OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 2, 2014

To:

Hon. David L. Borowski
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Edward Lee Hennings 322846
Chippewa Valley Correctional Treatment Facility
2909 E. Park Ave.
Chippewa Falls, WI 54729

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

2013AP2105-CR State of Wisconsin v. Edward Lee Hennings (L.C. #1996CF3053)

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

Edward Lee Hennings, *pro se*, appeals an order denying his claim that a new factor warrants sentence modification. He also appeals the order denying his motion for reconsideration.[1] Based upon our review of the briefs and record, we conclude at conference that

[1] The Honorable David L. Borowski presided over the postconviction proceedings underlying this appeal.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We affirm.

Hennings shot and killed another person on June 11, 1996. A jury found Hennings guilty of first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (1995-96). At sentencing in November 1996, the circuit court imposed the maximum forty-year sentence. *See* WIS. STAT. § 939.50(3)(b) (1995-96). Hennings, by counsel, pursued a postconviction motion, which the circuit court denied.[3] He appealed, and we affirmed. *See* ***State v. Hennings***, No. 1997AP1654-CR, unpublished slip op. (WI App June 30, 1998) (***Hennings I***). In 1999, Hennings, proceeding *pro se*, filed a second postconviction motion, which the circuit court denied.[4] We affirmed. *See* ***State v. Hennings***, No.1999AP2793, unpublished slip op. (WI App Dec. 27, 2000) (***Hennings II***). The circuit court denied Hennings's third postconviction motion in 2001, and he did not appeal.

Hennings, still representing himself, filed his fourth postconviction motion in 2005.[5] He alleged that a new factor, namely, a change in parole policy allegedly reflected in a 1994 letter written by then-Governor Tommy G. Thompson, warranted sentence modification. The circuit

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] The Honorable David A. Hansher presided over Hennings's trial and sentencing and denied Hennings's first postconviction motion.

[4] The Honorable Bonnie L. Gordon presided over Hennings's second postconviction motion.

[5] The Honorable David A. Hansher presided over Hennings's third and fourth postconviction motions.

court rejected his claim, and we affirmed. *See* ***State v. Hennings***, No. 2005AP692-CR, unpublished slip op. (WI App Dec. 13, 2005) (***Hennings III***).

In August 2013, Hennings, assisted by counsel, filed the postconviction motion underlying this appeal. In that motion, his fifth, he again contended that a new factor warranted relief. As grounds, Hennings alleged that the circuit court was unaware at sentencing that he was subject to the law governing presumptive mandatory release and sentenced him believing that he would be released on parole on or before his mandatory release date. The circuit court rejected the claim and his motion to reconsider. This appeal followed.

Generally, a prisoner sentenced in Wisconsin for a crime committed before December 31, 1999, is entitled to mandatory release on parole after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony, including first-degree reckless homicide, between April 21, 1994, and December 31, 1999.[6] The parole commission is authorized to deny such prisoners presumptive mandatory release for the reasons listed in § 302.11(1g)(b).[7] According to Hennings, the remarks of the circuit court during the

[6] The law governing presumptive mandatory release first went into effect on April 21, 1994. *See* 1993 Wis. Act. 194, §§ 1-7; WIS. STAT. § 991.11 (1993-94).

[7] Pursuant to WIS. STAT. § 302.11(1g)(b)1.-2., "[t]he parole commission may deny presumptive mandatory release on one or more of the following grounds: 1. Protection of the public. 2. Refusal by the inmate to participate in counseling or treatment that the social service and clinical staff of the institution determines is necessary."

original sentencing proceedings show it lacked awareness that he was subject to presumptive mandatory release and thus might not be released on parole after serving two-thirds of his sentence.

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). Hennings alleges that he is "now being classified" as an inmate subject to presumptive mandatory release and that this change in his parole eligibility is a new factor warranting sentencing modification.[8]

The circuit court previously considered and resolved this issue. In the postconviction motion underlying ***Hennings III***, Hennings argued that the circuit court "assum[ed] that Hennings would be paroled earlier than his M.R. date. In reality, inmates who serve long sentences go to 'Presumptive M.R.'" Hennings went on to argue: "a substantial parole policy change has occur[r]ed, which changes [Hennings's] eligibility fo[r] parole. This was not known to the [c]ourt in November 1996 and is highly relevant to the trial court[']s original sentencing decision." The circuit court rejected his contentions, explaining: "this court did not expressly

[8] Hennings complains that the circuit court improperly conducted an independent investigation into the allegations he offered in his postconviction motion. As the circuit court acknowledged, it independently obtained information from the Department of Corrections before deciding Hennings's motion. "Judges are generally prohibited from independently gathering evidence." ***State v. Vanmanivong***, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76. Because our decision is based on considerations unrelated to the circuit court's independent inquiry, we need not and do not consider this matter further. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we resolve appeals on narrowest possible ground).

rely on parole eligibility as a factor in determining sentence, and therefore any change in parole policy does not constitute a new factor for purposes of sentence modification."

Hennings thus has litigated and lost his claim that a change in his parole eligibility constitutes a new factor. Although he couched his claim in 2005 somewhat differently from the way that he couches it now, his claim is not new. Therefore, it is barred. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Last, we note Hennings's contention that, absent sentence modification, "he will probably serve the entire 40 years." Hennings acknowledges, however, that he had served only seventeen years of his forty-year sentence when he filed his most recent postconviction motion. He is therefore approximately nine years away from his presumptive mandatory release date. *See* WIS. STAT. § 302.11(1)-(1g). Thus, as the circuit court determined, any claim that a new factor exists based on actual denial of presumptive mandatory release is premature. *See* ***State v. Armstead***, 220 Wis. 2d 626, 635, 583 N.W.2d 444 (Ct. App. 1998) (we do not decide issues based on hypothetical or future facts).

Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals