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DISTRICT II

January 16, 2013

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

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|--------------|---|
| 2012AP316-CR | State of Wisconsin v. Jermaine T. Bolling (L.C. # 2000CF1095) |
| 2012AP317-CR | State of Wisconsin v. Jermaine T. Bolling (L.C. # 2000CF1099) |

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Jermaine T. Bolling appeals from a circuit court order denying a motion to modify sentence.¹ Bolling contends that he is entitled to sentence modification on the basis of a new factor. Based upon our review of the briefs and record, we conclude at conference that this case

¹ The order from which Bolling appeals lists two cases: Waukesha County Circuit Court case No. 2000CF1095 (appellate case No. 2012AP316-CR) and Waukesha County Circuit Court case No. 2000CF1099 (appellate case No. 2012AP317-CR). As noted by the State, Bolling was never sentenced in Waukesha County Circuit Court case No. 2000CF1095 because the charges against him were dismissed. Accordingly, the State asks that we dismiss appellate case No. 2012AP316-CR. We agree that dismissal is appropriate because Bolling was not aggrieved in that case and there is nothing for him to appeal.

is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2009-10).² We affirm the order of the circuit court.

Bolling was convicted following a guilty plea of three counts of delivery of cocaine. The circuit court imposed an aggregate sentence of eight years of imprisonment, consisting of four years of initial confinement and four years of extended supervision. The court ordered the sentence to run consecutive to another sentence that Bolling was serving.

Bolling filed a motion to modify his sentence on the basis of a new factor. Following a hearing on the matter, the circuit court denied Bolling's motion.³ This appeal follows.

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 analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶37-38. 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 decides independently. *See Harbor*, 333 Wis. 2d 53, ¶33. If the defendant demonstrates that there is a

² All references to the Wisconsin Statutes are to the 2009-10 version.

³ Bolling did not order the transcript of the hearing in which the circuit court made its determination. When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the circuit court's ruling. *State v. McAttee*, 2001 WI App 262, ¶5 n. 1, 248 Wis. 2d 865, 637 N.W.2d 774.

new factor, the question of whether that new factor warrants sentence modification is committed to the circuit court's discretion. *See id.*, ¶37.

On appeal, Bolling renews his argument that he is entitled to sentence modification on the basis of a new factor. Specifically, he accuses the writer of the presentence investigation report (PSI) of bias for recommending that he receive a consecutive sentence.

We are not persuaded that Bolling's allegation constitutes a new factor. To begin, the PSI writer's alleged bias against Bolling was something known or which could have been known at the time of sentencing. Moreover, the court indicated at sentencing that it felt that a concurrent sentence would unduly depreciate the seriousness of Bolling's offenses. Thus, at the hearing on Bolling's motion, the court could have reasonably determined that the alleged new factor did not justify sentence modification. Accordingly, we are satisfied that the court properly denied Bolling's motion to modify sentence.

Upon the foregoing reasons,

IT IS ORDERED that appeal No. 2012AP316-CR is dismissed.

IT IS FURTHER ORDERED that the order of the circuit court in appeal No. 2012AP317-CR is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals