver's license, with a blood alcohol content near .210, and traveling at speeds of 98/99 mph."

At the sentencing hearing, the circuit court asked Miller's counsel if he had received a copy of the PSI, and counsel confirmed that he had received and *reviewed* it. When the court asked for "[a]ny corrections," counsel identified several specific errors with the PSI but said nothing about the PSI three times identifying Miller's BAC as being .210 on the night of the crash. The court subsequently asked counsel, "[A]ny evidence or testimony prior to sentencing argument today," and counsel responded, "No, your Honor." Later, but before sentencing arguments began, the court again asked counsel, "[A]nything else we need to take up before sentencing argument today," and counsel responded, "I don't believe so." In his sentencing arguments, totaling seven pages, counsel made no mention of Miller's BAC the night of the crash. When Miller spoke to the court next, he too made no mention of his BAC the night of the crash.

In pronouncing Miller's sentence, the circuit court stated, "[W]e have a number of aggravating factors …. First and foremost, your extremely high blood alcohol concentration of .210. Even for Calumet County, that's high. It's dangerous. Anybody that's at a .2 knows that they're drunk and should not be driving." Later in its sentencing comments, the court again expressed its concern with Miller's "high blood alcohol concentration" of ".201[sic]." When the court had finished pronouncing the sentence, it asked counsel for Miller, "[A]nything else you would like to place on the record today," to which counsel responded, "Nothing at this time, your honor." The court sentenced Miller to fourteen years of initial confinement and fourteen years of extended supervision.

Miller filed a postconviction motion seeking sentence modification based on a new factor. He specifically asserted that "new evidence now exists" to show the .210 BAC the court relied upon at sentencing was "inaccurate" and his actual BAC the night of the crash was .153, because this was the BAC "proven at trial."

At an evidentiary hearing on Miller's motion, the State introduced Miller's medical records from his hospital visit the night of the crash, which records indicate medical personnel drew blood from Miller at 9:16 p.m., and the test results from this draw, which came back fifteen minutes later, indicate a BAC of .210. Also at the hearing, counsel for Miller testified that he had "read the entire PSI to [Miller] over the telephone word for word" but had no explanation for why he (counsel) did not object to the .210 BAC shown in the PSI when the court specifically asked him if there was anything in the PSI that should be corrected.

At the hearing, a state crime lab toxicologist testified that "headspace gas chromatography" is used at the lab for testing of alcohol in blood samples. When asked "whether or not enzymatic immunoassay testing can be utilized for alcohol content outside of" the crime lab, she stated, "I believe it can," but she also made clear she had never used such testing for that purpose "or been trained in that." The toxicologist further acknowledged she was unaware as to how headspace gas chromatography testing "compares to other types of testing as far as accuracy levels."

The toxicologist testified that, considering "average elimination rates" and "assuming that the individual [sic] was totally absorbed and there was no drinking" in between, a blood draw taken at 10:32 p.m. that shows a result of .153 means the individual's BAC range approximately seventy-five minutes earlier, so around 9:16 p.m., "could possibly be" .165 to

.184. The toxicologist agreed that her testimony "doesn't in any way suggest or relate to what the hospital may have done or may have not done in this case," she had "no knowledge of what the hospital did," and she could not "opine about the accuracy of either [gas chromatography or immunoassay testing] in comparison." Further, when asked if "gas chromatography [is] more accurate than immunoassay testing," she stated, "I am not familiar with how … the enzyme immunoassay testing is used for alcohol." She agreed she "can't opine anything about the accuracy of other labs' results." She further indicated she was not aware of the impact a "CT contrast" or "lactate produced by the body in response to trauma or bones being broken" could have on blood alcohol test results, either for the type of testing done at the crime lab or for any other type of testing. When asked, "Regardless of what type of blood alcohol testing you do, is it safe to say that any liquids introduced in any manner intravenously are going to dilute and therefore lower a blood alcohol concentration," the toxicologist responded, "According to the articles I have read about IV fluids, there's a possibility that it will dilute the sample, but if collected correctly, the impact should be minimal."

The circuit court denied Miller's postconviction motion on the basis that Miller had not established by clear and convincing evidence that the .210 BAC the court had relied on at sentencing was erroneous. Specifically, the court stated that "[i]t's difficult for the Court to determine whether or not both of those tests are accurate or not" but concluded that both the .210 and .153 results "could both be accurate … given the time that had gone by [and the] medical treatment that had been provided." The court added that "the test closer in time to the driving," i.e., the test of the 9:16 p.m. blood sample that resulted in .210, "may very well have been just as accurate" as the test of the 10:32 p.m. sample that was done by the state crime lab and resulted in .153. It stated, "I don't know. I don't have any evidence one way or the other." The court also

pointed out that .210 "was the blood alcohol concentration" that was listed in the complaint, the information, and the PSI.

The circuit court also concluded that even if the .210 BAC it had relied upon in sentencing Miller was erroneous, nonetheless, no new factor had been shown because while the difference between a .210 and .153 BAC was relevant to the imposition of Miller's sentence, it was not highly relevant given all the other aggravating factors the court focused on in sentencing Miller. The court added that the "most aggravating factors are the death of an individual and a child that, quite frankly, was almost killed as well and is going to be going through the rest of his life with all sorts of medical issues." Relatedly, the court further determined that even if Miller had shown a new factor, sentence modification was not warranted in light of all the other significant aggravating factors the court relied upon in sentencing Miller. Miller appeals.

Discussion

As the circuit court noted in ruling on Miller's postconviction motion, Miller forfeited his objection to the court's reliance upon the .210 BAC in sentencing him because neither Miller nor his counsel objected to that BAC—identified three times in the PSI—when the court specifically invited counsel to identify any errors in the PSI before sentencing him. Because of this forfeiture, his postconviction challenge would normally be reviewed within the rubric of an ineffective-assistance-of-counsel challenge. *See* ***State v. Benson***, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484. Miller, however, has raised and developed no such issue on appeal; thus, we could affirm the circuit court on the basis that Miller forfeited his appellate challenge. Nevertheless, we will address Miller's new factor argument directly, and we conclude he has not established a new factor.

Whether a defendant has presented facts that constitute a new factor is a question of law we review independently. ***State v. Harbor***, 2011 WI 28, ¶33, 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 [circuit court] 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." ***Id.***, ¶40 (citation omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. If the circuit court determines there is no new factor, "it need go no further in its analysis." ***Id.***, ¶38 (citation omitted). If, however, a new factor is present, the court determines in its discretion whether the new factor warrants sentence modification, a determination we will uphold unless the court erroneously exercised its discretion. ***Id.***, ¶¶33, 37.

Miller asserted in his postconviction motion that "new evidence now exists" to show that the .210 BAC the circuit court relied on at sentencing was "inaccurate"; he insists in his postconviction motion and on appeal that his actual BAC the night of the crash was .153.[2] We conclude Miller failed to demonstrate by clear and convincing evidence that the .210 BAC was inaccurate, and thus, he failed to show the existence of a new factor.

Simply put, the toxicologist from the crime lab failed to provide the type of evidence Miller needed to aid his postconviction challenge. It is undisputed the hospital laboratory's

[2] Miller also asserts that the circuit court relied upon inaccurate information on the same basis—he claims the .210 BAC the court relied upon at sentencing was not correct, and instead, the court should have used the BAC of .153. For the reasons explained in our discussion related to his new factor assertion, he has not shown by clear and convincing evidence that the .210 BAC the court relied upon at sentencing was in fact inaccurate. *See* ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (explaining that defendant bears the burden of showing by clear and convincing evidence that the information the court relied upon was in fact inaccurate).

testing of Miller's blood sample drawn at 9:16 p.m. the night of the crash showed a .210 BAC and the state crime lab's testing of his blood sample drawn at 10:32 p.m. that night showed a .153 BAC. Significantly, Miller failed to establish that the testing by the hospital was unreliable. To begin, he failed to show what type of testing was utilized by the hospital. While he suggests in his briefing that the hospital *may* have used enzymatic immunoassay testing instead of the headspace gas chromatography testing utilized by the crime lab, he produced no actual evidence of this. Moreover, when the toxicologist from the crime lab was asked "whether or not enzymatic immunoassay testing can be utilized for alcohol content outside of" the crime lab, she stated, "I believe it *can*" (emphasis added), while also making clear she had never used such testing for that purpose "or been trained in that," later adding, "I am not familiar with how … the enzyme immunoassay testing is used for alcohol." But, again, no evidence was presented as to what type of testing the hospital actually used in procuring the .210 BAC result from the 9:16 p.m. blood draw.

The toxicologist was clear that she "c[ould]n't opine anything about the accuracy of other labs' results" and that she was not aware of the impact a "CT contrast" or "lactate produced by the body in response to trauma or bones being broken"—from the accident—could have on blood alcohol test results, either for the type of testing done at the crime lab or for any other type of testing. When asked, "Regardless of what type of blood alcohol testing you do, is it safe to say that any liquids introduced in any manner intravenously are going to dilute and therefore lower a blood alcohol concentration," she responded, "According to the articles I have read about IV fluids, there's a *possibility* that it will dilute the sample, *but* if collected correctly, the impact should be minimal." (Emphasis added.) This established nothing helpful to Miller.

