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DISTRICT IV

August 7, 2014

To:

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Circuit Court Judge
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Madison, WI 53703

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

2013AP1063-CR	State of Wisconsin v. Gregory W. Baumann (L.C. # 2010CM3620)
2013AP1064-CR	State of Wisconsin v. Gregory W. Baumann (L.C. # 2011CF218)
2013AP1065-CR	State of Wisconsin v. Gregory W. Baumann (L.C. # 2011CF994)
2013AP1066-CR	State of Wisconsin v. Gregory W. Baumann (L.C. # 2011CF1394)

Before Lundsten, Sherman and Kloppenburg, JJ.

Gregory Baumann appeals judgments of conviction and circuit court orders denying postconviction relief in four criminal cases. Baumann contends that the circuit court erroneously exercised its discretion by denying Baumann's motions for sentence modification. Based upon

our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

Baumann was convicted of multiple charges on guilty or no-contest pleas in these four cases. The circuit court imposed a global sentence of three years of initial confinement and three years of extended supervision, consecutive to Baumann’s sentence in a separate case. Baumann moved for sentence modification, seeking to have the total sentence in these cases run concurrently with his sentence in the other case. He asserted that he had a heart condition that constituted a new factor justifying sentence modification. The court denied sentence modification; it found that Baumann had not established a new factor and that, even if he had, the court would decline to modify Baumann’s sentence.

Whether facts constitute a “new factor” for sentence modification purposes is a question of law, subject to our independent review on appeal. *State v. Harbor*, 2011 WI 28, ¶33, 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.”” *Id.*, ¶40 (quoted source omitted). If a new factor exists, the circuit court has discretion whether to modify a sentence based on that new factor. *Id.*, ¶¶33, 36.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Baumann argues that his deteriorating health constitutes a new factor justifying sentence modification. He relies on a medical report and a statement from his cardiologist indicating that Baumann suffers from a heart condition resulting in at least thirty percent chance of mortality in the next three years. However, the same evidence also indicates that Baumann had suffered from heart problems for years prior to sentencing. Significantly, while the evidence indicates that Baumann suffers from a heart condition, it does not indicate in what way Baumann's heart condition has worsened since sentencing. That is, while Baumann presented evidence of his diagnosis and his mortality risk, nothing in that evidence indicates that the same diagnosis and mortality risk did not exist at the time of sentencing.² Because Baumann did not present facts showing that his health had, in fact, deteriorated since sentencing, we conclude that Baumann has not met his burden to demonstrate a new factor warranting sentence modification by clear and convincing evidence.³ *See Harbor*, 333 Wis. 2d 53, ¶36 (defendant bears the burden to establish a new factor by clear and convincing evidence).

² Baumann contends that he would have established at an evidentiary hearing that his health had deteriorated. However, at the postconviction motion hearing, Baumann's counsel informed the court that an evidentiary hearing was not necessary for a determination of whether a new factor existed. We will not address a contrary argument on appeal.

³ The State argues that, under *State v. Harbor*, 2011 WI 28, ¶58, 333 Wis. 2d 53, 797 N.W.2d 828, a worsening health condition does not constitute a new factor as a matter of law. We do not share the State's reading of *Harbor* as establishing a blanket rejection of new factor claims premised on worsening health conditions. Rather, the *Harbor* court rejected Harbor's new factor claim because "Harbor's 'mental health issues were addressed, discussed and considered' during sentencing, and ... 'the court was cognizant of the problems facing the defendant.'" *Id.* The court explained that, because "[t]he court was informed that Harbor had been diagnosed with bipolar disorder and severe depression, that she had been hospitalized for mental health issues, and that she had been prescribed medication to control her symptoms," the court "conclude[d] as a matter of law that the facts related to Harbor's mental health do not constitute a new factor." *Id.* Thus, the court based its decision on grounds that the sentencing court had been aware of Harbor's health problems at sentencing, not that worsening health problems can never constitute a new factor.

Therefore,

IT IS ORDERED that the judgments and orders are summarily affirmed pursuant to WIS.
STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals