COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2027-CR **Cir. Ct. No. 2006CF5598**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON DEARLO WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Brandon Dearlo Williams, *pro se*, appeals the circuit court's order denying his motion for sentence modification. He argues that the circuit court mistakenly believed he was eligible for the Challenge

Incarceration Program, and that this mistaken belief constitutes a "new factor" entitling him to sentencing modification. We disagree and affirm.

¶2 Williams was convicted of three charges: one count of felony intimidation of a victim with use or attempted use of force, as a party to a crime, one count of first-degree reckless injury while armed, as a party to a crime, and one count of first-degree recklessly endangering safety while armed. On the first count, Williams received nine years of imprisonment, with five years of initial confinement and four years of extended supervision. On the second count, he received twelve years of imprisonment, with eight years of initial confinement and four years of extended supervision. On the third count, he received seven years of imprisonment, with five years of initial confinement and two years of extended supervision. The sentences run concurrently.

¶3 Williams argues that the circuit court's sentencing comments show that it incorrectly believed that he was eligible for the Challenge Incarceration Program, and that this mistake is a "new factor" entitling him to resentencing. Assuming for the sake of argument that the circuit court made a mistake in determining Williams' eligibility for the Challenge Incarceration Program, an issue we need not decide, we conclude that any potential error would not constitute a new factor.

¶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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or

set of facts constitutes a new factor is a question of law, which we review *de novo*. ***State v. Lechner***, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998).

¶5 The supreme court recently clarified the law in this area in ***State v. Harbor***, 2011 WI 28, ___ Wis. 2d ___, 797 N.W.2d 828. ***Harbor*** explains that the ***Rosado*** new factor test had been incorrectly modified by cases that added the additional requirement that the new factor must "'frustrate[] the purpose of the original sentencing.'" ***Harbor***,¶41 (citation omitted). The supreme court explained:

> We take this opportunity to clarify the law. We conclude that frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor.
>
> The purposes underlying a sentence include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. Certainly, a fact that frustrates the purpose of the original sentence likely satisfies the ***Rosado*** test, provided that the fact was also unknown to the circuit court at the time of sentencing. Any fact that frustrates the purpose of the original sentence would generally be a new fact that is highly relevant to the imposition of sentence.
>
> Yet, the converse may not always be true. A circuit court might conclude that its entire approach to sentencing would have been different had it been aware of a fact that is highly relevant to the imposition of sentence. Even so, the court may not be able to conclude that the new fact, which would have changed its entire approach to sentencing, necessarily frustrates the purpose of the original sentence it imposed.

Id., ¶¶48-50 (quotation marks and citations omitted).

¶6 Here, the circuit court's primary focus in sentencing Williams was the seriousness of the crime; Williams led a group of people who armed themselves and fired shots into the home of a family of a homicide victim because

the group was upset that their friend had been convicted of the murder. The circuit court also focused on the "mob mentality" behind the crime, questioning "what kind of mob thinking went on to allow you and these other guys to get so totally outside the bounds of civilized society." The circuit court said that a substantial prison term was necessary for public safety and to give Williams time to change the "abhorrent" thought process that led to this crime. The circuit court mentioned Williams' eligibility for the Challenge Incarceration Program only briefly at the end of its sentencing comments when it stated that it did not oppose Williams' eligibility for the Challenge Incarceration Program. The circuit court did not base the length of Williams' confinement on his eligibility for the Challenge Incarceration Program and did not suggest in any way that Williams' eligibility was integral to the sentence structure. Because the circuit court's determination of Williams' Challenge Incarceration Program eligibility was not highly relevant to the sentence, Williams has not shown the existence of a new factor.[1]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[1] The circuit court concluded, as we do, that no new factor existed, but based its decision on the fact that Williams' ineligibility for the Challenge Incarceration Program did not frustrate the purpose of the original sentence. Under ***State v. Harbor***, 2011 WI 28, ___ Wis. 2d ___, 797 N.W.2d 828, which had not been decided when the circuit court issued its decision, the fact that the purpose of the original sentence was not frustrated is not, by itself, sufficient grounds to find that no new factor exists. However, the circuit court's reliance on the pre-***Harbor*** case law in its order denying the motion for sentence modification is of no legal import here because our review of this question is *de novo*.