COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
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. 2004AP2337-CR

Cir. Ct. No. 1984CF9373

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP WAYNE HARVEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Phillip Wayne Harvey appeals from a circuit court's order denying his motion for sentence modification. Harvey was convicted in 1985 of one count of kidnapping while armed, three counts of armed robbery and seven counts of first-degree sexual assault. The court imposed sentences

totaling one-hundred years of imprisonment. Harvey moved the circuit court for sentence modification in August 2004, arguing that an alleged change in Parole Board policy regarding discretionary parole amounted to a new factor entitling him to resentencing. Harvey also argued that his ineligibility to petition for sentence modification under WIS. STAT. § 973.195(lr)(a) and (b)1. (2003-04),[1] violates equal protection and the prohibition against *ex post facto* laws. Because the circuit court properly concluded that neither ground entitled Harvey to resentencing, we affirm.

¶2 As proof of a change in parole policy entitling Harvey to sentence modification, he pointed to a 1994 letter from former Governor Tommy G. Thompson to former Department of Corrections Secretary Michael J. Sullivan, instructing him to "pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date." The letter

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[1] The relevant subsections of WIS. STAT. § 973.195 provide as follows:

> **(1r)** CONFINEMENT IN PRISON. (a) An inmate who is serving a sentence imposed under s. 973.01 for a crime other than a Class B felony may petition the sentencing court to adjust the sentence if the inmate has served at least the applicable percentage of the term of confinement in prison portion of the sentence. If an inmate is subject to more than one sentence imposed under this section, the sentences shall be treated individually for purposes of sentence adjustment under this subsection.
>
> (b) Any of the following is a ground for a petition under par. (a):
>
> 1. The inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since he or she was sentenced.

went on to state that "[t]he policy of this Administration is to keep violent offenders in prison as long as possible under the law."

¶3 To obtain sentence modification, Harvey was required to show: (1) that there is a new factor; and (2) that the new factor justifies sentence modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's determination; however, whether the new factor justifies modification of the sentence is committed to the circuit court's discretion and will be reviewed under an erroneous exercise of discretion standard. ***Id.***

¶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 [the] 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). This court subsequently developed the definition of a "new factor" as "an event or development which frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶5 A defendant must establish the existence of a new factor by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9. Accordingly, "[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." ***Id.*** at 15. Parole policy cannot, however, be considered a relevant sentencing factor "unless the court expressly relies on parole eligibility" in imposing sentence. ***Id.***

¶6 Upon our review of the record, we conclude that Harvey failed to demonstrate how the alleged change in parole policy frustrated the court's sentence. The circuit court stated at Harvey's sentencing in 1985 that it "wholeheartedly" agreed with the PSI author's recommendation that a one-hundred year sentence be imposed on Harvey. The circuit court mentioned discretionary parole policy only in passing and for the limited purpose of advising Harvey that he would first become eligible for parole after serving twenty-five years of his sentence. The court did not suggest it believed that Harvey would be paroled after serving a quarter of his sentence or that he should be paroled at all. Because the record does not demonstrate that the circuit court expressly relied on Harvey's parole eligibility at his sentencing, the alleged change in Parole Board policy does not constitute a new factor entitling Harvey to sentence modification. *See* ***Franklin***, 148 Wis. 2d at 8, 15.

¶7 Harvey argues next that the Thompson letter violates the constitutional prohibition against *ex post facto* laws. We disagree. An *ex post facto* law is a law passed after the commission of an offense. ***State ex rel. Britt v. Gambl***e, 2002 WI App 238, ¶23, 257 Wis. 2d 689, 653 N.W.2d 143. Application of such a law violates the prohibition against *ex post facto* law if its application: "(1) criminalizes conduct that was innocent when committed[;] (2) increases the penalty for conduct after its commission[;] or (3) removes a defense that was available at the time the act was committed." ***Id.***

¶8 Only the second consideration—whether former Governor Thompson's 1994 letter to Secretary Sullivan affects Harvey's eligibility for parole—is relevant here. There is nothing in the record showing that Harvey's

future eligibility for parole has been adversely affected by the 1994 letter. Because Harvey failed to show the necessary connection, his *ex post facto* argument must fail.

¶9 Harvey also argues that the 1994 letter violates his due process rights. We agree with the State that this argument is vague. Accordingly, we decline to address it. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989) ("Simply to label a claimed error as constitutional does not make it so, and we need not decide the validity of constitutional claims broadly stated but never specifically argued.").

¶10 Harvey's second major claim is that defendants given indeterminate sentences are treated differently than those sentenced under TIS, a determinate sentencing scheme governing the sentencing of persons who commit felonies after December 31, 1999. A member of the latter group may petition for sentence modification under WIS. STAT. § 973.195(1r)(b)1., on the basis of the inmate's rehabilitation, education and treatment while incarcerated. Harvey contends that his ineligibility to petition for sentence modification under the statute violates equal protection.

¶11 Harvey was sentenced under an indeterminate sentencing scheme predating TIS. Even if the new scheme is viewed as conferring a benefit not previously conferred, the new statute does not violate equal protection: "the Fourteenth Amendment does not forbid statutes and statutory changes to have a

beginning, and thus to discriminate between the rights of an earlier and later time." ***Sperry & Hutchinson Co. v. Rhodes***, 220 U.S. 502, 505 (1911).[2]

¶12 In any event, persons convicted of Class B felonies are not permitted to petition for sentence reduction under WIS. STAT. § 973.195(1r)(a). Here, the circuit court convicted Harvey of eleven crimes, all of which were categorized as Class B felonies. Accordingly, even if Harvey were able to demonstrate that § 973.195 applies to persons serving indeterminate sentences, it would not apply to him.

¶13 Finally, Harvey complains that WIS. STAT. § 973.195(1r)(a) amounts to an *ex post facto* law as applied to him. We reject the argument as the claimed error cannot exist since the statute does not apply to Harvey in the first instance.

By the Court.—Order affirmed.

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

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[2] Consistent with this general principle, the Alabama Criminal Court of Appeals wrote:

> Where legislation confers a benefit not previously provided and is effective on a certain date, the apparent inequity results from all such ameliorative legislation and has been held not to deny equal protection. ***Jackson v. Alabama***, 530 F.2d 1231, 1238 (5th Cir. 1976). *See also* ***Brooks v. State***, 622 So.2d 447, 449 (Ala. Crim. App. 1993). ("A prisoner sentenced under an earlier, less favorable sentence reduction statute generally has no right to complain of the ameliorative provisions of a later good-time statute.").

Zimmerman v. State, 838 So.2d 404, 406 (Ala. Crim. App. 2001).