Miller also places his hope in the toxicologist's testimony suggesting that, considering "average elimination rates" and "assuming that the individual [sic] was totally absorbed and there was no drinking" in between, Miller's blood draw taken at 10:32 p.m., which showed a .153 BAC, means Miller's BAC range approximately seventy-five minutes earlier—around 9:16 p.m., the time the .210 BAC sample was drawn—"could possibly be" .165 to .184. From this, Miller concludes that the .210 BAC from the 9:16 p.m. blood draw must be inaccurate.

We conclude the circuit court did not err in determining Miller failed to show the .210 BAC it relied upon at sentencing was in fact inaccurate. To begin, the toxicologist, whose testimony Miller was hoping would make his case, could only state, based upon the .153 BAC crime lab result related to the 10:32 p.m. blood draw, that Miller's BAC at 9:16 p.m. "could possibly" have been between .165 and .184. This testimony certainly comes up short of the "to a reasonable degree of scientific certainty" standard normally considered as reliable testimony. *See* ***State v. Wind***, 60 Wis. 2d 267, 273-74, 208 N.W.2d 357 (1973) (It is "preferable but not required" to ask for an expert opinion in the form of "to a reasonable degree of scientific or medical certainty." (quoting ***State v. Muhammad***, 41 Wis. 2d 12, 24, 162 N. W. 2d 567 (1968)). Furthermore, hospitals undoubtedly test blood samples so they can make medical decisions based upon those results. Without actual proof that the testing method the hospital here used is unreliable, we, like the circuit court, decline to assume that it is. Miller has failed to show a new factor because he has failed to show by clear and convincing evidence that the .210 BAC relied upon by the court in sentencing him was inaccurate.

Furthermore, we conclude the circuit court did not err in also determining that a new factor was not present because *even if* the .210 BAC was inaccurate, the inaccuracy, while relevant to the imposition of Miller's sentence, was not *highly relevant* to it in light of other

significant factors the court considered at sentencing.[3] The court based its decision that the BAC "inaccuracy" was not highly relevant upon the difference between the .210 BAC from the hospital testing and the .153 BAC from the crime lab testing that Miller insists is the correct BAC. But, as the toxicologist suggested and Miller acknowledges, his BAC at 9:16 p.m., approximately seventy-five minutes closer in time to the crash, would have been higher than .153, indeed the toxicologist suggested possibly as high as .184. Using this higher BAC cuts in half the difference between the .210 BAC and the .153 BAC. Ultimately though, as the court

[3] At the postconviction hearing the circuit court explained that it

> took into account the blood alcohol concentration … but also went on[] … to discuss the status of the defendant being revoked at the time, the fact that there was no ignition interlock device installed on his vehicle at the time to prohibit his operation of that vehicle, that being the third consideration.
>
> The fourth was very dangerous and reckless driving, speeds of up to 98 to 99 miles per hour at times. The fifth consideration was the fact that the defendant had a very inexperienced passenger on his motorcycle. The sixth was that there was very close proximity of these four OWIs occurring between October 5th of 2014 and this particular offense on August 19th of 2018.
>
> The seventh was that the defendant had been sentenced for his OWI third before the same court just a few months before he was ultimately—well, he was sentenced on an OWI third on March 18th of 2018 and he was released from jail in the early summer of 2018 and committed this offense on October [sic] 19th of 2018 only a few months after his release from the jail.
>
> The eighth consideration was that he killed a person. The ninth was that he almost killed a child. The tenth was that compared to other OWIs that the Court had participated in the last two decades, this was either the most serious or tied with the most serious OWI—homicide OWI injury that the Court had seen in that time period.
>
> And the eleventh was that the defendant was going from bar to bar and getting more and more intoxicated as the day went on operating at greater blood alcohol concentrations, stopping, drinking more, getting back on the bike and repeating that.

stated, "[W]hether the defendant [was] almost eight times the legal limit [if the .153 BAC is considered] or ten times the legal limit [if the .210 BAC is considered], the other ten aggravating factors were still present." The relevance of the difference is even less if .184—nine times the legal BAC limit—is compared with the .210 BAC. Additionally and relatedly, because of the minimal relevance of the difference between .210 and .184 (or .153), we also conclude that the court did not erroneously exercise its discretion in determining that even if Miller had shown a new factor, sentence modification is nonetheless unwarranted.

Miller bears the burden on appeal to convince us the circuit court erred in denying his postconviction motion. *See* ***Gaethke v. Pozder***, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381. He has not satisfied that burden.

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