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DISTRICT I

October 8, 2024

To:

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You are hereby notified that the Court has entered the following opinion and order:

2023AP1223-CR State of Wisconsin v. Freddie D. Nash (L.C. # 1997CF973910)

Before White, C.J., Donald, P.J., and Colón, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Freddie D. Nash, *pro se*, appeals from orders of the circuit court denying his motion for sentence modification and his motion for reconsideration of that order. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

Nash was sentenced in February 1998 after pleading guilty to first-degree reckless homicide and to being a felon in possession of a firearm. The sentencing court imposed a forty-

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

five year sentence for the reckless homicide charge, and a consecutive two year sentence for the firearm charge. Nash's conviction was upheld by this court both on direct appeal, *see* ***State v. Nash***, No. 2006AP429-CR, unpublished slip op. (WI App Dec. 28, 2006), and in a collateral challenge, *see* ***State v. Nash***, No. 2010AP143, unpublished slip op. (WI App Mar. 8, 2011).

The offenses were committed in July 1997. At that time, the sentencing court was required to set a parole eligibility date at sentencing for certain serious felonies committed between April 21, 1994, and December 31, 1999. *See* WIS. STAT. § 973.0135(2)(b). The maximum date for parole eligibility was two-thirds of the sentence imposed. ***Id.*** This was a mandatory release date under WIS. STAT. § 302.11(1); however, an amendment to that statute, enacted in 1994, changed it to a *presumptive* mandatory release date. WIS. STAT. § 302.11(1g)(am); *see also* 1993 Wis. Act 194, §2.

In Nash's motion for sentence modification, he asserts that the adoption of WIS. STAT. § 302.11(1g)(am) is a new factor. 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. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). To prevail, a defendant must satisfy a two-prong test that requires the defendant: (1) to demonstrate by clear and convincing evidence that a new factor exists; and (2) to show that the alleged new factor justifies sentence modification. ***Id.***, ¶¶36-38. Whether a fact or set of facts constitutes a new factor is a question of law that this court considers *de novo*, while determining whether a new factor warrants sentence modification rests in the circuit court's discretion. ***Id.***, ¶33.

Nash argues that the statutory amendment is a new factor because it "effectively lengthens the time a defendant spends incarcerated." He asserts that the parole policy was necessarily considered by the sentencing court when it imposed his sentence, and contends that because the court never used the term "presumptive mandatory release," it had "no clue" that the parole policy had changed. Thus, Nash contends that the sentencing court "anticipated and had an expectation" that he would be released on his parole eligibility date; that is, upon completion of two-thirds of his sentence.

Nash made substantially the same argument in a previous motion for sentence modification, which was rejected by the circuit court and by this court. *See* ***State v. Nash***, No. 2016AP2247-CR, unpublished op. and order (WI App May 31, 2018). We concluded that Nash had not demonstrated that the sentencing court was unaware of the statutory change to WIS. STAT. § 302.11(1g)(am), nor had he established that the change was a highly relevant factor in the imposition of his sentence. ***Nash***, No. 2016AP2247-CR, at 2.

As a result, the circuit court rejected Nash's current motion for sentence modification on the grounds that this issue was already litigated in a prior postconviction motion. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We agree that Nash's motion is procedurally barred for that reason. *See* ***id.***

Furthermore, Nash's motion also fails on the merits. Nash has again failed to show that the statutory change was not known to the sentencing court at the time of sentencing. *See* ***Harbor***, 333 Wis. 2d 53, ¶40. The amended statute was enacted almost four years before Nash's sentencing. His argument, that the sentencing court's lack of reference to a *presumptive* mandatory release date indicates that it was not aware of the statutory change, is not compelling.

See ***State v. Ziller***, 2011 WI App 164, ¶13, 338 Wis. 2d 151, 807 N.W.2d 241 ("While a circuit court must articulate the basis for its sentence, it is not required to use magic words.").

In fact, the sentencing court stated that it set Nash's parole eligibility date at the maximum because he "was not a good risk for any early release on parole." As noted in our previous decision, it cannot logically be construed from the record that the sentencing court intended for Nash to serve *only* two-thirds of his sentence. *See* ***Nash***, No. 2016AP2247-CR, at 2-3.

Indeed, the sentencing court focused on punishment and the need to protect the community, characterizing Nash as "extremely dangerous" and "a serious risk to re-offend." Thus, Nash has also not demonstrated that the parole policy was highly relevant in the imposition of sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

In short, not only is Nash's motion for sentence modification procedurally barred, *see* ***Witkowski***, 163 Wis. 2d at 990, but he has also not demonstrated that the amended statutory parole policy is a new factor, *see* ***Harbor***, 333 Wis. 2d 53, ¶40. Accordingly, we affirm the circuit court's orders denying his motions for sentence modification and reconsideration.

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals