

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP1654-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF1166

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO MORALES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
TAMMY JO HOCK, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Roberto Morales appeals an order denying his motion for sentence modification. He contends his “diminished mental capacity” is a new factor justifying a reduced sentence.¹ We affirm the order.

¶2 Morales entered no contest pleas to five counts of delivering cocaine. Numerous other charges were dismissed and read in for sentencing purposes. The court imposed concurrent sentences totaling six years’ initial confinement and five years’ extended supervision.

¶3 Morales filed a pro se motion for sentence modification in which he raised numerous issues, but he explicitly indicated he was not seeking to have his convictions overturned or vacated, and he did not request resentencing.² The remedy for Morales’ claims of ineffective assistance of counsel, failure to understand the proceedings, difficulty understanding English, and failure to understand the elements of the offenses and potential penalties would be vacating the no-contest pleas and/or resentencing rather than sentence modification. The only issue Morales raises that is consistent with the relief he requests is whether his mental health, as affected by alcohol and drug use, constitutes a new factor justifying a reduced sentence. It does not.

¹ Morales also asked the circuit court to modify his sentence to make him eligible for the Challenge Incarceration Program and Earned Release Program. The court did make Morales eligible for both programs at the original sentencing hearing. On appeal, Morales requests to have all of his sentences run concurrently. The court imposed concurrent sentences at the original sentencing. Morales also asserts he was sentenced based on inaccurate information, but does not identify any specific inaccuracy. We will not address that issue because it is not fully developed. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

² Had he been successful in withdrawing his pleas or seeking resentencing, he could have been subjected to additional convictions and a longer sentence. See *State v. Dielke*, 2004 WI 104, ¶2, 274 Wis. 2d 595, 682 N.W.2d 945.

¶4 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, 234 N.W.2d 69 (1975). The burden is on Morales to establish by clear and convincing evidence that a new factor exists. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis.2d 53, 797 N.W.2d 828. Whether a fact constitutes a new factor is a question of law that this court determines independently. *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶5 Morales' mental state does not meet the standard for sentence modification as a new factor. At sentencing, the court recognized Morales' struggles with alcohol and drug abuse. Morales admits in his motion that he discussed the effect of his drug and alcohol dependence on his mental state with his attorney before sentencing, but asked that it not be presented out of guilt and shame. Therefore, it was not unknowingly overlooked by all of the parties.

¶6 Morales argues for the first time on appeal that he suffers from attention deficit disorder, and he has abandoned the claims made in his postconviction motion that he suffered from depression and indecisiveness. We do not consider issues that are abandoned on appeal, *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998), or arguments raised for the first time on appeal, see *State v. Schulpius*, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495. In any event, attention deficit disorder would not be highly relevant to the sentence imposed for selling cocaine.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2013-14).

