



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 II

May 15, 2024

To:

Hon. Sandra J. Giernoth
Circuit Court Judge
Electronic Notice

Sarah Burgundy
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Benjamin R. Stibbe, #446669
Fox Lake Correctional Inst.
P.O. Box 147
Fox Lake, WI 53933

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

2023AP1119-CR	State of Wisconsin v. Benjamin R. Stibbe (L.C. #2005CF295)
2023AP1120-CR	State of Wisconsin v. Benjamin R. Stibbe (L.C. #2006CF171)

Before Neubauer, Grogan 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).

In these consolidated cases, Benjamin R. Stibbe appeals from orders denying his motion to modify sentence. He alleges the existence of a new factor. Based upon our review of the briefs and Records, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2006 and 2007, Stibbe was convicted in two cases of four total counts of first-degree reckless homicide. He was accused of delivering drugs that caused four overdose deaths. Both cases were resolved via pleas.

In the first case, the circuit court sentenced Stibbe on a single count to eighteen years of initial confinement and fifteen years of extended supervision. In the second case, the court sentenced Stibbe on three counts to a total of twenty-five years of initial confinement and fifteen years of extended supervision. It ordered the sentence in the second case to run concurrently to the sentence in the first case.

In 2023, Stibbe filed a motion to modify sentence. In it, he alleged the existence of a new factor based on a theory that Wisconsin statutes require “heavier punishment” for violent offenses and his offenses are not considered violent under federal sentencing case law. The circuit court denied Stibbe’s motion without a hearing. This appeal follows.

A circuit court may modify a sentence upon a defendant’s showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 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 ... 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 reviews independently. *See Harbor*, 333 Wis. 2d 53, ¶33.

Here, we are not persuaded that Stibbe has demonstrated the existence of a new factor. To begin, he has not identified any Wisconsin statutes requiring “heavier punishment” for violent offenses. Moreover, there is no indication that the circuit court considered his offenses to be

violent when imposing its sentences.² Finally, Stibbe has failed to explain why federal sentencing case law, which has no applicability in Wisconsin courts, is a fact highly relevant to his sentences. For these reasons, we are satisfied that the circuit court properly denied his motion.³

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to 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 Appeal

² As noted by the State, the sentencing transcripts reflect no mention of “violence” at all, let alone as a factor in Stibbe’s sentencing.

³ To the extent we have not addressed an argument raised by Stibbe on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).