



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

January 24, 2024

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Electronic Notice

Hon. Mary Kay Wagner
Circuit Court Judge
Electronic Notice

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

John Blimling
Electronic Notice

Mark D. Richards
Electronic Notice

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

2022AP1446-CR	State of Wisconsin v. Joey Del Real (L.C. #2019CF63)
2022AP1447-CR	State of Wisconsin v. Joey Del Real (L.C. #2019CF663)

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).

In these consolidated cases, Joey Del Real appeals from judgments of conviction and an order denying his postconviction motion to modify sentence. He alleges the existence of a new factor. Based upon our review of the briefs and record, we conclude at conference that these

cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

In 2019, Del Real was convicted following guilty pleas to delivery of a schedule IV drug, possession with intent to deliver methamphetamine (more than 50 grams), possession with intent to deliver THC (more than 10,000 grams), and possession of a firearm by a felon—all as a repeater. The first charge arose from a controlled buy. The remaining charges arose from a search of Del Real’s home and vehicles.

The circuit court imposed an aggregate sentence of twenty years of initial confinement and fourteen years of extended supervision. In doing so, it cited the seriousness of the offenses, the fact that Del Real was a repeat offender, and the need to protect the public.

After pronouncing its sentence, the circuit court noted Del Real’s qualification for the Substance Abuse Program (SAP) but questioned his qualification for the Challenge Incarceration Program (CIP). Upon learning that Del Real was qualified for CIP, the court made him eligible for both programs. The relevant exchange was as follows:

THE COURT: I think he qualifies for Substance Abuse.

[DEFENSE COUNSEL]: Okay. Challenge Incarceration Program?

THE COURT: I don’t know if he qualifies for that.

[DEFENSE COUNSEL]: Well, I guess you could issue, if he --

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

THE COURT: I'm happy to approve that. I think it's a good program. Yeah. I think the presentence does indicate he is qualified, so, yes, absolutely.

[DEFENSE COUNSEL]: Both of them?

THE COURT: Absolutely.

Over two and a half years later, Del Real filed a postconviction motion to modify sentence. He argued that because Department of Corrections' policies would not consider him "suitable" for the SAP or CIP until four years before his release on extended supervision, the circuit court should modify his sentence based on a new factor. After a hearing on the matter, the court denied the motion. This appeal follows.

A circuit court may modify a sentence upon a defendant's showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 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 ... it was unknowingly overlooked by all of the parties.'" *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court reviews independently. *See Harbor*, 333 Wis. 2d 53, ¶33.

Here, we are not persuaded that Del Real has demonstrated the existence of a new factor. As noted by the State, the timing of the availability of the SAP or CIP played no role in the circuit court's sentencing of Del Real. Indeed, the programs were hardly discussed. The objective of Del Real's sentence, as reflected in the sentencing transcript, was to keep him incarcerated for a long period of time due to the seriousness of the offenses, the fact that he was a repeat offender, and the need to protect the public. In other words, Del Real's access to prison

programming—which the court did not ultimately control²—was not highly relevant to the imposition of sentence. Accordingly, we are satisfied that the court properly denied Del Real’s motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgments 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.

Samuel A. Christensen
Clerk of Court of Appeals

² Notwithstanding the circuit court’s eligibility finding, Del Real’s participation in prison programming was ultimately a determination for the Department of Corrections. See *State v. Schladweiler*, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶47-48 & n. 11, 333 Wis. 2d 53, 797 N.W.2d 828.