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DISTRICT II

March 27, 2013

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

2012AP1337-CR

State of Wisconsin v. Joseph C. Athans (L.C. # 2009CF1350)

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

Joseph C. Athans appeals pro se from an order denying his motion for sentence modification. Based on 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 (2011-12).¹ We affirm the order of the circuit court.

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

Athans was convicted following a plea of no contest to armed robbery with threat of force. The circuit court sentenced Athans to four years of initial confinement and six years of extended supervision.

Athans subsequently filed a motion to modify his sentence, arguing that the circuit court failed to consider sentencing guidelines and that a new factor existed. The circuit court denied Athans' motion. This appeal follows.

On appeal, Athans first contends that the circuit court erroneously exercised its discretion by failing to consider sentencing guidelines. Athans argues that such guidelines are mandatory and that the failure to consider them provides him with a basis for sentencing relief.

We are satisfied that the circuit court did not erroneously exercise its discretion by failing to consider sentencing guidelines in Athans' case. As noted by the State, effective July 1, 2009, the Wisconsin legislature repealed the mandate that circuit courts had to consider sentencing guidelines. *See State v. Barfell*, 2010 WI App 61, ¶¶3-4, 324 Wis. 2d 374, 782 N.W.2d 437. Because Athans' sentencing hearing occurred on February 26, 2010, over seven months after this repeal, the circuit court was under no obligation to consider the guidelines. *See id.*, ¶9.

Athans next contends that he is entitled to sentence modification on the basis of a new factor. Specifically, he maintains that he suffers from a brain injury which affects his capacity to conform his conduct.

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 fact or set of facts do not constitute a new factor as a matter of law, we need go no further in our analysis. *Id.*, ¶38.

Upon review of the record, we conclude that Athans’ brain injury does not constitute a new factor as a matter of law. It is clear from the sentencing transcript that both parties as well as the circuit court were well aware of Athans’ brain injury, which he had suffered twenty to thirty years ago. Indeed, the court acknowledged that Athans’ medical condition may have played a role in his criminal behavior because Athans felt the need to self-medicate with drugs. Accordingly, because Athans’ brain injury was known to the trial judge at the time of sentencing, it does not constitute a new factor. *Id.*, ¶40.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals