COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1392-CR **Cir. Ct. No. 1999CF120**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. WINIUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Winius, pro se, appeals from an order denying his "Motion for Reconsideration of Sentence Modification or in the Alternative Sentence Modification." The motion sought reconsideration of a 2011 circuit court order denying sentence modification based on new factors. Citing

WIS. STAT. §§ 806.07 and 805.15(3) (2015-16),[1] the present motion alleges newly discovered evidence revealed by newspaper accounts of a "secretive system" that denied inmates access to the prison programs deemed necessary by the parole commission.[2] Winius argues: (1) the "secretive system" constitutes a new factor justifying a sentence reduction; (2) the "secretive system" violates his constitutional rights to due process and constitutes an ex post facto law; (3) Judge McGinnis exhibited judicial bias; and (4) this court should exercise its discretionary reversal powers under WIS. STAT. § 752.35. We reject these arguments and affirm the order.

¶2 Winius' argument that the "secretive system" constitutes a new factor justifying a sentence reduction fails for three reasons. First, the motion was improperly brought under WIS. STAT. §§ 806.07 and 805.15, neither of which applies in criminal cases. *See* ***State v. Henley***, 2010 WI 97, ¶¶5, 39-44, 61, 328 Wis. 2d 544, 787 N.W.2d 350.

¶3 Second, the motion is procedurally barred because it substantially duplicates previous postconviction motions that were denied and affirmed on appeal. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). In 2002, Winius requested a sentence reduction based on the alleged new

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The newspaper articles attached to Winius' motion describe the system under which the Program Review Committee (PRC) at each institution determines a prisoner's access to various programs. Due to limited resources, prisoners are placed on a waiting list until they are near their mandatory release date or presumptive mandatory release date. The parole commission will deny parole to inmates who have not completed various programs. The articles indicate the PRCs have been in existence for more than twenty years and describe the procedure as "a secretive system that robs the parole board of its power."

factor of his inability to get into a sex offender treatment program because he was not near his mandatory release date. In 2011, he again claimed a new factor consisting of a change in preference for treatment from the parole eligibility date to the mandatory release date. The present motion merely rephrases the same issue.

¶4 Third, the motion fails on its merits because Winius has not established by clear and convincing evidence that a new factor exists. *See* ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828.

¶5 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. For a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing. It is not a relevant factor unless the circuit court expressly relied on parole eligibility. *See* ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). It is not sufficient to show that the court merely mentioned parole at sentencing. *See* ***id.*** Here, Winius relies solely on the sentencing court's statement that "the actual length of time you will spend incarcerated will be entirely up to you." The court made that statement in the context of noting that Winius was fortunate not to be charged under statutes that would have made him subject to a life sentence without parole. Nothing in the record suggests the sentencing court based the twenty-eight-year sentence on

the belief that Winius would be released prior to his mandatory release or presumptive mandatory release date.[3]

¶6 Winius' due process and ex post facto arguments fail because the constitutional arguments are not properly presented in a motion for sentence modification. Constitutional issues should be raised by motion under WIS. STAT. § 974.06, and are subject to the procedural bar set out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Any argument that the Program Review Committee or the parole commission violated Winius' constitutional rights should be raised by a writ of certiorari. *See* ***Richards v. Graham***, 2011 WI App 100, ¶¶5-6, 336 Wis. 2d 175, 801 N.W.2d 821. In addition, Winius' motion did not develop his argument that the "secretive system" might violate his constitutional rights, and the circuit court did not rule on that issue.

¶7 Winius' argument that Judge McGinnis exhibited judicial bias was not properly preserved for appeal. The arguments he makes in his brief regarding the number of substitution requests and that the judge "is facing scrutiny for failing to report outside income," were never raised in the circuit court and cannot be raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The judge's strong rejection of Winius' offer to pay a

[3] In denying Winius' motion, the circuit court noted "in my opinion nothing that you have provided or nothing that you have cited or relied upon is—it doesn't frustrate the intent and the purpose of Judge Bayorgeon's sentence." In ***State v. Harbor***, 2011 WI 28, ¶42, 333 Wis. 2d 53, 797 N.W.2d 828, our supreme court withdrew the language from earlier cases indicating that a defendant must establish the new factor frustrated the purpose of the original sentence. However, whether Winius established a new factor is a question of law that we decide without deference to the circuit court. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). Our conclusion that Winius failed to establish a new factor does not depend on whether the "secretive system" frustrates the purpose of the initial sentence.

fine as part of a modified sentence and the court's refusal to allow an unidentified gallery spectator who was not called as a witness to speak, does not demonstrate bias.

¶8 Finally, Winius has not established any basis for this court to reverse in the interest of justice. He develops no argument establishing that the real controversy was not tried or that justice has miscarried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20-21, 456 N.W.2d 797 (1990).

By the Court.—Order affirmed.

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