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**DISTRICT IV**

May 10, 2019

To:

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

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2018AP1182-CR	State of Wisconsin v. Billy N. Richmond (L.C. # 2014CM2272)
2018AP1183-CR	State of Wisconsin v. Billy N. Richmond (L.C. # 2015CF1702)
2018AP1184-CR	State of Wisconsin v. Billy N. Richmond (L.C. # 2016CF995)

Before Lundsten, P.J., Sherman and Fitzpatrick, 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).**

Billy Richmond, pro se, appeals an order denying Richmond's motion for sentence modification. Richmond contends that the sentencing court erred by failing to explain why it imposed consecutive sentences and by applying sentencing enhancers. Based upon 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 (2017-18).<sup>1</sup> We summarily affirm.

In August 2016, Richmond pled no-contest to felony aggravated battery and misdemeanor battery, both as domestic abuse and as a repeater, and misdemeanor resisting or obstructing an officer, as a repeater. The court imposed three years of initial confinement and two years of extended supervision on the aggravated battery conviction, nine months of jail on the battery conviction, and six months of jail on the obstruction conviction, all imposed consecutively.

In April 2018, Richmond moved for sentence modification. Richmond argued that the sentencing court failed to explain why it imposed consecutive sentences and improperly imposed the repeater enhancer without first imposing maximum sentences. The circuit court denied sentence modification, finding that Richmond had not shown a new factor that would warrant sentence modification.

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36–37, 333 Wis. 2d 53, 797 N.W.2d 828. A “new factor” for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant establishes the existence of a new factor, the circuit court must then determine whether the new

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶38. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. *Id.*, ¶33.

Richmond contends as “new factors” that the sentencing court erred by failing to explain why it imposed consecutive sentences and by applying the repeater enhancer without first imposing maximum sentences. See *State v. Hall*, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41 (“In sentencing a defendant to consecutive sentences, the [circuit] court must provide sufficient justification for such sentences and apply the same factors concerning the length of a sentence to its determination of whether sentences should be served concurrently or consecutively.”); *State v. Harris*, 119 Wis. 2d 612, 626, 350 N.W.2d 633 (1984) (“[T]he repeater statute ... is not applicable unless the [circuit] court seeks to impose a sentence greater than that prescribed by law for a first offender.”). Richmond contends that the sentencing court’s errors are new factors that warrant sentence modification. We are not persuaded. We reject Richmond’s underlying contentions of error by the sentencing court. We therefore conclude that Richmond has not established a new factor for sentence modification purposes.<sup>2</sup>

We first address Richmond’s argument that the circuit court erred by failing to explain why it imposed consecutive sentences. A circuit court has “wide discretion in determining whether to impose a concurrent or consecutive sentence.” *State v. Davis*, 2005 WI App 98, ¶27, 281 Wis. 2d 118, 698 N.W.2d 823. Contrary to Richmond’s argument, a sentencing court is not

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<sup>2</sup> The State argues that Richmond has failed to assert any facts unknown to the circuit court at the time of sentencing, and that Richmond has not shown that the circuit court overlooked relevant sentencing law. The State also argues that Richmond is improperly raising a resentencing claim by way of a sentence modification motion. Because we reject Richmond’s underlying claims of sentencing court error, we need not reach whether they could establish a new factor or whether they were properly raised by sentence modification motion.

required to separately explain why it imposed sentences consecutively. *State v. Berggren*, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. Rather, courts must explain “the relevant and material factors” that influenced the decision. *Id.* Ultimately, the “court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length.” *Id.*, ¶46. “The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public’s need for protection.” *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

Here, the circuit court considered facts relevant to the primary sentencing factors and explained its sentencing decision on the record. It explained that it considered the serious nature of the batteries, including that Richmond committed the first battery against the victim four days after she gave birth to their child and committed the second battery against the same victim eight months later, blinding the victim in one eye; Richmond’s age and criminal history; and the need to protect both the victim and the public from Richmond’s violent actions. While the court did not separately explain its reasons for imposing consecutive sentences, it sufficiently explained the reasons for its overall sentence, which included the imposition of consecutive sentences. Thus, Richmond has not established a new factor.

We turn next to Richmond’s argument that the court erred by using the repeater enhancer. A circuit court may not use the repeater statute to enhance a sentence when it imposes less than the maximum. *See Harris*, 119 Wis. 2d at 619. Here, however, the circuit court did not state that it used the repeater statute to increase the sentence it imposed. Richmond cites the circuit court’s statements that Richmond had been convicted of the crimes as a repeater, and argues that the court therefore applied the repeater enhancer to the sentences. However, that Richmond was

convicted of the crimes as a repeater does not mean that the circuit court used the repeater statute to enhance Richmond's sentence. Nothing in the court's sentencing comments indicates that the court relied on the repeater enhancer to increase the sentence it imposed. Accordingly, Richmond has not established a new factor.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*