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DISTRICT II

January 21, 2015

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

2014AP1134-CR State of Wisconsin v. Bryan M. Hantula (L.C. #2008CF579)

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

Bryan Hantula appeals pro se from an order denying his motion for sentence modification and from an order denying his motion for reconsideration. He argues that the trial court's failure to include its oral statement regarding risk reduction sentence (RRS) eligibility in the original judgment of conviction constitutes a new factor. We disagree and affirm. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2011-12).[1]

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

Hantula pled guilty to sexual assault of a child under sixteen in violation of WIS. STAT. § 948.02(2). The trial court imposed a ten-year sentence, bifurcated as five years' initial confinement and five years' extended supervision, and determined that Hantula was eligible for the Challenge Incarceration and Earned Release Programs (CIP, ERP).[2] The court then asked the parties if there was anything further to discuss. Defense counsel asked the court to consider RRS. Hantula confirmed to the court that he was willing to participate in programming. *See* WIS. STAT. § 973.031 (2009-10). The court responded:

> The Court is of the opinion that you would benefit from risk reduction and will allow you to participate in that and will order participation in that with the Department of Corrections to the extent that they can set up a specific plan for you.

The court said it "hope[d]" the Department of Corrections (DOC) would set out a program for Hantula to help him "get [his] life on track."

The judgment of conviction, entered March 2, 2011, indicated that the court had found Hantula eligible for CIP and ERP, but it did not mention RRS. A corrected judgment, entered on February 18, 2014, states: "The court orders a risk reduction sentence, and the defendant agrees to participate in assessment and programming" (upper case omitted). The record does not reflect what prompted the correction.

A month later, Hantula moved pro se for sentence modification citing a new factor. He alleged that because the original judgment of conviction did not reflect the court's oral pronouncement regarding RRS, he was unable to participate in a treatment program that would

[2] Hantula's WIS. STAT. § 948.02(2) conviction rendered him ineligible for ERP or CIP. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

have allowed a sentence reduction. *See* WIS. STAT. § 302.042(4) (2009-10). The law permitting a court to order RRS was repealed effective August 3, 2011. *See* 2011 Wis. Act 38, §§ 13, 92.

The court denied the motion. It ruled that participation in RRS was not highly relevant to sentencing because it had already imposed and explained the ten-year sentence when Hantula's ability to take part in that program was raised. The court denied Hantula's pro se motion for reconsideration for the same reason. This appeal followed.

"Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citing ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983)). A defendant seeking sentence modification has the burden to demonstrate by clear and convincing evidence the existence of a new factor. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). A new factor is a fact or set of facts "highly relevant to the imposition of sentence" but unknown to the court at the time of sentencing, either because the factor did not yet exist or it was overlooked by all parties. ***Harbor***, 333 Wis. 2d 53, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, the analysis ends. ***Id.***, ¶38.

Nothing suggests that Hantula's ability to participate in RRS was a highly relevant factor in Hantula's sentence. The trial court did not mention RRS when explaining its sentencing rationale. Only after the court set forth its sentencing rationale, imposed sentence, informed him of the conditions of his extended supervision, and described other obligations attendant to his punishment did Hantula ask the court to consider RRS. The court said it "hope[d]" the DOC could fashion an RRS program for him and authorized his participation "to the extent that [DOC]

can set up a specific plan for you." The court did not revisit the length or structure of the sentence it already had pronounced. Hantula's sentence was not crafted with an eye to a risk reduction sentence.

Hantula has not demonstrated by clear and convincing evidence the existence of a new factor. Therefore, sentence modification is not warranted.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals