COURT OF APPEALS DECISION DATED AND FILED

January 19, 2011

A. John Voelker
Acting 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. 2010AP191-CR

Cir. Ct. No. 1991CF911569

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD ALLEN TABAT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Gerald Allen Tabat, *pro se*, appeals from an order denying his motion for postconviction relief and from an order denying his motion to reconsider. The circuit court rejected his claim that an alleged change in parole policy warrants sentence modification. Because we conclude that the alleged

policy change is neither a new factor nor an *ex post facto* law that retroactively increased his punishment, we affirm.

BACKGROUND

¶2 Tabat pled guilty in 1991 to three counts of robbery, two counts of second-degree sexual assault, and one count of attempted second-degree sexual assault, all as a habitual criminal. The charges stemmed from a six-month crime spree during which Tabat attacked women who were waiting for busses or leaving their parked cars late in the evening. The circuit court imposed an aggregate indeterminate prison term of fifty-five years. In 2009, he filed the postconviction motions underlying this appeal. He asserted that an alleged change in Wisconsin's parole policy is a new factor requiring sentence modification and that the alleged policy change improperly lengthened his prison term retroactively.[1] The circuit court disagreed. Tabat unsuccessfully moved for reconsideration, and he now appeals.

DISCUSSION

¶3 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 … it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Additionally, the new factor "must be an event or development [that] frustrates the purpose of the original sentence." ***State v.***

[1] Tabat previously sought sentence modification in 1998, and the circuit court denied the claim. Tabat's earlier postconviction litigation has no bearing here.

Michels, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). To obtain a sentence modification based on an alleged new factor, the defendant must demonstrate the existence of the new factor by clear and convincing evidence. ***State v. Koeppen***, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. If a new factor exists, the defendant must then demonstrate that it warrants sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a set of facts constitutes a new factor is a question of law that we review *de novo*, but whether an existing new factor warrants sentence modification is a question that rests in the circuit court's discretion. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242.

¶4 Tabat was sentenced in 1991 under Wisconsin's indeterminate sentencing scheme.[2] "Under that system, a convicted defendant generally became parole eligible after serving 25% of the sentence." ***State v. Delaney***, 2006 WI App 37, ¶11, 289 Wis. 2d 714, 712 N.W.2d 368. Additionally, under indeterminate sentencing, an inmate generally "reached his or her mandatory release date after serving two-thirds of the stated sentence." ***State v. Crochiere***, 2004 WI 78, ¶6, 273 Wis. 2d 57, 681 N.W.2d 524 (footnote omitted); *see also* WIS. STAT. § 302.11(1) (1991-92).

¶5 Tabat asserts that the circuit court imposed his sentences with an "awareness of parole" but that a change in state policy "in effect abolished parole in Wisconsin for all ... violent offenders who do see the parole board." He traces

[2] The legislature thoroughly revised Wisconsin's sentencing scheme with the passage of 1997 Wis. Act 283 and 2001 Wis. Act 109. ***State v. Delaney***, 2006 WI App 37, ¶11 n.2, 289 Wis. 2d 714, 712 N.W.2d 368. The revisions took effect long after the circuit court sentenced Tabat in the instant case, and they have no bearing on the structure of Tabat's sentences.

the alleged change in parole policy to a 1994 letter written by then-Governor Tommy Thompson to the former secretary of the Department of Corrections. The letter expressed Thompson's belief that "mandatory release for violent criminals is wrong." Further, the letter instructed the DOC secretary to "pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date" because "the policy of [the Thompson] Administration is to keep violent offenders in prison as long as possible under the law." Tabat characterizes the letter as a "policy directive" concerning parole, and he believes that the policy is a new factor requiring modification of his sentences. Tabat is not correct.

¶6 First, we have previously determined that the Thompson letter "had nothing to do with parole." *See* ***Delaney***, 289 Wis. 2d 714, ¶21. The letter refers to mandatory release, not parole eligibility. ***Id.***, ¶16. Therefore, the letter did not "abolish parole" and cannot support Tabat's claim for sentence modification.[3] Indeed, we explicitly held in ***Delaney*** that the letter "did not constitute or produce a change in parole policy." ***Id.***, ¶24. To the extent that Tabat seeks to reverse that conclusion with arguments based on statistics, documents generated in other proceedings, his own unsuccessful efforts to obtain parole, and other assorted materials, he cannot succeed. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (court of appeals cannot overrule, modify, or withdraw language from a published decision of the court of appeals).

[3] Tabat does not deny that he remains statutorily eligible for parole pursuant to WIS. STAT. § 304.06(1)(b) (2007-08). All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶7 Second, a change in Wisconsin's parole policy, even if shown, is not a new factor for purposes of sentence modification unless the circuit court expressly relied on parole eligibility when imposing sentence. *See* ***Franklin***, 148 Wis. 2d at 15. "If the court does base its sentence on the likely action of the parole board, [the court] has the power to protect its own decree by modifying the sentence if a change in parole policy occurs." ***Id.*** Tabat does not demonstrate that the sentencing court relied on parole policy in his case.

¶8 Tabat points to the following portion of the circuit court's remarks to support his claim for relief:

> Mr. Tabat, as an individual you are I think above the average person. I think you have got a lot of abilities but there are an awful lot of changes that have to occur now. I think you have forfeited your right to live in a civilized community for some time until there is a demonstration you have gotten rid of whatever is inside of you that causes this rage so that you can control yourself, so that you understand what conditions you should and should not put yourself into, so that you can come back some day and be a decent, law abiding, contributing citizen. A great deal – when that will occur isn't going to be directly determined by what I do here today but is going to be pretty much determined by how you respond when you're in our State Penal System.
>
> I can impose years. The prison people have the authority to keep you there for a long, long, long, long time. Or if there is improvement and you show that you are able to handle things, you can be back in – in the community again. It's up to them what's – after I have finished today.

¶9 These remarks do not demonstrate that the circuit court based its sentence on any "likely" action by the parole board. *See* ***id.*** The circuit court did not premise its sentence on any likely release date, or promise Tabat that he was likely to be granted discretionary parole at any time based on the sentence imposed.

¶10 Moreover, a defendant seeking relief on the basis of an alleged new factor must show "some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the [circuit] court." ***Michels***, 150 Wis. 2d at 99. Tabat has not made that showing.

¶11 The primary purpose of the sentences here was community protection. The circuit court stated that Tabat "is no novice to the criminal justice system," and that he had been engaged in criminal activity "for a long, long time." In the circuit court's view, "the enormity of this spree of savage behavior" demonstrated the need for "behavioral constraints." The circuit court therefore concluded that "because of the nature of these events, the numbers of them, the series, the way they were executed, I think it requires a number of --- a considerable period of time in our State Prison System." The circuit court's remarks do not demonstrate that discretionary parole was critical to the purpose of the sentences. *See* ***id.*** Accordingly, Tabat did not satisfy his burden to show that any alleged change in parole policy constitutes a new factor in his case.

¶12 Tabat additionally proffers an argument that the governor's "policy directive" and its implementation retroactively lengthen his sentences and therefore constitute violations of "the *Ex Post Facto* Clause."[4] Again, Tabat is not correct. "An *ex post facto* law includes any law which was passed after the commission of the offense for which the party is being tried." ***Delaney***, 289 Wis. 2d 714, ¶23 (italics added). In ***Delaney***, we summarily rejected the argument that the Thompson letter constitutes a violation of the *ex post facto* clauses,

[4] Both the United States constitution and the Wisconsin constitution contain clauses barring *ex post facto* laws. *See* U.S. CONST. ART. 1, §§ 9-10; WIS. CONST. ART. 1, §12. Tabat does not cite a specific constitutional provision.

explaining that "the Thompson letter did not have the force of law." *See* ***id.***, ¶24. Our rejection of an *ex post facto* challenge in ***Delaney*** requires us to reject Tabat's similar challenge here. *See* **Cook**, 208 Wis. 2d at 190.

By the Court.—Orders affirmed.

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