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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 III**

March 12, 2024

*To*:

Hon. James A. Morrison
Circuit Court Judge
Electronic Notice

Sheila Dudka
Clerk of Circuit Court
Marinette County Courthouse
Electronic Notice

Lisa E. F. Kumfer
Electronic Notice

Richard A. Powell 555223
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

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2022AP54-CR State of Wisconsin v. Richard A. Powell
(L. C. No. 2009CF40)

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).**

Richard Powell, pro se, appeals an order denying his motion for reconsideration of an order denying his motion for sentence modification. Powell argues that the circuit court erroneously exercised its discretion by denying his reconsideration motion without explanation and without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Powell's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

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

In 2009, the State charged Powell with thirteen counts of some form of homicide by intoxicated use of a vehicle and eight counts of some form of homicide by negligent operation of a vehicle. The charges arose from allegations that Powell was driving eighty-one miles per hour in a forty-five mile-per-hour zone with a blood alcohol level of .238 when he crashed his pick-up truck into a sedan carrying a family of five, killing them all. Autopsies revealed that two of the victims had been pregnant. In exchange for Powell's no-contest pleas to five counts of homicide by intoxicated use of a vehicle, the State agreed to recommend that the two counts of homicide by intoxicated use of a vehicle involving the unborn children be dismissed, but read in, and that the remaining counts be dismissed outright.

The sentencing court imposed consecutive sentences, aggregating in twenty-five years of initial confinement followed by fifteen years of extended supervision. In imposing the sentences, the court considered proper sentencing factors, *see* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, and placed particular emphasis on the seriousness of the offenses, deterrence, and the need for the community to be protected from a person who "drinks and drives and kills seven people in a single clip."

Relevant to the present appeal, the sentencing court acknowledged Powell's eligibility for a risk reduction sentence,[2] noting that Powell "would have to agree to be assessed and to follow through with all the programming, and if he did that there would be a possibility, not a guarantee,

[2] A risk reduction sentence allowed an inmate convicted of certain nonviolent offenses to reduce the length of his or her initial confinement. An inmate who successfully served a risk reduction sentence could be released on extended supervision after serving at least seventy-five percent of his or her term of initial confinement if "the department determines that he or she ha[d] completed the programming or treatment under his or her plan and … maintained a good conduct record during his or her term of confinement." *See* WIS. STAT. § 302.042(4) (2009-10). The law permitting a court to order a risk reduction sentence was repealed effective August 3, 2011. *See* 2011 Wis. Act 38, §§ 13, 92.

but a possibility that he could be released at 75 percent of time imposed." After confirming Powell's willingness to be assessed and "work the program," the court stated that it did not think the risk reduction sentence was a "bad thing" if Powell was willing to participate.

Powell filed a postconviction motion for sentence modification, asserting that the sentencing court relied on inaccurate information. The circuit court denied the motion and, on appeal, we affirmed the judgment and order.[3] *See* ***State v. Powell***, No. 2012AP327-CR, unpublished op. and order (WI App Apr. 3, 2013).

In March 2021, Powell, now pro se, sought another sentence modification based on a claimed new factor. Specifically, Powell argued that at the time of his sentencing, the sentencing judge and the parties overlooked that Department of Corrections (DOC) policy would delay his participation in the risk reduction sentence program until he started serving his fifth consecutive sentence. Thus, he could not participate in the program until he had already served twenty years of initial confinement. Because DOC policy precluded him from receiving a reduction of his first four sentences, Powell claimed the risk reduction sentence was illusory. After a hearing, the circuit court determined that although it was clear the sentencing court wanted to give Powell the benefit of the risk reduction program before he left prison, the court's emphasis on deterrence suggested that it "did not want to substantially reduce" the sentence. The court denied Powell's motion in an order entered June 22, 2021, and Powell did not appeal that order.

[3] The Honorable Tim A. Duket presided over Powell's sentencing, and we refer to him as the sentencing judge or sentencing court. The Honorable James Morrison presided over the postconviction motions, and we refer to him as the circuit court.

On December 10, 2021, Powell moved for reconsideration, stating that he had written the sentencing judge regarding his intent with respect to the risk reduction sentence. In an attached response, the sentencing judge observed that it had been "nearly 12 years since the sentencing hearing" and that he did "not have the benefit of reviewing the sentencing transcript." The judge continued: "Regardless, it was my intention that the Risk Reduction Sentence apply to each of the consecutive sentences." The judge further recalled that he "wanted assessment and programming to start as soon as possible." The judge acknowledged, however, that he was "not sure [his] intention would control as it might be merely an issue of law without regard to the intention of the sentencing judge." The circuit court stamped "denied" on Powell's reconsideration motion, and this appeal follows.

"To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Motions for reconsideration are reviewed under the erroneous exercise of discretion standard. ***Id.***, ¶6. We affirm a circuit court's discretionary determination "when the court applies the correct legal standard to the facts of record and reaches a reasonable result." ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. Furthermore, if the exercise of discretion is not apparent from the record, "we are obliged to search the record to determine whether in the exercise of proper discretion," the decision can be affirmed. ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

Powell argues that the circuit court erroneously exercised its discretion by simply stamping his reconsideration motion "denied" and by doing so without a hearing at which the sentencing judge could clarify his intentions with respect to the risk reduction sentence. A

circuit court may deny a postconviction motion without a hearing if the motion fails to allege detailed facts on its face which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether the motion presented sufficient grounds for relief is a question of law that we review de novo. ***Id.*** Because nothing in the reconsideration motion warranted revisiting the denial of Powell's sentence modification motion, we affirm.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. A new 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 original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need not go further in the analysis. ***Id.***, ¶38. The existence of a new factor, however, does not automatically entitle a defendant to sentence modification. ***Id.***, ¶37. If a new factor is present, the circuit court, in the exercise of its discretion, determines whether the new factor justifies sentence modification. ***Id.***

Here, we conclude that even with the arguably new evidence of the sentencing court's intent that risk reduction apply to each of Powell's consecutive sentences, that intent did not constitute a new factor justifying sentence modification. In ***State v. Schladweiler***, 2009 WI App 177, ¶5, 322 Wis. 2d 642, 777 N.W.2d 114, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶15, 333 Wis. 2d 53, 797 N.W.2d 828, a defendant similarly argued that DOC

eligibility criteria that prevented the defendant from participating in the Challenge Incarceration Program (CIP) was a new factor justifying sentence modification, given the sentencing court's express intention to make the defendant eligible for the program. There, the defendant asserted that the court would have structured his sentence differently had it known that the sentence, combined with other factors, would render him ineligible under the DOC's placement criteria. ***Id.*** This court noted that even when a sentencing court decides that a defendant is eligible for a program, "the final placement decision is vested with the DOC." ***Id.***, ¶10. Because the sentencing court in ***Schladweiler*** had acknowledged that participation in CIP was "a possibility to be ultimately determined by [DOC]," this court held that the defendant's subsequent denial of placement was not a new factor for purposes of sentence modification. ***Id.***, ¶¶11, 15.

Just as in ***Schladweiler***, the sentencing court in the present matter stated that "there would be a possibility, not a guarantee, but a possibility that [Powell] could be released at 75 percent of time imposed." Because the final placement decision is vested with the DOC, the sentencing court's subsequently stated intention for Powell to be eligible for the risk reduction program earlier than he was deemed eligible by the DOC is not a new factor justifying sentence modification and, therefore, did not entitle Powell to relief on reconsideration.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. 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*