

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2016

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. 2015AP1117-CR

Cir. Ct. No. 2013CF3043

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LESTER DAVID ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Lester David Roberts appeals a judgment convicting him of two counts of injury by intoxicated use of a vehicle. He also appeals an order denying his postconviction motion. Roberts argues that his sentence should be modified based on a “new factor,” his statutory ineligibility for

the challenge incarceration program and the earned release program (now known as the substance abuse program). We affirm.

¶2 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). “Whether a fact or set of facts presented by the defendant constitutes a ‘new factor’ is a question of law.” *Id.*, ¶33. We review questions of law independently of the circuit court. *Id.* If a new factors exists, “[t]he determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court.” *Id.* We will overturn a discretionary decision only if the circuit court misuses its discretion. *Id.*

¶3 Roberts contends that his statutory ineligibility for the programs is a new factor because the primary objective of the circuit court’s sentence was rehabilitation and the sentence was structured around the therapy he would receive participating in early release programs. He points out that the circuit court specifically stated that he would be eligible for the programs after he served four years of the seven years of initial confinement it imposed on him.

¶4 The problem with this argument is that the circuit court flatly rejected Roberts’ assertion that his eligibility for the programs was highly relevant to its sentence. In its order denying Roberts’ postconviction motion, the circuit court explained:

[T]he court acknowledged that the defendant had rehabilitative needs and made him eligible for the early release programs because they offered “the best

programming that we have available in our prison system for somebody with substance abuse issues.” Even so, the court understood that its finding of eligibility for the challenge incarceration and substance abuse programs was not binding on the Department of Corrections and was merely a statement to the DOC that the court did not object to placing the defendant in either program. The court did not base its sentencing decision in this case on the defendant’s participation in the early release programs, and therefore, the defendant’s ineligibility for those programs is not highly relevant to the sentence imposed.

Because Roberts’ statutory ineligibility was not highly relevant to the circuit court’s sentence, it is not a new factor.

¶5 Roberts’ claim fails for another reason. The circuit court said that it would not exercise its discretionary power to modify Roberts’ sentence *even if Roberts’ ineligibility for the programs were considered to be a new factor*. The circuit court explained that sentence modification was not warranted because Roberts’ conduct had a devastating impact on his victims; therefore, sentence modification would “unduly depreciate the life-altering consequences of the defendant’s behavior and would frustrate the goals of punishment, deterrence and community protection.” The circuit court’s discretionary ruling is supported by the facts of this case and is thus unassailable.

By the Court.—Judgment and order affirmed.

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

