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DISTRICT II

December 27, 2013

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

2013AP1033-CR	State of Wisconsin v. Cory D. Brotherton (L.C. # 2011CF425)
2013AP1034-CR	State of Wisconsin v. Cory D. Brotherton (L.C. # 2012CF7)
2013AP1035-CR	State of Wisconsin v. Cory D. Brotherton (L.C. # 2012CF9)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

In these consolidated appeals, Cory D. Brotherton appeals from judgments of conviction and an order denying his motion to modify sentence. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the judgments and order of the circuit court.

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[1] All references to the Wisconsin Statutes are to the 2011-12 version.

In February 2012, Brotherton was convicted following pleas of no contest to burglary as a party to a crime, theft as a party to a crime, and possession of narcotics. The circuit court sentenced Brotherton to an aggregate sentence of six years of initial confinement and four years of extended supervision.

In March 2013, Brotherton filed a motion to modify his sentence on grounds that new factors existed and that he was sentenced on inaccurate information. The circuit court denied the motion. This appeal follows.

On appeal, Brotherton first contends that he is entitled to sentence modification on the basis of new factors. Specifically, he maintains that delays in the availability of alcohol and other drug abuse (AODA) treatment programs and the Earned Release Program constitute new factors.

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. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶37-38. 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 (quoting ***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 that this court decides independently. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. If the fact or set of facts do not constitute a new factor as a matter of law, we need go no further in our analysis. ***Id.***, ¶38.

Upon review of the record, we conclude that delays in the availability of AODA treatment programs and the Earned Release Program do not constitute new factors. At sentencing, the circuit court's overriding concerns were the seriousness of Brotherton's offenses and the need to protect the public. The only treatment program the court discussed and authorized was the Earned Release Program, and the court specifically conditioned that authorization upon Brotherton first serving "at least" two years of his initial confinement so as to avoid his premature release. After that two-year period had run, the court recognized that it would be up to the department of corrections to decide when, if at all, Brotherton could participate in the program.[2] In light of the foregoing, Brotherton cannot demonstrate that delays in the availability of AODA treatment programs and the Earned Release Program are highly relevant to the imposition of his sentence or a fact not known by the court.

In a related argument, Brotherton next contends that he is entitled to sentence modification because he was sentenced on the basis of inaccurate information. He appears to assert that the "inaccurate information" was the circuit court's alleged belief that he would be immediately placed in the Earned Release Program unless the court established a waiting period for eligibility and that he would receive AODA counseling during his initial confinement.

A defendant has a "due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. When a defendant seeks resentencing, the defendant must establish by clear and convincing evidence both that the

[2] The circuit court acknowledged its inability to make such predictions, stating, "Who knows when the program is available, when the prison system would find Mr. Brotherton suitable to be in the program…."

information at issue is inaccurate and that the sentencing court actually relied upon it. ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. We independently review a defendant's due process challenge to the sentence. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶9.

Again, reviewing the record, we conclude that the circuit court did not rely upon inaccurate information in sentencing Brotherton. As noted above, the court ordered a delay of "at least" two years to participate in the Earned Release Program and recognized that the department of corrections would ultimately determine when, if at all, Brotherton could participate in the program. Moreover, the court did not order that other AODA treatment programs be made available to Brotherton immediately upon his initial confinement. As a result, Brotherton has failed to establish that he was sentenced on the basis of inaccurate information.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals