

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1821-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY L. TRIGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Jeffrey Triggs appeals from a judgment convicting him of one count of possession of cocaine with intent to deliver, and two orders denying his motions for postconviction relief. The issues are: (1) whether the parole commission properly denied Triggs's application for discretionary parole; (2) whether the trial court properly denied Triggs's motion to modify his sentence

based on a “new factor”; and (3) whether the trial court properly denied Triggs’s motion to withdraw his plea after sentencing on the basis of ineffective assistance of counsel. We resolve these issues against Triggs and affirm.

The police stopped Triggs while he was driving because his view was obstructed by an object hanging from his rearview mirror. During the stop, Triggs consented to a search of his person, which resulted in the seizure of cocaine. Triggs was arrested and, after being read his rights, Triggs told the police that he intended to sell the cocaine.

Pursuant to a plea agreement, Triggs entered a guilty plea to the charge of possession of cocaine with intent to deliver. The State agreed to recommend three years of probation, with six months in the county jail as a condition, if Triggs was employed full time by the time of sentencing, which was sixty-days after the plea hearing.

Between entry of the plea and a hearing prior to sentencing, Triggs told his attorney that he wanted to withdraw his plea. Triggs contends that he and his attorney never discussed the issue of plea withdrawal, other than when he told him that he wanted to withdraw his plea. Triggs’s attorney testified at the postconviction hearing that he informed Triggs about the disadvantages of moving to withdraw the plea, and that Triggs decided he did not want to withdraw the plea. During a hearing held prior to sentencing, Triggs never mentioned that he wanted to withdraw his plea. At the sentencing hearing, the State recommended thirty-months’ incarceration because Triggs had not yet obtained employment. The trial court agreed and sentenced Triggs to thirty months of incarceration.

After sentencing, Triggs filed a motion to withdraw his guilty plea. Shortly thereafter, the parole commission denied Triggs’s application for

discretionary parole. Several months later, the trial court denied Triggs's motion to withdraw his guilty plea. Triggs then filed a motion to modify his sentence and a second motion to withdraw his plea, which the trial court denied. Triggs appeals these orders and the underlying judgment of conviction.

Triggs first argues that the commission's decision to deny him discretionary parole should be reversed. He contends that the decision was based on "an illegal directive" of the Joint Finance Committee of the Wisconsin Legislature that prohibited the commission from any early release of drug dealers during 1996-97.

A person seeking review of the commission's decision not to grant discretionary parole should petition for a writ of certiorari in the trial court. *See State ex rel. Hansen v. Circuit Court*, 181 Wis.2d 993, 996 n.2, 513 N.W.2d 139, 141 n.2 (Ct. App. 1994). Triggs never petitioned the trial court for a writ of certiorari based on the commission's decision to deny him discretionary parole. Because this issue was not properly raised in the trial court, we will not address it. And, even if the issue were properly raised, we would not address it because Triggs has since been granted parole. Thus, the issue is moot. *See Milwaukee Police Ass'n v. City of Milwaukee*, 92 Wis.2d 175, 183, 285 N.W.2d 133, 137 (1979) (a case is moot when determination is sought upon some matter which when rendered, cannot have any practical effect upon a then existing controversy).

Triggs next argues that the Joint Finance Committee's directive to the commission not to release drug dealers on discretionary parole is a "new factor" justifying modification of his sentence.

A defendant seeking modification of a sentence must demonstrate that there is a new factor justifying the motion. *See State v. Franklin*, 148 Wis.2d

1, 8, 434 N.W.2d 609, 611 (1989). 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 the original sentencing” *Id.* (citation omitted). A change in parole eligibility after sentencing can constitute a new factor. *Kutchera v. State*, 69 Wis.2d 534, 553, 230 N.W.2d 750, 760 (1975). However, the supreme court has said that “[i]n order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing.” *Franklin*, 148 Wis.2d at 15, 434 N.W.2d at 614. The supreme court further explained that “[i]t is not a relevant factor [in sentencing] unless the court expressly relies on parole eligibility.” *Id.* Whether a fact or set of facts constitutes a new factor is a question of law that we decide without deference to the trial court’s determination. *Id.* at 8, 434 N.W.2d at 611.

The trial court did not mention parole eligibility as a factor when it sentenced Triggs. The trial court’s main consideration was whether Triggs had obtained employment. Because the trial court did not expressly consider parole policy when it sentenced Triggs, the change in parole policy by the Joint Finance Committee is not a new factor justifying sentence modification. *See Franklin* at 15, 434 N.W.2d at 614.

Triggs next argues that the trial court should have allowed him to withdraw his plea after sentencing because he received ineffective assistance of trial counsel. At the postconviction hearing, Triggs’s trial counsel testified that he and Triggs had discussed plea withdrawal prior to sentencing, but that Triggs was in agreement with the recommendation not to attempt to withdraw the plea. Triggs testified that he and counsel never discussed the issue. The trial court’s decision on the ineffective assistance of counsel claim turned, in large part, on whether the court believed Triggs or Triggs’s counsel. The trial court chose to

believe the testimony of trial counsel. The trial court properly rejected Triggs's claim that he received ineffective assistance of counsel based on its determination of the credibility of the witnesses.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

