COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2259-CR **Cir. Ct. No. 2010CF5441**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY EDWARD THORNTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Edward Thornton appeals from a judgment of conviction entered upon his guilty pleas to one count of armed robbery and one count of attempted armed robbery. He also appeals from an order denying postconviction relief. Thornton claims that repeal of the statutes formerly

permitting inmates to earn positive adjustment time that potentially reduced their terms of initial confinement is a new factor warranting modification of his sentences. We disagree and affirm.

BACKGROUND

¶2 The relevant facts are undisputed. On January 25, 2011, the circuit court sentenced Thornton for the Class C felonies of armed robbery and attempted armed robbery. *See* WIS. STAT. §§ 943.32(2), 939.32 (2009-10).[1] The circuit court imposed two consecutive eight-year terms of imprisonment, each bifurcated as four years of initial confinement and four years of extended supervision.

¶3 At the time of Thornton's sentencing, an inmate sentenced for a Class C felony was eligible to "earn one day of positive adjustment time for every 5.7 days served that [the inmate did] not violate any regulation of the prison or [did] not refuse or neglect to perform required or assigned duties." *See* WIS. STAT. § 304.06(1)(bg)2. The statute permitted an offender who earned positive adjustment time to petition for release from confinement after serving the initial confinement portion of his or her bifurcated sentence less positive adjustment time earned. *See* ***id.*** Pursuant to WIS. STAT. § 304.06(1)(bk), the circuit court had the option of accepting or rejecting the determination that an inmate had earned positive adjustment time. The circuit court could thus permit an early release from incarceration or could order the inmate to remain in prison for a period that did not exceed the inmate's term of initial confinement. *See* ***id.***

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

¶4 WISCONSIN STAT. §§ 304.06(1)(bg) and 304.06(1)(bk) were two of the various statutes providing for and regulating positive adjustment time that the legislature repealed as of August 3, 2011. *See* 2011 Wis. Act 38, §§ 58-59; *see also* 2011 Wis. Act 38, §§ 38-41, 60-61, 88. Accordingly, Thornton is no longer eligible to earn positive adjustment time, although he is eligible to petition for early release from confinement based on positive adjustment time that he earned before the effective date of repeal. *See* ***id.***, § 96.

¶5 Thornton moved for postconviction relief on several grounds. As relevant here, he contended that the repeal of the law permitting him to earn positive adjustment time is a new factor justifying sentence modification. The circuit court rejected the claim, and this appeal followed.

DISCUSSION

¶6 A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. ***Id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.*** Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶37.

¶7 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.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

¶8 When a defendant demonstrates the existence of a new factor, the circuit court decides in the exercise of its discretion whether sentence modification is warranted. ***Id.***, ¶37. We review that decision for an erroneous exercise of discretion. ***Id.***, ¶33.

¶9 Our resolution of Thornton's claim in this case is governed by our recent decision in ***State v. Carroll***, 2012 WI App 83, No. 2011AP1922-CR. There, the defendant claimed that the repeal of the law permitting inmates to earn positive adjustment time under WIS. STAT. § 302.113(2)(b) constituted a new factor warranting sentence modification.[2] ***Carroll***, 2012 WI App 83, ¶5. In resolving the claim, we determined that the potential to earn positive adjustment time is not highly relevant to an inmate's sentence unless the circuit court relies on that potential at sentencing. *See* ***id.***, ¶10. We then examined the "actual words" used by the sentencing court to determine whether it relied on the availability of positive adjustment time. *See* ***id.***, ¶¶10-11. Ultimately, we rejected the defendant's claim in ***Carroll***, explaining that the sentencing court in that case "did not mention, much less discuss, positive adjustment time." *See* ***id.***, ¶11.

¶10 In the instant case, too, the circuit court did not mention or discuss positive adjustment time at sentencing. Thus, the sentencing remarks demonstrate that the circuit court did not rely on positive adjustment time when fashioning Thornton's sentences.

[2] Pursuant to WIS. STAT. § 302.113(2)(b), inmates sentenced for misdemeanors or for certain Class F to Class I felonies were eligible to earn one day of positive adjustment time for every two days served without violating prison regulations or refusing or neglecting required or assigned duties. Effective August 3, 2011, the legislature repealed § 302.113(2)(b). *See* 2011 Wis. Act. 38, § 38.

¶11 Moreover, the circuit court stated in its postconviction order that "the court was not concerned about [Thornton's] eligibility for positive adjustment time." We do not disturb a circuit court's factual findings unless they are clearly erroneous. *See* ***State v. Carter***, 2010 WI 77, ¶20, 327 Wis. 2d 1, 785 N.W.2d 516. Here, the circuit court's determination is supported by the record of the sentencing proceeding. That record is silent on the issue of positive adjustment time and thus reflects no circuit court concern with the issue. Accordingly, we conclude as a matter of law that repeal of the potential to earn positive adjustment time is not a new factor justifying sentence modification here.

¶12 We note Thornton's contention that the circuit court erroneously analyzed his claim for sentence modification by determining that "the defendant's ineligibility for positive adjustment time under the new legislation does not frustrate the purpose of the original sentence[s] in this case." Thornton correctly states 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." *See* ***Harbor***, 333 Wis. 2d 53, ¶48. The circuit court's determination regarding frustration of the sentencing purpose, however, has no effect on our ultimate conclusion. First, a circuit court is not barred from considering whether an alleged new factor frustrates the purpose of a sentence. *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451. Second, we affirm correct circuit court decisions, including those reached for the wrong reasons. ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924. Here, we independently determine as a matter of law that the repeal of eligibility to earn positive adjustment time is not a new factor in this case.

¶13 Finally, Thornton argues that the repeal of the law allowing him to earn positive adjustment time results in his "los[s of] a benefit that existed at the time he was sentenced.... [He] is attempting to avoid the post-sentencing extension of his initial confinement." We addressed and rejected virtually the same argument in ***Carroll***. *See* ***id.***, 2012 WI App 83, ¶12. Applying the teachings of that case, we conclude that Thornton's claim of a lost benefit is speculative, because the claim requires accepting the assumption that the circuit court would agree to apply any positive adjustment time he earned towards a reduction of his term of confinement. *See* WIS. STAT. §§ 304.06(1)(bg)2., 304.06(1)(bk)2.b.; *see also* ***Carroll***, 2012 WI App 83, ¶12. We are not persuaded to accept that assumption. Therefore, we reject the claim that repeal of the potential to earn positive adjustment time extends Thornton's time in confinement. For all of the foregoing reasons, we affirm the decision of the circuit court.

By the Court.—Judgment and order affirmed.

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