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DISTRICT I

September 8, 2021

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
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Levett Dewarren Musgraves 251988
McNaughton Corr. Center
8500 Rainbow Rd.
Lake Tomahawk, WI 54539-9558

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

2020AP2089-CR

State of Wisconsin v. Levett Dewarren Musgraves
(L.C. # 1991CF911251)

Before Brash, C.J., Dugan and White, 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).

Levett Dewarren Musgraves appeals an order of the circuit court denying his motion for sentence modification. He also appeals from the circuit court order denying his motion for reconsideration. Musgraves contends that he is entitled to sentence modification on the basis of a new factor. Upon our review of the briefs and record, we conclude at conference that this

matter is appropriate for summary disposition. See WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

In 1992, a jury found Musgraves guilty of first-degree intentional homicide while armed. Musgraves was sixteen years old at the time of the offense. At sentencing, the circuit court imposed the mandatory sentence of life imprisonment and ordered Musgraves eligible for parole in the year 2020. As relevant to this appeal, in September 2020, Musgraves filed a motion for sentence modification arguing that the COVID-19 pandemic and allegedly mitigating information contained in a December 1990 psychological evaluation were new factors warranting sentence modification. Musgraves also noted that some inmates who, like him, had been sentenced to life imprisonment for offenses committed as juveniles, had been identified for relief from their sentences by the Public Interest Justice Initiative.² Musgraves believed that he would be eligible for the program, but had not been selected as of the date of his motion.

The circuit court denied the motion, stating that neither the pandemic nor information contained in the 1990 psychological evaluation constituted new factors warranting sentence modification. The circuit court stated that even if the pandemic constituted a new factor, it was not highly relevant to the imposition of Musgraves's sentence. The circuit court did not address Musgraves's claim about the Public Interest Justice Initiative.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The Public Interest Justice Initiative is a joint project between the Milwaukee County District Attorney's office and the Legal Aid Society of Milwaukee to review cases of persons sentenced to life imprisonment for offenses committed as juveniles. See <https://wislawjournal.com/2019/11/27/milwaukee-da-legal-aid-society-review-juvenile-life-sentences> (last visited Aug. 23, 2021).

Musgraves subsequently moved for reconsideration, arguing that he was entitled to have his motion decided by the judge who sentenced him,³ that the circuit court made multiple errors in denying his motion, and that the circuit court failed to address his argument that he was entitled to selection for the Public Interest Justice Initiative.

The circuit court denied the motion but again did not address Musgraves's argument as to the Public Interest Justice Initiative. This appeal follows.

On appeal, Musgraves contends that the circuit court failed to address his argument as to the Public Interest Justice Initiative. As this court best construes his argument, he contends that the program has successfully argued for sentence modifications for other juveniles serving life sentences and could do so for him; Musgraves contends that he is eligible for the program and that the Milwaukee County District Attorney's Office's failure to recognize his eligibility (thus far) constitutes a new factor warranting sentence modification. Musgraves is mistaken.

A circuit court may modify a defendant's sentence upon the showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor consists 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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). A defendant seeking sentence modification "must demonstrate both the existence of a new factor and that the new factor

³ The Honorable Jeffrey A. Wagner sentenced Musgraves, the Honorable Frederick C. Rosa denied Musgraves's motion for sentence modification, and Judge Wagner denied Musgraves's motion for reconsideration.

justifies modification of the sentence.” *Harbor*, 333 Wis. 2d 53, ¶38. The defendant “has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.*, ¶36 (citing *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989)).

Whether the facts presented constitute a new factor is a question of law, which we review independently of the circuit court. *See Harbor*, 333 Wis. 2d 53, ¶33. However, “[t]he determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court,” and that decision is reviewed for an erroneous exercise of discretion. *Id.*

Musgraves is correct that the circuit court did not address his contention about the Public Interest Justice Initiative; however, we may affirm a correct circuit court decision on grounds other than those relied upon by the circuit court. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). Our *de novo* review persuades us that Musgraves’s belief about his eligibility for the initiative is not a new factor warranting sentence modification. Although the initiative was not known to the circuit court at the time of sentencing, it was not highly relevant to the imposition of his sentence. Rather, the circuit court focused on the gravity of the offense, Musgraves’s attitude and demeanor, the impact Musgraves’s actions had on the victim’s family, and the need to deter others from the same type of offense. Accordingly, we agree with the circuit court that sentence modification was not warranted.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the orders are 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

OFFICE OF THE CLERK



Supreme Court of Wisconsin

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December 15, 2021

To:

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

No. 2020AP2089-CR State v. Musgraves, L.C. #1991CF911251

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Levett Dewarren Musgraves, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

BY THE COURT:

DATE SIGNED: November 11, 2020

Electronically signed by Honorable Frederick C. Rosa
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Branch 35

STATE OF WISCONSIN,

Plaintiff,

vs.

LEVELT DEWARREN MUSGRAVES,

Defendant.

Case No. 91CF911251

DECISION AND ORDER
DENYING MOTION FOR SENTENCE MODIFICATION

On September 24, 2020, the defendant filed a *pro se* motion for sentence modification, alleging that the COVID-19 pandemic and a psychological evaluation from December 19, 1990 are new factors.¹ On December 15, 1992, the court sentenced the defendant sentenced to life imprisonment with parole eligibility on December 15, 2020. The court has reviewed the motion and finds that the defendant has not presented a new factor for purposes of sentence modification. 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." *Rosado v. State*, 70 Wis. 2d 280, 288 (1975). The report from 1990 is not a new factor because it was known and in existence when the defendant was sentenced in 1992. Additionally, even though the pandemic was "not known to the trial judge at the time of original sentencing," it is not a fact that was "highly relevant to the imposition of the sentence." While the court recognizes the potential threat of COVID-19 to the inmate population, it also recognizes that the institution has a legal obligation to take the necessary steps to keep inmates safe and healthy. Even assuming, *arguendo*, that the COVID-19 pandemic does qualify as a new factor, the court finds that individualized relief is not warranted based on the facts and circumstances of this case. See *State v. Harbor*, 333 Wis. 2d 53, 73 (2011) (the existence of a new factor does not automatically entitle the defendant to sentence modification).

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for sentence modification is **DENIED**.

¹ The defendant also alludes to a claim that his sentence is contrary to *Miller v. Alabama*, 567 U.S. 2455, 2469 (2012), which held that the 8th Amendment "forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." However, *Miller* is inapplicable because the defendant is eligible for parole.

FILED

12-01-2020

John Barrett

Clerk of Circuit Court

1991CF911251

BY THE COURT:

DATE SIGNED: December 1, 2020

Electronically signed by Judge Jeffrey A. Wagner
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Branch 38

STATE OF WISCONSIN,

Plaintiff,

vs.

LEVELT MUSGRAVES,

Defendant.

Case No. 91CF911251

**DECISION AND ORDER
DENYING MOTION FOR RECONSIDERATION**

On November 24, 2020, the defendant filed a *pro se* motion seeking reconsideration of a decision and order entered by Judge Frederick Rosa on November 11, 2020, denying his motion for sentence modification. He argues that Judge Rosa had no business deciding his sentence modification motion because he was not the sentencing judge – rather, this court sentenced the defendant.¹ This court has reviewed the defendant's motion for sentence modification and Judge Rosa's decision. The court concurs with Judge Rosa that the December 19, 1990 psychological report prepared by Dr. Tyrone Carter is not a new factor in this case. The report was prepared at the request of the State Public Defender's Office to assist in determining whether the defendant's jurisdiction should be waived to adult court. It did not offer an opinion about his culpability in this case for mitigation purposes. Moreover, Dr. Carter's findings were incorporated into the

¹ The defendant incorrectly denominates this court as Branch 30 of the circuit court. This court has always been assigned to Branch 38 of the circuit court.

presentence report, which the court reviewed prior to sentencing. (See Presentence Report, p. 7). Thus, Judge Rosa was entirely correct when he stated in his written decision that Dr. Carter's psychological report was not a new factor "because it was known and in existence when the defendant was sentenced in 1992."

The defendant also argues that the court set an ambiguous parole eligibility date. At sentencing, the prosecutor asked the court to set the defendant's parole eligibility "somewhere between 20 and 25 years *from today's date.*" (Tr. 12/15/92, p. 11). Upon consideration of the relevant sentencing factors, the court sentenced the defendant to life imprisonment "with a parole eligibility date of the year 2020 and he will become eligible for parole *on that date.*" (Id. at p. 16). Although the court did not express a specific parole eligibility date on the record, the court intended "that date" to be December 15, 2020.

In sum, the court rejects the defendant's assertions that Judge Rosa entered an arbitrary decision or that he had a right to a decision from his sentencing judge. The defendant's motion for sentence modification was assigned to Judge Rosa for review and decision while this court was on medical leave. Judge Rosa's decision was not arbitrary; *it was correct.* Nothing in the defendant's current motion persuades the court to alter that decision, and therefore, the defendant's motion for reconsideration is denied.

SO ORDERED.

¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Harbor*, 333 Wis. 2d 53, ¶ 36. A new factor is “a fact or set of facts highly relevant to the imposition of sentence” that is not known to the sentencing court, “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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

Second, the defendant must show the circuit court that the new factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶¶ 37–38. If the defendant fails to satisfy one of these two requirements, the court may deny his or her request on that basis without addressing the other requirement. *Id.* ¶ 38.

C. Musgraves not being selected for relief under the Public Interest Justice Initiative is not a new factor because it is not highly relevant to the imposition of sentence.

The Public Interest Justice Initiative is a joint project between the Milwaukee County District Attorney’s office and the Legal Aid Society of Milwaukee to review cases of persons sentenced to life imprisonment for offenses committed as juveniles.³ For example, under this program, the district attorney’s office and lawyers for Phillip Torsrud recently asked the circuit court to vacate Torsrud’s 1991 conviction for first-degree intentional homicide for a murder he committed when he was 16.⁴ The parties agreed that Torsrud would then

³ <https://wislawjournal.com/2019/11/27/milwaukee-da-legal-aid-society-review-juvenile-life-sentences/> (accessed April 5, 2021).

⁴ <https://www.jsonline.com/story/news/2020/12/28/phillip-torsruds-life-sentence-homicide-age-16-could-end-early-30-years-milwaukee-wick-field/3924062001/> (accessed April 5, 2021).

to life imprisonment for crimes committed as juveniles. Rather, the case-by-case review being conducted under this program is not unlike the individualized nature of sentencing in Wisconsin. See *State v. Gallion*, 2004 WI 42, ¶ 48, 270 Wis. 2d 535, 678 N.W.2d 197.

For these reasons, Musgraves's sentence modification claim fails because he cannot show that his being passed over for the Public Interest Justice Initiative is a new factor.

II. Even if Musgraves could prove the existence of a new factor, he would not be entitled to sentence modification because the circuit court properly exercised its discretion in concluding that sentence modification was not warranted in Musgraves's case.

The circuit court also determined in denying Musgraves's sentence modification that sentence modification was not warranted in this case. (R. 103:1, A-App. 1.) In addressing whether Musgraves had proven that the COVID-19 pandemic was a new factor, the court said that it "finds that individualized relief is not warranted based on the facts and circumstances of this case." (R. 103:1, A-App. 1.) In other words, the court concluded that sentence modification was not warranted regardless of whether Musgraves could prove the existence of a new factor. (R. 103:1, A-App. 1.)

As noted, the circuit court exercises its discretion when determining whether sentence modification is appropriate in a particular case. See *Harbor*, 333 Wis. 2d 53, ¶¶ 37–38. Here, the circuit court properly exercised its discretion in determining that sentence modification "is not warranted based on the facts and circumstances of this case." (R. 103:1, A-App. 1.) See *Norton*, 248 Wis. 2d 162, ¶ 8. The sentencing transcript shows that the court offered a thorough and reasoned explanation for a sentence with a parole eligibility date in the year 2020. The circuit court did not misuse its