COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-1108-CR
03-1109-CR

Cir. Ct. Nos. 00CF000233
01CF000018

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN V. YANICK, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Martin Yanick, Jr. appeals from an order that denied his motion for sentence modification. Yanick believes he is entitled to a sentence reduction because the legislature reduced the maximum potential

penalties for the crimes for which he was convicted after he had been sentenced. We disagree and affirm for the reasons explained below.

BACKGROUND

¶2 On August 8, 2001, Yanick was convicted and sentenced on charges of escape and a fifth offense of operating a motor vehicle while intoxicated (OWI). The trial court imposed concurrent terms of thirty-six months of initial confinement and twenty months of extended supervision.

¶3 At the time the offenses were committed in 2000, escape was classified as a Class D felony punishable by up to ten years' imprisonment, or a fine of up to $10,000, or both. OWI-5th was an unclassified felony punishable by imprisonment from six months to five years, or a fine of $600 to $2,000, or both. *See* WIS. STAT. §§ 946.42(3)(a), 939.50(3)(d), 346.63(1)(a), 346.65(2)(e) (1999-2000). Pursuant to 2001 Wis. Act 109, §§ 840, 588, and 457, which took effect February 1, 2003, escape and OWI-5th were both reclassified as Class H felonies punishable by up to six years' imprisonment, or a fine up to $10,000, or both.

¶4 Yanick moved to reduce his sentences, arguing that the new penalties constituted a new factor. The trial court denied his motion, and he appeals.

DISCUSSION

¶5 A trial court has inherent authority under the common law to modify a sentence based on a new factor. A new sentencing factor is a fact or set of facts highly relevant to the imposition of a sentence, but not known to the trial judge at the time of sentencing, which operates to frustrate the purpose of the original sentence. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654

N.W.2d 242, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Mar. 13, 2003) (citations omitted). Whether a particular set of facts constitutes a new factor is a question of law which we review *de novo*. ***Id.*** Here, the trial court correctly determined, as a matter of law, that a reduction of the statutory penalty for a crime does not constitute a new factor warranting sentence modification under common law. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547-48, 335 N.W.2d 399 (1983).

¶6 Yanick points out that the newly enacted sentencing legislation allows an inmate who has served at least 75% of his or her initial confinement to petition for a sentence adjustment based upon a change in the law that would have resulted in a shorter period of confinement. *See* WIS. STAT. § 973.195(1r)(b)3 (2001-02);[1] 2001 Wis. Act 109, § 1143m (*eff.* Feb. 1, 2003). Yanick concedes that he is not yet eligible for consideration under the terms of the section because he has not yet completed the required percentage of the initial confinement portion of his sentence. He appears to maintain, however, that the very enactment of § 973.195(1r)(b)3, as part of a larger overhaul of the sentencing laws, which had been implemented in stages, somehow modified the common law rule to allow consideration of a change in a sentencing statute as a new factor at any time. We disagree. Because the sentence adjustment statute requires an inmate to have served at least 75% of the initial confinement time before raising a claim based on a change in a sentencing law, it cannot fairly be read to modify the common law standard for sentence modification claims brought prior to satisfying that prerequisite.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶7 Finally, Yanick asks this court to declare that the circuit court erroneously determined that he will not be eligible to apply for sentence adjustment even after having served 75% of his initial confinement time. We note that whether WIS. STAT. § 973.195 is available to inmates who were sentenced prior to its effective date is an issue currently pending in another case before this court. *See* ***State v. Stenklyft***, 03-1533-CR. The issue is premature in Yanick's case, however, and we will not issue an advisory opinion on the subject here. *See* ***State v. Robertson***, 2003 WI App 84, ¶32, 263 Wis. 2d 349, 661 N.W.2d 105.

By the Court.—Order affirmed.

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