COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1279-CR **Cir. Ct. No. 1997CF970299**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEANDRA BROWN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Leandra Brown, *pro se*, appeals from orders denying his motions to modify his sentence and to reconsider the adverse decisions. Because Brown fails to demonstrate the existence of a new factor warranting sentence modification, we affirm.

¶2 Brown pled guilty to one count of second-degree sexual assault of a child committed in January 1997. *See* WIS. STAT. § 948.02(2) (1995-96). The crime was at that time, and is today, statutorily defined as a "serious felony." *See* WIS. STAT. § 302.11(1g)(a)2. (1995-96); WIS. STAT. § 302.11(1g)(a)2. (2009-10).[1] On June 4, 1997, the circuit court imposed and stayed an indeterminate fifteen-year prison sentence and placed Brown on probation for eight years. He failed to complete his probation, however, and he is presently serving his prison sentence.

¶3 In late 2009 and early 2010, Brown filed a sequence of motions for postconviction relief. He complained that he was not granted parole when he reached his presumptive mandatory release date, and he contended that this constituted a new factor warranting sentencing modification. The circuit court correctly rejected his contentions.[2]

¶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 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, a new factor must frustrate the purpose of the original sentence imposed. *See* ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a set of facts constitutes a new factor is a question of law that this court reviews *de novo*. ***State v. Lechner***, 217 Wis. 2d

[1] All further references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Stanley A. Miller presided over Brown's 1997 sentencing. Judge Miller is no longer on the bench. The Honorable Kevin E. Martens presided over the postconviction motions underlying this appeal.

392, 424, 576 N.W.2d 912 (1998). We conclude that Brown fails to show a new factor because the possibility that he would not be paroled before he completed his prison sentence existed at the time of sentencing.

¶5 Brown is serving an indeterminate sentence.[3] An indeterminate sentence has "the effect of a sentence at hard labor for the maximum term fixed by the court, subject to the power of actual release from confinement by parole by the department [of corrections]." WIS. STAT. § 973.013(1)(b). Release on parole is governed, in part, by WIS. STAT. § 302.11. When the circuit court sentenced Brown, the statute provided, in pertinent part: "*[e]xcept as provided in sub[]. (1g)* ... each inmate is entitled to mandatory release on parole by the department [of corrections]. The mandatory release date is established at two-thirds of the sentence." *See* WIS. STAT. § 302.11(1) (1995-96) (emphasis added). This language remains in force today for prisoners serving indeterminate sentences. *See* WIS. STAT. §§ 302.11(1), 302.11(1z).

¶6 Brown focuses on the statutory language providing for mandatory release after serving two-thirds of an indeterminate sentence, but his release date is controlled by the exception in WIS. STAT. § 302.11(1g). As relevant here, that subsection provides, as it did at the time of Brown's sentencing, that a "mandatory release date ... is a presumptive mandatory release date for an inmate who is serving a sentence for a serious felony committed on or after April 21, 1994." *See* § 302.11(1g)(am), WIS. STAT. § 302.11(1g)(am) (1995-96). The presumptive mandatory release scheme permits the parole commission to deny parole to an

[3] Although Wisconsin currently employs a determinate sentencing scheme, determinate sentencing in this state first applies to offenses committed on or after December 31, 1999. *See* ***State v. Stenklyft***, 2005 WI 71, ¶16, 281 Wis. 2d 484, 697 N.W.2d 769.

otherwise eligible inmate who has served two-thirds of a sentence for a serious felony if the commission concludes that the inmate poses too great a risk to the public or if the inmate has refused necessary treatment. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶10, 246 Wis. 2d 814, 632 N.W.2d 878. Given the statutory scheme in place when the circuit court sentenced Brown, the possibility that the parole commission would not release Brown immediately after he served two-thirds of his sentence did not first develop after the sentencing proceeding. *See* ***Kluck***, 210 Wis. 2d at 7.

¶7 Brown argues, however, that the sentencing court "did not want [him] to exceed the 10 years in prison." He thus implies that his release after ten years was an essential purpose of the sentence. *See* ***Michels***, 150 Wis. 2d at 99. To address this aspect of Brown's postconviction claims, the circuit court sought a copy of the sentencing transcript. The circuit court determined that a transcript was never filed and that the court reporter's notes are no longer available. *See* SCR 72.01(47) (requiring court reporters to maintain the verbatim notes taken during a court proceeding for ten years after a hearing). The circuit court therefore concluded that Brown cannot demonstrate the sentencing court's "specific intent." Brown now insists that because he cannot obtain a sentencing transcript to support his argument, he is entitled to immediate release. He is wrong.

¶8 "It has been said repeatedly that a postconviction motion for relief requires more than conclusory allegations." ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. This rule remains applicable when a defendant's postconviction motion contains a claim that relevant transcripts are unavailable. *See, e.g.* ***State v. Perry***, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), and ***State v. Baker***, 169 Wis. 2d 49, 76, 485 N.W.2d 237 (1992).

¶9 In ***Perry***, the supreme court considered a defendant's claim that gaps in the available transcripts hampered a direct appeal from a judgment of conviction. ***Perry***, 136 Wis. 2d at 98. The ***Perry*** court determined that a defendant in such circumstances has a burden to show that a transcript is missing, in whole or in part, and to show "a 'colorable need'" for the missing transcript. ***Id.*** at 108. The court explained: "the claim should be more than frivolous and the lacunae of the record should be of such substance as to lend credence to the claim that error was arguably prejudicial had the missing segment been produced." ***Id.***

¶10 In ***Baker***, the supreme court considered the proper procedure when a defendant cannot obtain relevant transcripts for a collateral attack on a conviction based on a claimed violation of a constitutional right. ***Baker***, 169 Wis. 2d at 55, 76. The ***Baker*** court determined that the defendant must launch the collateral attack by submitting affidavits or other evidence sufficient to make a *prima facie* showing to support the claim. ***Id.*** at 77.

¶11 Here, Brown offered only a conclusory assertion that the sentencing court intended him to serve no more than ten years in confinement. He argues that the "[j]udgment [r]oll is proof" of his contention, but he does not explain what he sees in the judgment roll that he believes supports his position. Our own review of the docket entries discloses that the circuit court imposed and stayed a fifteen-year sentence and ordered that Brown serve it consecutively to any other sentence. Nothing in this entry or in any other component of the docket constitutes evidence bolstering Brown's bald assertion that the purpose of his sentence was to ensure his release from confinement after ten years.

¶12 Brown failed to demonstrate that a new factor exists that might warrant sentence modification. Accordingly, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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