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DISTRICT IV

January 23, 2026

To:

Hon. Bennett J. Brantmeier
Circuit Court Judge
Electronic Notice

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

2024AP1241-CR State of Wisconsin v. Richard J. Sulla (L.C. # 2011CF221)

Before Graham, P.J., Blanchard, and Taylor, 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).

Richard Sulla, pro se, appeals a circuit court order that denied Sulla's motion for 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 summarily affirm.

In April 2012, Sulla was convicted of armed burglary and burglary. Sulla was sentenced to ten years of initial confinement and ten years of extended supervision, consecutive to any current sentence. Sulla pursued a postconviction motion, which was denied.

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

In May 2024, Sulla filed in the circuit court the motion for sentence modification that underlies this appeal. *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828 (explaining that a circuit court may grant a motion for sentence modification when a new factor is shown by clear and convincing evidence and the new factor justifies modification of the sentence). Specifically, Sulla argued that the following constituted new factors warranting sentencing modification: (1) Sulla lacked access to substance abuse treatment while he was in jail with Huber release privileges and committed the offenses in this case, contrary to the sentencing court's comments that, while in that status, Sulla "had only to say the word and there were professionals who would have assisted [him] in addressing drug abuse or addiction"; (2) at the time of sentencing, Sulla had served only one prior term of probation and had four prior felony convictions and one misdemeanor conviction, contrary to the sentencing court's comments that Sulla had "four failed probations and eighteen convictions before these"; and (3) Sulla's most recent COMPAS risk assessment, with a corrected history of one failed probation, shows that Sulla's risk assessment is low for both general and violent recidivism, contrary to an older COMPAS assessment that showed a high overall risk of recidivism based on a history of four failed probations. Sulla asked the circuit court to modify his sentences to run concurrently and to make him eligible for the Earned Release Program.

Sulla also argued that, in addition to the claimed new factors, the following facts should be considered relevant to the circuit court's consideration of the sentence modification motion: (1) that Sulla's appointed counsel spent limited time on his case; (2) that Sulla had a history of service in the military and, as a result, was allegedly addicted to opioids; (3) that Sulla had positive accomplishments while incarcerated; and (4) that Sulla had plans for successful reentry to the community on his release.

The circuit court denied the motion. The court determined that Sulla had not shown a new factor for sentence modification purposes. Sulla appeals.

A motion for sentence modification based on a new factor must demonstrate: (1) the existence of a new factor, by clear and convincing evidence; and (2) that the new factor justifies modification of the sentence. ***Harbor***, 333 Wis. 2d 53, ¶¶36-37. 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 (quoted source omitted). Whether a motion for sentence modification presents a new factor is an issue of law that we review de novo. ***Id.***, ¶33. If the motion does not demonstrate a new factor, the court need not address the second inquiry, that is, whether sentence modification is warranted. ***Id.***, ¶38.

We conclude that Sulla's postconviction motion fails to demonstrate a new factor. Sulla does not allege that he was not aware, at the time of sentencing, that he lacked access to treatment in jail or of his own criminal history. Because those facts were known to Sulla, they could not present a new factor for sentence modification. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (facts are not "new" if the defendant was aware of them at the time of sentencing). Sulla's allegation that his more recent COMPAS assessment shows a low overall risk of recidivism also fails to allege a new factor as a matter of law. *See* ***State v. Sobonya***, 2015 WI App 86, ¶7, 365 Wis. 2d 559, 872 N.W.2d 134 (stating that a post-sentencing expert report was not a new fact or set of facts because it was "an expert's opinion based on previously known or knowable facts"). A challenge based on a new opinion about the significance of facts known or knowable at the time of sentencing "is better characterized as a

motion for reconsideration," and not a motion based on a new factor. *See* ***id.***, ¶8. Because Sulla knew his criminal history at the time of sentencing, the DOC's subsequent assessment of Sulla's risk of recidivism based on that history could not constitute a new factor.

As noted, Sulla also argued that additional facts should be considered relevant to his sentence modification motion. To the extent that Sulla intended to rely on those facts to constitute claims of new factors, we reject those arguments as well. The time that Sulla's counsel spent on this case, and Sulla's military history and substance abuse, were all facts known to Sulla at the time of sentencing and therefore cannot count as new factors. *See* ***Crockett***, 248 Wis. 2d 120, ¶14. Separately, Sulla's accomplishments while incarcerated, as well as his plans to positively integrate back in the community, are also not new factors that could support sentence modification. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997) ("[C]ourts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentencing modification.").

