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DISTRICT IV

December 16, 2014

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

2013AP1892-CR State of Wisconsin v. Wallace B. Baskerville (L.C. # 1997CF306)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Wallace Baskerville, pro se, appeals a circuit court order that denied Baskerville's motion for sentence modification. 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 summarily affirm.

In 1998, Baskerville was convicted of mayhem, aggravated battery, and bail-jumping. The court sentenced Baskerville to thirty years in prison for the mayhem conviction, with

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

concurrent prison sentences of ten years for the battery conviction and five years for the bail-jumping conviction. In a postconviction motion, Baskerville argued that the mayhem and battery charges were multiplicitous, which is a species of Double Jeopardy claim. The circuit court rejected that argument. In 2004, we reversed the order denying postconviction relief and remanded for further proceedings on Baskerville's multiplicity claim. On remand, the circuit court vacated the aggravated battery conviction and sentence, evidently based on the claim of multiplicity.

In July 2013, Baskerville moved for sentence modification. Baskerville argued that two new factors justified sentence modification: (1) that Baskerville's sentencing for mayhem and aggravated battery had violated Baskerville's rights under the Double Jeopardy Clause; and (2) that parole legislation and policy had changed. The circuit court denied the motion. The court focused on Baskerville's parole argument, and determined that Baskerville failed to establish a new factor because Baskerville did not establish that the sentencing court actually relied on Baskerville's parole eligibility.

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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted source omitted). We review de novo whether facts constitute a new factor. ***State v. Boyden***, 2012 WI App 38, ¶6, 340 Wis. 2d 155, 814 N.W.2d 505. If a new factor exists, the circuit court may, in its discretion, modify the sentence. ***Id.***

Baskerville contends first that he established a new factor by showing that his convictions and sentence for both mayhem and battery violated the Double Jeopardy Clause. At the outset, Baskerville contends that the circuit court erred by failing to specifically address this argument. It is true that the circuit court did not specifically address this part of Baskerville's motion. Rather, the court addressed only Baskerville's new factor claim based on a change in parole policy. Nonetheless, we affirm the order denying Baskerville's motion because we conclude, as a matter of law, that Baskerville failed to prove the existence of a new factor based on the Double Jeopardy violation evidently found by the circuit court. *See* ***Rolland v. County of Milwaukee***, 2001 WI App 53, ¶6, 241 Wis. 2d 215, 625 N.W.2d 590 (WI App 2000) ("[A]n appellate court may affirm a trial court's correct ruling irrespective of the trial court's rationale.").

Baskerville argues that the Double Jeopardy violation found by the circuit court is a new factor because the court's sentencing decision as to the mayhem conviction was influenced by the battery conviction. However, rather than citing any facts that would show that the circuit court relied on the battery conviction in imposing sentence for mayhem, Baskerville relies on ***State v. Morris***, 108 Wis. 2d 282, 290 n.5, 322 N.W.2d 264 (1982), *abrogated on other grounds by* ***State v. Kelty***, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886, for the proposition that, following an order vacating one conviction on multiplicity grounds, resentencing is warranted as to the remaining conviction. We are not persuaded.

In ***State v. Church***, 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141, the supreme court explained that "[a] double jeopardy bar to one conviction and sentence in a multi-count case does not operate to invalidate the sentences on all the remaining counts, nor does it necessarily invalidate the sentence on the specific surviving parallel count which gave rise to the

double jeopardy challenge." Thus, "'there is nothing invalid or illegal' about the sentences on the counts that remain after a successful double jeopardy challenge." ***Id.*** (quoted source omitted). While "resentencing is procedurally and constitutionally permissible if the invalidation of one sentence on double jeopardy grounds disturbs the overall sentence structure or frustrates the intent of the original dispositional scheme," resentencing is not necessary, let alone required, if "the invalidation of one count on double jeopardy grounds has no affect at all on the overall sentence structure." ***Id.*** Such is the case here; the circuit court vacated Baskerville's concurrent sentence for battery based on a Double Jeopardy violation, leaving intact Baskervile's valid sentence for mayhem. Because Baskerville has not established that the battery conviction was highly relevant to the court's sentencing as to mayhem, and the sentences were imposed concurrently, the order vacating the battery conviction does not constitute a new factor warranting sentence modification.

Next, Baskerville contends that the enactment of WIS. STAT. § 302.11(1g) and a change in parole policy to release fewer inmates to parole constitute a new factor because the circuit court overlooked those changes at sentencing. Baskerville points out that the legislature enacted § 302.11(1g) in 1994, four years prior to Baskerville's 1998 sentencing. *See* 1993 Wis. Act 194, § 2. Baskerville asserts that, due to the enactment of § 302.11(1g), Baskerville's mandatory release date is presumptive only, and he is less likely to be released to parole due to changes in parole policy. He then contends that, because there was no mention of the change in parole law and policy at his sentencing, the circuit court must not have been aware of those changes. Baskerville cites ***Kutchera v. State***, 69 Wis. 2d 534, 230 N.W.2d 750 (1975), for the proposition that a change in parole eligibility can constitute a new factor. Again, we determine that Baskerville has not shown a new factor in this case.

As Baskerville concedes, WIS. STAT. § 302.11(1g) went into effect four years before Baskerville was sentenced, and nothing said by the sentencing court indicated that the court was unaware of that legislation. We presume that judges know and apply the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Additionally, Baskerville does not cite to any statements by the sentencing court indicating that the court relied on the date it believed Baskerville would be eligible for parole. There is nothing in the sentencing transcript that indicates that parole eligibility was relevant to the court's sentencing determination. *See* ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) ("In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing.").

Baskerville also argues that the circuit court erred by addressing Baskerville's motion as brought under WIS. STAT. § 973.19, when the motion invoked the court's inherent rather than statutory authority to modify Baskerville's sentence. *See* ***State v. Noll***, 2002 WI App 273, ¶¶9-11, 258 Wis. 2d 573, 653 N.W.2d 895 (explaining that a defendant may seek sentence modification either as a matter of right under § 973.19, or under the inherent power of the circuit court based on a new factor that warrants sentence modification). While it is true that the circuit court cited § 973.19 as the basis for Baskerville's motion, the court also recognized that § 973.19 was inapplicable because Baskerville's motion was not made within ninety days of sentencing. The court then recognized that Baskerville's motion sought resentencing based on a new factor, and determined that Baskerville had not established a new factor warranting sentence modification. Accordingly, we discern no reversible error in the court's citation to § 973.19.

Baskerville also contends that the circuit court erred by denying his motion without a hearing. Baskerville cites ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996), for the

proposition that a circuit court must hold an evidentiary hearing if a postconviciton motion alleges facts which, if true, would entitle the defendant to relief. However, as we have explained, the facts asserted in Baskerville's motion do not constitute a new factor warranting sentence modification. Accordingly, the circuit court did not err by denying the motion without a hearing.

Finally, Baskerville argues that this court should exercise its discretionary authority to reverse under WIS. STAT. § 752.35 because the real controversy has not been fully heard and there has been a miscarriage of justice. Baskerville reasserts the arguments set forth above and again contends that he is entitled to a hearing on his motion. As we have explained, we reject those arguments on the merits and determine that Baskerville is not entitled to a hearing. Accordingly, we decline to reverse under § 752.35.

To the extent that Baskerville raises other arguments not explicitly addressed in this opinion, they have been considered and rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

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

Diane M. Fremgen
Clerk of Court of Appeals