



OFFICE OF THE CLERK
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 I

December 11, 2018

To:

Hon. Stephanie Rothstein
Criminal Justice Facility
949 N. 9th St.
Milwaukee, WI 53233

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

David William Orr 148391
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2014AP2837-CR State of Wisconsin v. David William Orr (L.C. # 1996CF960206)

Before Kessler, P.J., Brennan and Brash, 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).

David William Orr, *pro se*, appeals from an order denying his motion for sentence modification. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2015-16).¹ We summarily affirm the order.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 1996, Orr pled guilty to two counts of repeated sexual assault of the same child, contrary to WIS. STAT. §§ 948.025(1) (1993-94; 1995-96). On count one, he was sentenced to ten years of incarceration.² On count two, the sentencing court imposed and stayed twenty-five years of incarceration and placed Orr on probation for fifteen years, consecutive to the prison sentence in count one. After Orr completed his prison sentence on count one, he began serving his term of probation. His probation was later revoked and he is now serving the twenty-five-year term of incarceration.

In November 2014, Orr filed the motion for sentence modification that is the subject of this appeal. Orr argued that he was entitled to sentence modification based on a new factor: the alleged failure of the Department of Corrections (“DOC”) to provide “adequate programming.”³ The circuit court denied the motion in a written order.⁴

Defendants may seek sentence modification upon the showing of a “new factor.” *See State v. Harbor*, 2011 WI 28, ¶¶35, 57, 333 Wis. 2d 53, 797 N.W.2d 828. 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.

² The Honorable Patricia D. McMahon accepted Orr’s plea and sentenced him. We will refer to Judge McMahon as the sentencing court.

³ According to Orr’s appellate reply brief, he “successfully completed a sex offender treatment program” and an AODA treatment program during his period of incarceration for count one. (Bolding and capitalization omitted.) Orr implies that he needs additional AODA treatment, noting that his probation was revoked in part due to his use of marijuana. He also asserts that he needs treatment for mental illness.

⁴ The Honorable Stephanie Rothstein denied the motion. We will refer to her as the circuit court.

Id., ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). “[A] motion for sentence modification based on a new factor [requires] a two-step inquiry.” *Id.*, ¶36. First, it is the defendant’s “burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* “Whether the fact or set of facts put forth by the defendant constitutes a ‘new factor’ is a question of law.” *Id.* Second, if the defendant establishes the existence of a new factor, the circuit court exercises discretion to determine whether sentence modification is justified. *See id.*, ¶37.

The circuit court concluded that Orr had not shown the existence of a new factor and, therefore, it did not proceed to the second step of determining whether sentence modification was justified. *See id.* The circuit court explained why Orr had not demonstrated a new factor:

[Orr] submits that the [DOC] has failed (or refused) to rehabilitate him and provide him with the treatment that he needs. He maintains that the [sentencing] court intended him to obtain treatment for his mental health issues, but the DOC is thwarting all efforts in that regard. He therefore seeks court assistance to have him placed in [a counseling program addressing drugs and alcohol] at the Winnebago Mental Health Facility.

The defendant’s motion is denied. First, the court does not supervise the operations of the DOC. It has no authority to review the actions of the DOC and no authority to place prisoners in specific facilities.... Second, the sentencing court also placed significant weight on punishment, deterrence and community protection. Although it believed that treatment was necessary, it still classified the defendant as a “risk” and it considered protection of the public vital. The court does not find that a new factor exists.

(Record citation omitted.) This appeal follows.⁵

⁵ The notice of appeal was filed in December 2014. Orr did not file his appellate brief until March 2018, after receiving numerous extensions of time from this court.

We conclude that Orr’s motion did not establish the existence of a new factor. As best we can discern, Orr’s motion alleged that the “new factor” was the DOC’s failure to provide adequate programming for Orr.⁶ For instance, the motion argued: “It would ... seem apparent that the [DOC’s] refusal to allow Orr into an assessed residential [AODA] ... [p]rogram would then justify a motion for sentence modification.”⁷

We have carefully examined the sentencing transcript. The parties and the presentence investigation report acknowledged that Orr needed counseling in multiple areas to address his psychological and sexual issues. When it imposed Orr’s sentence, the sentencing court stated:

With respect to Count 1, you should be placed in the appropriate treatment. It’s up to the institution to determine where that placement is, but the concern of the [c]ourt is that there be treatment for sex offender and treatment for alcohol and drug abuse, and any other counseling that is deemed appropriate. There is an indication of psychological counseling; that would also be consistent.

It is clear from this statement that the sentencing court was expressing its desire for Orr to receive treatment but also acknowledging that the DOC would be the entity to determine where Orr would receive treatment. Even if we accept as true Orr’s assertion that he is being denied a specific type of AODA treatment he desires, we are not persuaded that fact is “highly relevant to

⁶ Orr’s appellate brief appears to support our interpretation of his motion. Orr’s appellate brief asserts that he is not seeking to be placed in the Winnebago Mental Health Facility but instead to have his twenty-five-year sentence reduced or his sentences imposed concurrently “in order to force the [DOC], by its own dictums, to enroll the defendant into a residential [AODA] ... program.” For purposes of deciding this appeal, we accept Orr’s representations about the relief requested in his sentence modification motion.

⁷ In support of his assertions, Orr’s motion and appellate brief cite unpublished cases where the defendants were successful in their motions for sentence modification. We may not address unpublished cases released prior to July 1, 2009, except in limited circumstances that do not apply here. *See* WIS. STAT. RULE 809.23(3). Therefore, we do not discuss those cases.

the imposition of sentence.” See *Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). The sentencing court did not contemplate or guarantee that Orr would receive specific treatment in a specific location at a specific time. The fact that Orr is not receiving the type of AODA counseling he desires is not a new factor that is highly relevant to his sentence. See *id.*, ¶36. Therefore, he is not entitled to sentence modification. See *id.*

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

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

Sheila T. Reiff
Clerk of Court of Appeals