For these reasons, we conclude that Sulla's postconviction motion did not establish a new factor for sentence modification purposes. The circuit court properly denied the motion on that basis without reaching the issue of whether the claimed new factors warranted modification of Sulla's sentence.[2]

[2] Sulla asserts that the circuit court's analysis as to whether he presented a new factor was flawed. However, because our review of whether Sulla presented a new factor is de novo, any alleged flaw in the circuit court's analysis is of no consequence to our decision on appeal.

(continued)

We now turn to Sulla's arguments, which he made in his postconviction motion in the circuit court and in his initial brief in this court, that he is entitled to resentencing because he was sentenced based on inaccurate information and because his trial counsel was ineffective. The State argues that these are constitutional claims that Sulla is procedurally barred from pursuing because they arise under WIS. STAT. § 974.06 and Sulla was therefore required to raise them in his first postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) (absent a showing of a sufficient reason for failing to raise claims arising under § 974.06 in an earlier postconviction motion, those claims are barred).

In reply, Sulla takes the position that he seeks only sentence modification based on a new factor. He asserts that he is not pursuing any claim for relief under WIS. STAT. § 974.06 and that therefore he was not required to provide the circuit court with a sufficient reason for failing to raise these claims earlier.

We agree with the State that these are constitutional claims and therefore they fall within the ambit of WIS. STAT. § 974.06 and are subject to the procedural bar. *See* ***State v. Tiepelman***,

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Sulla also contends that a motion for sentence modification must show only the existence of a new factor and not that the new factor justifies sentence modification. He argues that our supreme court withdrew the requirement to show that the new factor justifies sentence modification in ***State v. Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828. Sulla is apparently attempting to refer to the fact that the court in ***Harbor*** withdrew the requirement previously stated in case law "that an alleged new factor must also frustrate the purpose of the original sentence." ***Id.*** However, our supreme court reaffirmed in ***Harbor*** that a motion for sentence modification "must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***Id.***, ¶38. In any event, as explained, Sulla's motion failed to present a new factor.

As part of his discussion of the new factor issue, Sulla relies on case law that recognizes a defendant's constitutional due process right to be sentenced based on accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. These references do not advance Sulla's new factor arguments. As we have explained, ***Harbor*** summarizes the standards for a new factor sentence modification motion. The inaccurate information aspect of Sulla's arguments is addressed in the text of this opinion.

2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (motion for resentencing based on claim that the defendant was denied the constitutionally protected due process right to be sentenced upon accurate information); ***State v. Anderson***, 222 Wis. 2d 403, 408-09, 588 N.W.2d 75 (Ct. App. 1998) (motion for resentencing based on claim that counsel was constitutionally ineffective at sentencing).

Sulla makes no claim that he provided a sufficient reason to overcome the procedural bar. Rather, his argument against application of the bar is that the State forfeited its procedural bar argument because it did not make that argument in the circuit court. *See* ***State v. Avery***, 213 Wis. 2d 228, 248, 570 N.W.2d 573 (Ct. App. 1997) (declining to apply the procedural bar because the State failed to raise the issue in the circuit court), *abrogated on other grounds by* ***State v. Armstrong***, 2005 WI 119, ¶162, 283 Wis. 2d 639, 700 N.W.2d 98. However, we decline to apply forfeiture against the State. First, applying the forfeiture rule against the State would not serve to avoid "'blindsid[ing]'" the circuit court here with a reversal "'based on theories which did not originate'" in the circuit court. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476 (quoting ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)). That is, applying ***Escalona***'s procedural bar provides a reason to affirm the circuit court, and therefore reliance on the procedural bar would not blindside the court with an unforeseen reversal. Second, and closely related, respondents may in many circumstances advance arguments that would sustain the circuit court's ruling, even if that argument was not made in the circuit court. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 (we may consider new arguments raised by respondents seeking to affirm the circuit court and may affirm a ruling on a theory or reasoning not presented to the circuit court). Third, Sulla fails to provide us with a well-supported basis to

think that he had any basis to overcome the procedural bar that he would have presented to the circuit court, had the State raised ***Escolana***.

In sum on this issue, to the extent that Sulla means to pursue a claim for resentencing based on constitutional errors, he is procedurally barred from doing so because he fails to assert any reason for failing to raise those claims earlier.

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.

Samuel A. Christensen
Clerk of Court of Appeals