COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2504-CR **Cir. Ct. No. 1995CF952157**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN JEROME PETTIGREW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nathan Jerome Pettigrew appeals from an order denying his motion for sentence modification. The issue is whether Pettigrew's confinement beyond his presumptive mandatory release date constitutes a new factor for purposes of sentence modification. We conclude that the parole

commission's refusal to release Pettigrew when he reached his presumptive mandatory release date does not constitute a new factor warranting sentence modification. Therefore, we affirm.

¶2 A jury found Pettigrew guilty of a first-degree sexual assault that occurred May 17, 1995. The trial court imposed a sixteen-year indeterminate sentence. The parole commission denied Pettigrew presumptive mandatory release to parole after he had served two-thirds of his imposed sentence. *See* WIS. STAT. § 302.11(1) (2005-06).[1] Pettigrew moved for sentence modification, which the trial court denied. Pettigrew appeals.

¶3 Preliminarily, judicial review of decisions by the parole commission must be pursued by common law writs of certiorari. *See* WIS. STAT. § 302.11(1g)(d). Pettigrew did not file a petition for a writ of certiorari; he moved for sentence modification. Generally, we would dismiss this appeal for failing to comply with the proper procedure. Pettigrew contends, however, that he is not appealing from the parole commission's decision, but believes that its basis for denying his release to parole constitutes a new sentencing factor. Although it is arguable that he is merely attempting to circumvent the statutory requisite of § 302.11(1g)(d), we afford Pettigrew the benefit of the doubt and review the denial of his sentence modification motion on its merits.

¶4 Pettigrew moved for sentence modification, contending that the trial court presumed that he would be released to parole once he reached his mandatory release date; the parole commission's denial negated that presumption. Stated

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

otherwise, Pettigrew contends that had the trial court realized that he would be confined beyond his mandatory release date, it would have imposed a shorter sentence.

¶5 The defendant must clearly and convincingly prove the existence of a new factor warranting sentence modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-10, 434 N.W.2d 609 (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 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. at 8 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial 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.*** "Whether a set of facts is a 'new factor' is a question of law which we review without deference to the trial court. Whether a new factor warrants a modification of sentence rests within the trial court's discretion." ***Id.*** at 97 (citation omitted).

¶6 The arguable comments from the trial court at sentencing upon which Pettigrew relies are these:

> Something has to be done to protect the community from you for some period of time by incapacitating you and hopefully for a longer period of time by having you on a lengthy period of supervision. And the nature of this crime is such that that has to be an extremely lengthy period of time.

> In light of the fact that there is not a record of serious violence here, [the trial court] do[es]n't believe that the maximum is appropriate. There are no other sexual assault convictions. But as [the trial court] said, there's a drug problem and evidence of prior violence that requires, along with the offense, a lengthy period of supervision. The community needs it. The victim [i]s entitled to some sense of justice and retribution and you clearly have needs, perhaps needs that could be met on a period of probation but needs that can be better met, in [the trial court's] view, by assuring some period of incarceration.

From these comments, Pettigrew contends that the trial court contemplated "a lengthy period of supervision," which will not occur if he is confined beyond his presumptive mandatory release date.

¶7 The trial court disagreed. Its postconviction order explains, in pertinent part, that:

> The … decision to deny presumptive mandatory release to the defendant does not necessarily mean that he will spend the entire sentence in confinement. If the parole commission denies presumptive mandatory release to an inmate, the parole commission shall schedule regular reviews of the inmate's case to consider whether to parole the inmate under section 304.06(1), Stats. § 302.11(1g)(c), Stats. There is no indication that Judge Franke [the trial court judge who imposed sentence] expressly relied upon the defendant's parole eligibility as a factor in determining the length of the sentence, and therefore, the court finds that the Department's action does not constitute a new factor for purposes of sentence modification. In addition, the purpose of the original sentence – punishment, community protection – is not frustrated by the Department's denial of presumptive mandatory release.

¶8 In the context of the entirety of its sentencing remarks, the trial court did not consider whether or when Pettigrew was released to parole as "highly relevant" to the sentence it was about to impose. The trial court contemplated parole, but did not consider it necessary to the sentence it would impose.

¶9 Pettigrew contends that the trial court "could not have known" that the parole commission would require that he serve his entire sentence in confinement. The trial court is presumed to know the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. The trial court is thus presumed to know of WIS. STAT. § 302.11(1g)(am) (1995-96), authorizing "presumptive" mandatory release for those inmates who had committed a serious felony after April 20, 1994, and of § 302.11(1g)(c) (1995-96), requiring "regular reviews of [an] inmate's case to consider whether to parole [an] inmate" who had previously been denied presumptive mandatory release. We therefore also reject Pettigrew's contention that the parole commission's denial of presumptive mandatory release "was [a circumstance] not then in existence or because, even though it was then in existence, it was unknowingly overlooked by [the trial court and] all of the parties." *See* ***Rosado***, 70 Wis. 2d at 288. Moreover, failure to release Pettigrew to parole in no way frustrated the purposes of the sentence, which were principally protection of the community, and also punishment. As the assistant attorney general contended in the State's respondent's brief, "a Parole Commission decision to keep Pettigrew under the close supervision occasioned by confinement rather than the looser supervision of parole surely would not have disappointed the sentencing court." We agree. Denying Pettigrew his release to parole after he had served beyond his presumptive mandatory release date is not a new sentencing factor warranting sentence modification.

By the Court.—Order affirmed.

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