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WISCONSIN COURT OF APPEALS

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 II

May 20, 2026

To:

Hon. David P. Wilk
Circuit Court Judge
Electronic Notice

Abigail Potts
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Malcolm A. Butler #527313
Oshkosh Correctional Institution
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2025AP844-CR

State of Wisconsin v. Malcolm A. Butler (L.C. #2009CF1087)

Before Neubauer, P.J., Gundrum, and Lazar, 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).

Malcolm A. Butler, pro se, appeals from a circuit court order denying his motion for sentence modification. Butler argues the court erred by determining Butler failed to present a new factor that warranted sentence modification. 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 (2023-24).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

In 2011, a jury convicted Butler of attempted first-degree intentional homicide with use of a dangerous weapon as party to a crime, substantial battery with use of a dangerous weapon as party to a crime, armed robbery as party to a crime, and felon in possession of a firearm. Broadly, Butler and co-actors attacked and robbed the victim as he arrived home and then shot the victim as he tried to run away.

During sentencing, the circuit court characterized the facts of the case as “horrifying,” noting that when Butler and the co-actors tried to force the victim inside his home, the victim told Butler and the co-actors to “kill me out here” in order to protect the victim’s family. The court also considered Butler’s prior criminal record, noting it was “not extensive” but Butler “violated [conditions of supervision] over and over again[.]” As relevant to the current appeal, the court observed Butler’s “family background [was] not particularly remarkable” and Butler “d[id]n’t have overriding emotional or mental health issues.”² Finally, the court stated Butler’s crimes were the sort “of crimes that shock the conscience of the community.” The court sentenced Butler to a cumulative sentence of 30 years’ initial confinement and 20 years’ extended supervision.

In 2013, we affirmed Butler’s conviction. *State v. Butler*, 2014 WI App 4, 352 Wis. 2d 484, 844 N.W.2d 392 (2013). In 2021, we affirmed the circuit court’s denial of Butler’s WIS. STAT. § 974.06 motions. *State v. Butler*, No. 2019AP637, unpublished slip. op., ¶1 (WI App July 14, 2021).

² The presentence investigation report stated that Butler reported he was placed in specialized classes at school for behavior and otherwise had never been involved in any mental health or emotional health counseling.

In November 2024, Butler filed the underlying motion for sentence modification. Butler argued that two new mitigating factors warranted sentence modification. First, Butler stated that he recently learned that, as a child, assessments had been performed on him during his school enrollment that indicated he had some mental and emotional challenges. Second, in the years after his sentencing, Butler stated that his brothers committed serious crimes, which indicated there was some sort of hereditary familial issue. The circuit court denied his motion without a hearing. Butler appeals.

On appeal, Butler argues he is entitled to sentence modification because these two new factors were unknown to the circuit court at the time it imposed its sentence and were highly relevant to the sentence imposed. To prevail on a motion for sentence modification on the basis of a new factor, a defendant must demonstrate, by clear and convincing evidence, “both the existence of a new factor and that the new factor justifies modification of the sentence.” *State v. Harbor*, 2011 WI 28, ¶¶36, 38, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is defined as “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, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citation omitted). We conclude Butler has failed to demonstrate the existence of a “new factor.” *See id.*

First, Butler’s educational assessments do not constitute a new factor. The assessments do not identify anything significant that was in existence at the time of sentencing that Butler did not know about. Butler committed the crimes underlying this case when he was 20 years old. The assessments were completed when Butler was 8, 11, and 15 years old, and they do not identify a major mental or emotional issue. Although the assessments generally indicated that

Butler had difficulties with anger management and behavior and described various school incidents, these incidents were known to Butler at the time of sentencing. *See State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (a fact in existence at the time of sentencing is “new” only if “unknowingly overlooked by all of the parties”). Further, even though the assessments indicated Butler scored in the average and sometimes below average range of various tests given, we observe that in the most recent assessment, the school psychologist wrote that the “team felt” some of the lower scores were “due to environmental factors, such as being tired, and d[id] not reflect a specific disability in this area.”

Most importantly, even if the assessments showed Butler had a serious mental or emotional health condition (they do not), Butler has not demonstrated that this fact would be highly relevant to his sentence. The sentencing transcript reveals that Butler’s sentence was primarily based on the “highly aggravated set of facts,” the victim’s “horrifying experience,” and the “shock[ing]” nature of the crime. Nothing in Butler’s school assessments was relevant to these considerations. *See Harbor*, 333 Wis. 2d 53, ¶40 (New factor must be “highly relevant to the imposition of sentence.”). We conclude Butler has failed to establish the assessments constituted a new factor. *See id.*, ¶¶36, 40. Because he did not establish the existence of a new factor, he is not entitled to resentencing based on a new factor. *See id.*, ¶35.

We next turn to the newspaper articles that Butler provides that describe recent crimes committed by his brothers. According to the news articles provided by Butler, in 2017, one brother killed his step-father and then himself, and, in 2023, another brother killed a third brother.

Butler argues that his brothers' recent crimes undermine the circuit court's statement that his family's background was "not particularly remarkable." However, that his brothers committed crimes six and twelve years after Butler's sentencing, these facts were not highly relevant to the imposition of Butler's sentence. *See id.*, ¶40. As stated previously, Butler's sentence was primarily based on the "highly aggravated set of facts," the victim's "horrifying experience," and the "shock[ing]" nature of the crime. Butler's family's criminal record was not relevant to these considerations. *See id.* We conclude Butler has failed to establish that his brothers' crimes constituted a new factor. *See id.*, ¶¶36, 40. Because he did not establish the existence of a new factor, he is not entitled to resentencing based on a new factor. *See id.*, ¶35.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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