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**DISTRICT I**

February 24, 2020

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

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2019AP126-CR                      State of Wisconsin v. Jermaine Bernard Foster  
(L.C. # 2016CF3337)

Before Brash, P.J., Dugan and Donald, 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).**

Jermaine Bernard Foster appeals the judgment convicting him of first-degree reckless homicide by delivery of a controlled substance as a party to a crime. *See* WIS. STAT. §§ 940.02(2)(a), 939.05 (2015-16).<sup>1</sup> He also appeals the order denying his motion for sentence modification based on alleged new factors. Based upon our review of the briefs and record, we

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

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The victim in this matter died from a heroin overdose. According to the criminal complaint, Foster provided the heroin that caused the victim's death. Foster pled guilty to homicide and the circuit court imposed a twenty-eight year bifurcated sentence, with eighteen years of initial confinement and ten years of extended supervision. The circuit court explained that the sentence was warranted in light of the serious nature of the offense and "because of the aggravating factor of [Foster's] criminal history and [his] persistent involvement with ... high level retail drug sales[.]"

Foster subsequently filed a postconviction motion seeking sentence modification based on alleged new factors.<sup>2</sup> The circuit court denied Foster's motion without a hearing.

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: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37.

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

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<sup>2</sup> Foster alternatively alleged that his trial counsel was ineffective. He does not, however, pursue this claim on appeal. As such, we deem it abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (holding that issues raised before the circuit court but not raised on appeal are deemed abandoned).

existence or because ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See id.*, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *Id.*, ¶38.

On appeal, Foster maintains that the following new factors warrant sentence modification: his cooperation with law enforcement; additional information about his medical issues and work history; his level of comprehension; and the “baseless” statement by the State regarding the frequency of his drug deals.<sup>3</sup>

#### ***A. Cooperation with Law Enforcement***

First, Foster argues that his cooperation with law enforcement investigating the victim’s death was mischaracterized by the State at sentencing. Specifically, Foster claims that the circuit court was not informed that he told the police that Demetrius Green supplied him with the heroin that he sold to C.S., who then provided it to the victim.<sup>4</sup> Foster also claims that the circuit court was not aware of the State’s use of Foster’s statement against Green at Green’s sentencing.

Foster overstates the nature of his cooperation. Foster implicated Green as his supplier after Green was already in custody based on police observations that he supplied drugs to Foster.

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<sup>3</sup> In his postconviction motion, Foster additionally argued that the disparity between his sentence and the sentences of his coactors was a new factor. He abandons this claim on appeal. *See A.O. Smith Corp.*, 222 Wis. 2d at 491.

We do not discuss Foster’s claims in the same order that he presented them in his brief.

<sup>4</sup> C.S. was a confidential source during the police investigation of Foster. Although the parties use different initials for this individual in their briefs, this court will use the initials used in the criminal complaint.

Foster has not shown that his after the fact statement implicating Green was highly relevant to the imposition of his sentence.

Moreover, Foster's cooperation was known to the circuit court at the time of sentencing. Foster's supplier is referenced in the complaint, and at sentencing, the State explained that this was Green. Foster's statements to the police, which included that Green supplied Foster so many times that Foster "can't estimate how many drug deals" they did, was set forth in the complaint. The State, in its sentencing remarks, relayed Foster's admissions about the scope of his drug dealing. After noting that Foster initially did not cooperate with the police when they arrived at his apartment, the circuit court acknowledged at sentencing "[y]ou were later cooperative with the police when you gave a statement, and there's value in that." Because the circuit court was aware of Foster's cooperation, this does not constitute a new factor.

### ***B. Medical Issues and Work History***

Second, Foster takes issue with the State's remarks to the circuit court that Foster had not worked, which he submits "impl[ied] that he had just been dealing drugs." Foster highlights information he presented with his postconviction motion showing that he has had degenerative joint issues in his shoulders since 2008 and reflecting that he had a job at one point in 2014.

During the sentencing hearing, the circuit court noted that Foster told the police that he "really hadn't had a legitimate job in about ten years." From this the circuit court stated that it could "only assume" that when Foster was not in custody, he was "involved in the drug trade." The circuit court later determined that Foster's "persistent involvement with what I think is fair to describe as high level retail drug sales" was an aggravating factor.

Foster's own admissions about his sporadic employment history and drug dealing were the source of the circuit court's findings about his involvement in the drug trade. On appeal, Foster fails to show that the additional information related to his medical issues and limited work history was highly relevant to the imposition of his sentence. For instance, he does not show that his medical issues rendered him unable to work or that he was gainfully employed for a substantial part of the ten-year period in order to cast that time or his circumstances in a different light. This information does not constitute a new factor.

### ***C. Level of Comprehension***

Third, Foster argues that the circuit court was not fully apprised of his educational level. The circuit court, however, was aware of Foster's limited education. During its sentencing remarks, the circuit court stated: "Even though you didn't get a[n] HSED or GED or diploma, I think you're wise enough and experienced enough to know that th[e] risk [of death] was there." To show that he was not "wise enough," Foster highlights January 2017 testing of his functional education level, which indicate he tested at a sixth-grade level in reading and a fifth-grade level in math and language.

The circuit court's assessment of Foster's capabilities was based on his age and experience—not his reading, math, and language skills. During its sentencing remarks, the circuit court explained: "You were thirty-three at the time of this incident. That makes you older than most of the people that sit there, ... and it also puts you in a position to be able to think as a mature adult." The circuit court continued: "You're not an eighteen year old just running around trying to make a few dollars. You're looking at this with ... a more clear-eyed view." Foster has not

shown that the specifics of his functional education level was highly relevant to the imposition of his sentence. Therefore, it is not a new factor.

***D. Frequency of Drug Deals***

Foster sold C.S. heroin, which C.S. then shared with the victim immediately before the victim overdosed. As detailed in the complaint, C.S. told police that Foster sold C.S. drugs seventy to seventy-five times in six months. On appeal, Foster argues for the first time that C.S. exaggerated the number of drug purchases from Foster. Foster submits that, because he was in the House of Correction for sixty days during that period, C.S.'s claim "was highly unlikely." According to Foster, when the State relayed this information to the circuit court during the sentencing hearing, it did so in a "reckless statement [made] only to exaggerate Foster's drug dealing."

This claim fails for two reasons. As the State argues, and Foster does not refute, Foster forfeited this claim by not first raising it in his postconviction motion. *See State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (stating that failure to timely raise an argument forfeits the argument on appeal); *see also Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that failure to refute an argument constitutes a concession). In any event, this is not a new factor. Foster has not shown that C.S. did not account for Foster's time in custody when estimating the number of times C.S. purchased drugs from Foster. Moreover, even if C.S.'s estimate was off, Foster's own admissions were sufficient to demonstrate that he was a high level drug dealer. Foster has not shown that the number of purchases claimed by C.S. was highly relevant to the imposition of his sentence so as to constitute a new factor.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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*