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February 7, 2013

To:

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

2012AP1485-CR

State of Wisconsin v. Michael R. Malak (L.C. # 2005CF109)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Michael Malak appeals a judgment sentencing him to jail following the revocation of his probation on four counts of failure to pay child support, and an order denying his postconviction motion. He claims that he is entitled to resentencing based upon either inaccurate sentencing information or a new factor. After reviewing the briefs and record at conference, we conclude

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹
We affirm.

It is undisputed that the circuit court misunderstood the recommendation in the PSI to be for consecutive terms totaling ten years, rather than for concurrent terms totaling four years of initial confinement, plus a period of extended supervision. The question before us is whether the court's misunderstanding denied Malak due process. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant has due process right to be sentenced upon accurate information); *State v. Harbor*, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828, *reaffirming holding of Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (a new sentencing 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 sentencing either because it was not then in existence or because it was unknowingly overlooked by all the parties). We conclude that it did not.

The court explained that it did not base Malak's sentences in any way upon the PSI's prison recommendation. Instead, the court was focused on the fact that Malak had actually been making payments (though not keeping up with the interest), and concluded that the most important sentencing goal was to keep Malak making payments by giving him jail time with Huber privileges rather than prison time. Because the court did not rely on its misunderstanding of the PSI recommendation, Malak was not denied due process by being sentenced "based on" inaccurate information. Likewise, because the court stated that it would have imposed the same jail terms no matter how long a prison term the PSI had recommended, the information that the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

PSI recommendation was shorter than the court thought did not frustrate the purpose of the sentence, which was to keep Malak in the community while still impressing upon him the seriousness of his conduct.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals