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 II

December 10, 2014

To:

Hon. Michael J. Piontek
Circuit Court Judge
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

James E. Overturf, #315642
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2013AP2545-CR State of Wisconsin v. James E. Overturf (L.C. # 1995CF1075)

Before Brown, C.J., Reilly and Gundrum, JJ.

James Overturf appeals from a circuit court order denying his sentence modification motion. Based upon 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.

In 1996, Overturf was convicted on his guilty pleas to three counts of child enticement as a repeat offender. The circuit court sentenced him to three consecutive ten-year terms. In 1997

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

we affirmed Overturf's conviction. ***State v. Overturf***, 1997AP848-CRNM, unpublished op. and order (WI App June 11, 1997).

In August 2013, Overturf filed a *pro se* motion to modify his sentence. In that motion, Overturf argued that presumptive mandatory release under WIS. STAT. § 302.11(1g) (1995-96) was a new factor warranting sentence modification. Overturf alleged that his trial counsel did not make him aware of presumptive mandatory release. Overturf sought a reduction of each of his sentences by one-third and mandatory release to parole in November 2015. Such a modification would achieve what Overturf claimed that the sentencing court had intended: he should serve only twenty of the thirty years imposed. The court denied Overturf's motion after a non-evidentiary hearing because the sentencing judge intended for Overturf to serve the sentence he imposed. Overturf appeals.

On appeal, Overturf argues that his trial counsel was ineffective for not advising him about the consequences of the presumptive mandatory minimum rules. Overturf's ineffective assistance of trial counsel claims are not preserved for appeal because trial counsel did not appear at the hearing on Overturf's motion. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In the absence of counsel's testimony, we cannot address this issue.

Overturf bore the burden to show a new factor. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. 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." ***Id.***, ¶¶40, 52 (citation omitted).

At his 1996 sentencing, the circuit court noted the ten-year maximum term for each count and Overturf's prior sex offenses. The court agreed with the State that if the court could impose more than the maximum, it would do so. The court stated that it expected Overturf to serve the entirety of his maximum sentence, and the court clearly intended to sentence Overturf to the maximum available sentence. There is no indication in the sentencing rationale that the court took any other perspective. The court referred to parole eligibility, but that reference did not detract from or undermine the court's clear intention to sentence Overturf to the maximum required by his case. There is no basis in the sentencing record for Overturf's claim that the circuit court intended for him to serve less than the maximum sentence imposed. The presumptive mandatory minimum rules are not a new factor.

Finally, we note that to enter proper guilty pleas, Overturf was not required to know the collateral consequences of those pleas. ***State v. Yates***, 2000 WI App 224, ¶6, 239 Wis. 2d 17, 619 N.W.2d 132. Presumptive mandatory release is a collateral consequence of a plea. ***Id.***, ¶17. Therefore, Overturf was not entitled to relief even if, as he claims, he lacked knowledge of the presumptive mandatory release provisions of WIS. STAT. § 302.11(1g) (1995-96) when he entered his guilty pleas.[2]

Upon the foregoing reasons,

[2] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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

Diane M. Fremgen
Clerk of Court of Appeals