COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1772-CR **Cir. Ct. No. 1994CF943564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AVERY D. SHELTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Wedemeyer,[1] Fine and Kessler, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Avery D. Shelton appeals from an order denying his sentence modification motion. The issue is whether the presumptive mandatory release statute, WIS. STAT. § 302.11(1g) (created April 21, 1994), constitutes a new sentencing factor warranting sentence modification.[2] We conclude that the trial court was aware of the current applicable law, namely the presumptive mandatory release statute, when it sentenced Shelton; thus, § 302.11(1g) is not a new factor. Additionally, we will not consider the presumptive mandatory release statute as a new factor because the trial court did not mention Shelton's parole eligibility or mandatory release date in its sentencing remarks. Therefore, we affirm.

¶2 Shelton pled guilty to first-degree reckless homicide, in violation of WIS. STAT. § 940.02(1) (1993-94), reduced from first-degree intentional homicide. Shelton committed that offense on September 13, 1994. On March 10, 1995, the trial court sentenced Shelton to a thirty-year indeterminate sentence.

¶3 On April 21, 1994, WIS. STAT. § 302.11(1g) became effective, which altered the mandatory release law insofar as offenders convicted of certain specified crimes that occurred between April 21, 1994 and December 31, 1999, were now only presumed to be entitled to release from prison on the applicable mandatory release date because the offenders were now also subject to the parole commission's approval. *See* § 302.11(1g)(am) and (b). Thus, the homicide that

[2] WISCONSIN STAT. § 302.11 was amended effective April 21, 1994, at which time subsection (1g) was also created. All references to § 302.11 are to the foregoing applicable version of the Wisconsin Statutes.

We use the phrases presumptive mandatory release statute and WIS. STAT. § 302.11(1g) interchangeably.

Shelton committed on September 13, 1994 is governed by § 302.11(1g), subjecting him to the parole commission's approval not to deny him presumptive mandatory release. *See* § 302.11(1g)(b).

¶4 Shelton moved for sentence modification, claiming that WIS. STAT. § 302.11(1g) is a new factor. The trial court denied the motion, ruling that "'a change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the [trial] court,'" citing ***State v. Franklin***, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1989), and then confirmed that the transcript of Shelton's sentencing did not indicate that the trial court expressed any reliance on parole eligibility as a factor when it imposed sentence.

¶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. 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).

> The existence of a new factor must be shown by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9. "In order 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 court expressly relies on parole eligibility." ***Id.*** at 15.

State v. Delaney, 2006 WI App 37, ¶9, 289 Wis. 2d 714, 712 N.W.2d 368.

¶6 The trial court did not mention parole eligibility or the presumptive mandatory release date in its sentencing remarks. The following remarks of the trial court when it sentenced Shelton confirm that WIS. STAT. § 302.11(1g) is not a new factor warranting sentence modification. After reciting the primary sentencing factors, the trial court stated that:

> The defendant went from exposure of life imprisonment with a parole eligibility date probably in – when he was 70 or 80 to a maximum prison term of 40 years. The State felt due to the evidence this was in the State's best interest and the Court accepted a plea, but it's still a homicide case. It's the most serious crime a person can be charged with in the State of Wisconsin.
>
> In fact, in New York they just passed the death penalty for first degree intentional homicide. If [Shelton] would have been tried for that in New York and convicted, he would have been sentenced to death.

In addressing Shelton's character, the trial court stated that Shelton "shows remorse but he hasn't accepted responsibility which [the trial court] think[s] is important…. It's easy to say I was there, but someone else did it." The trial court then continued:

> The matrix here calls for 120 to 240 months and [the trial court] believe[s] that is inadequate under the circumstances. [The trial court] believe[s] there are aggravating circumstances, specifically how the incident happened, specifically that [the victim] was shot in the back, specifically the attitude of [Shelton] in this case.
>
> It's great to say you're remorseful but [the trial court] just question[s] the validity of it; but [the trial court] can't immediately just say you get the maximum.…
>
> [The trial court] ha[s] to reject the contention of [the defense] attorney that 20 years is adequate. As far as the victim's family's concerned, the maximum sentence, 40 years, is inadequate. As far as [Shelton']s family is

> concerned, the maximum would be unduly harsh, and [the trial court] ha[s] to weigh all the facts and circumstances here…[the trial court] also ha[s] to take in consideration that this case could have gone to trial … and you could have been convicted of first degree intentional homicide, and if convicted, you probably … would have been in prison for most of your life.
>
> [The trial court] believe[s] the most appropriate sentence under the circumstances is to sentence you in excess of the matrix for the reasons stated on the record, the recommendation of the D.A. and the manner in which the victim was killed in this case. So [the trial court] can't accept the matrix and … sentence[s] you in excess of it but not to the maximum.

¶7 We conclude that the substance of the trial court's sentencing remarks, and its failure to mention Shelton's parole eligibility indicate that WIS. STAT. § 302.11(1g) was not "'a fact or set of facts highly relevant to the imposition of sentence.'" ***Franklin***, 148 Wis. 2d at 8 (quoting ***Rosado***, 70 Wis. 2d at 288). We consequently affirm the trial court's order denying Shelton's motion for sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).