COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP764-CR **Cir. Ct. No. 1992CF923395**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAHMAN S. ABDULLAH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Rahman S. Abdullah appeals from postconviction orders denying his related motions for sentence modification and reconsideration. The issue is whether the governor's expressed policy preference to his Secretary of the Department of Corrections "to keep violent offenders in prison as long as

possible under the law," subsequent to Abdullah's conviction constituted a change in parole policy warranting sentence modification. We conclude that the governor's expressed preference to a member of his administration recommending that the Department oppose parole requests by violent offenders is not a change in parole policy by the decision-maker (the Parole Commission), and even if it was, it would not warrant sentence modification because parole policy was not considered by the trial court when it imposed sentence, nor would it frustrate the trial court's purpose when it imposed sentence. Therefore, we affirm.

¶2 In 1993 incident to a plea bargain, the State reduced the charges of first-degree intentional homicide while armed, as a party to the crime, both as a completed and as an attempted crime, to charges of first-degree reckless homicide and first-degree reckless injury, each as a party to the crime, in exchange for Abdullah's guilty pleas to the reduced charges. The trial court imposed a twenty-year sentence for the homicide and a ten-year consecutive sentence for the reckless injury.

¶3 In 2005, Abdullah moved *pro se* for sentence modification predicated on an alleged change in parole policy, namely a 1994 letter from then Governor Tommy G. Thompson to the Secretary of the Department of Corrections directing the Department "to pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date [to further t]he policy of this Administration … to keep violent offenders in prison as long as possible under the law." The trial court summarily denied the motion because the trial court did not "expressly rely on parole eligibility as a factor" when it imposed sentence, nor did "any new parole policy" frustrate the purpose of the original sentence, which was community protection. Abdullah sought reconsideration, requesting the trial court to address "each issue raised by the

defendant separately" in his sentence modification motion. The trial court also summarily denied that motion because it was "not required to address nonmeritorious claims individually," and there was nothing in the reconsideration motion that warranted an evidentiary hearing.

¶4 Abdullah appeals from both orders, seeking sentence modification predicated on the alleged change in parole policy, namely that then Governor Thompson directed the Department Secretary to essentially oppose all parole requests by violent offenders. Abdullah asserts that this alleged change in parole policy is a denial of due process of law, an erroneous exercise of discretion, and violative of the constitution's ex post facto clause.

¶5 We conclude that the Thompson correspondence does not constitute a change in parole policy, merely a change in departmental policy. The Thompson correspondence directs the Department Secretary to oppose parole requests from violent offenders as a matter of departmental policy. It is the Parole Commission not the Department however, that determines whether to grant or deny parole requests. *See* WIS. STAT. § 301.03(3) (2005-06) ("the decision to grant or deny parole to inmates shall be made by the parole commission"); *see generally* WIS. STAT. § 15.145(1) (2005-06)[1]. Abdullah has not shown that the Parole Commission has changed its policy on determining whether to grant parole. Without showing a change in parole (as opposed to departmental) policy, there is no need to consider Abdullah's due process, erroneous exercise of discretion and

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

ex post facto arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues).

¶6 Assuming *arguendo*, that Abdullah had shown a change in parole policy, "a change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the [trial] court." ***State v. Franklin***, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1989). Abdullah contends that the trial court considered parole policy. We disagree.

¶7 The trial court merely told Abdullah that by entering a plea bargain to charges reduced from first-degree intentional homicide, which carried a mandatory life sentence, he would be eligible for parole. The trial court also told Abdullah that it was up to the Parole Commission, not the trial court, when to grant parole. Abdullah referred to the trial court's comments on parole policy, made during the guilty plea hearing:

> Trial Court: By entering this plea [to the reduced charges], [the State] take[s] that [parole eligibility date] out of the Court's hands; you understand that? [The trial court] will not be able to sentence you to life imprisonment [as it would have been obliged to do had Abdullah been convicted of the original charge of first-degree intentional homicide. The trial court] will not be able to determine the parole eligibility date; you understand that?
>
> Abdullah: Yes.
>
> Trial Court: That [parole eligibility] will be determined by the parole board. Whatever sentence [the trial court] give[s] you, and you know what [the trial court] gave your co-defendants. [The trial court] may have g[i]ve[n] them the maximum [t]hat they could receive, but they are eligible for parole under whatever deal the parole board has about computing that. In other words, it is not done by the Court. So that's what you[']r[e] facing now.

The trial court made similar parole references when it imposed sentence:

> [The trial court] think[s] a jury could have found them [Abdullah and his accomplices] guilty, all guilty, of intentional homicide. And then the Court would be faced with a different dilemma. [The trial court] would have to determine how long these people should stay in prison. [The trial court] would have to be a parole department by assessing the parole eligibility date if they had been found guilty.
>
> [The trial court] do[es] not have to do that in this case under these facts. The Parole Board [Commission] will determine how long they will stay in. [The trial court] will just determine what sentence is appropriate for the facts and for this particular defendant.

¶8 Notwithstanding our conclusion that Abdullah has not shown a change in parole policy, the trial court did not consider parole policy when it imposed sentence. It merely commented that by agreeing to the plea bargain, Abdullah would be eligible for parole; had he been convicted of the original first-degree intentional homicide charge, the trial court would have been obliged to impose a life sentence. *See* WIS. STAT. §§ 940.01(1); 939.50(3)(a) (1991-92). The trial court's remarks do not reflect any consideration of when Abdullah might be granted parole; it merely determined the length of the sentence it would impose.[2]

[2] In support of Abdullah's contention, he relies on ***Kutchera v. State***, 69 Wis. 2d 534, 552-53, 230 N.W.2d 750 (1975), in which the prosecutor urged the trial court to impose substantial consecutive sentences

> "because otherwise, with the law the way it is today, Your Honor, it is my understanding [Kutchera] could be paroled almost instantly otherwise. And I don't think it would be in the best interests of society, and I don't think it would be justice for this defendant to be paroled instantly."

Id. at 553. Unlike the trial court's general references to the availability of parole in this case, the trial court in ***Kutchera*** was expressly urged to impose both substantial and consecutive sentences because of the impending availability of parole. *See* ***id.*** ***Kutchera*** is distinguishable because in ***Kutchera***: (1) the parole policy had changed from "instant parole" to serving at least one year of a sentence before becoming parole eligible; and (2) substantial and consecutive sentences were imposed precisely to avoid the "instant parole" contemplated at the time sentence was imposed. *See* ***id.*** at 552-53.

In fact, the trial court expressly remarked at sentencing, "[n]ow how long [Abdullah] stays in prison will be up to some other parole authorities." Reviewing the trial court's references to parole in context, they cannot fairly be characterized as sentencing considerations.

¶9 Moreover, once a new sentencing factor has been established, the court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). ***Michels*** further explains that "[t]here must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***Id.***

¶10 The trial court's intent when it imposed sentence was to protect the community. As the trial court explained when it imposed sentence:

> under these facts, the background of this defendant and the situation [the trial court] see[s] here, his rehabilitative needs, protection of the community, gravity of this offense—this calls for the maximum. To say anything less would be to cheapen a life, would be to cheapen the security of our community and the security of our individuals and the lives of our citizens.

Therefore, even if we had concluded that there was a change in parole policy that alleged policy change did not frustrate the trial court's intent—community protection—when it imposed sentence.

¶11 A change in departmental policy is not a change in parole policy by the Parole Commission, which is the decision-maker for parole requests. *See* WIS. STAT. § 301.03(3). Moreover, the trial court's references to parole (available because of the plea bargain, without which Abdullah would have been exposed to the mandatory life sentence for one of the original charges) did not constitute a

consideration of parole policy as contemplated by ***Franklin***. *See* ***Franklin***, 148 Wis. 2d at 14. Even if there had been a change in parole policy, and even if the trial court had considered parole in imposing Abdullah's sentence, the arguably changed policy would not have frustrated the purpose of the original sentence, which was community protection. Consequently, we do not address the due process, erroneous exercise of discretion, and ex post facto claims argued by Abdullah since we conclude that there was no change in parole (as opposed to departmental) policy.[3] For this multitude of reasons, we affirm the trial court's postconviction order denying sentence modification, and its related order denying reconsideration.

By the Court.—Orders affirmed.

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

[3] Furthermore, Abdullah has not preliminarily shown that he was denied parole because of this purported policy change.