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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:

2014AP908-CR State of Wisconsin v. Allen L. Heckert (L.C. #1995CF190)

Before Brown, C.J., Neubauer, P.J. and Reilly, J.

Allen L. Heckert appeals pro se from an order denying his motion for sentence modification. 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 order of the circuit court.

In February 1997, Heckert was convicted following a no contest plea to first-degree sexual assault of a child. The circuit court sentenced Heckert to twenty years in prison.

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

In April 2014, Heckert filed a motion for sentence modification on the ground that a new factor existed. The circuit court denied his motion. This appeal follows.

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* ***id.***, ¶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.

On appeal, Heckert renews his argument that he is entitled to sentence modification on the basis of a new factor. Specifically, he maintains that the circuit court sentenced him without knowledge of a change in the law affecting his mandatory release date.

In 1993, the legislature amended WIS. STAT. § 302.11 to make the mandatory release date, otherwise established at two-thirds of a sentence, only presumptive for prisoners who committed certain felonies, including first-degree sexual assault of a child. 1993 Wis. Act 194. Although this amendment went into effect nearly three years before his sentencing, Heckert claims that the circuit court was unaware of it.

We are not persuaded that Heckert has established by clear and convincing evidence that the circuit court was unaware of this change in the law. To begin, we presume that the circuit court knows the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Moreover, the circuit court's comments at sentencing demonstrate that it was aware of the mandatory release statute as well as the possibility that the parole commission would deny Heckert's presumptive mandatory release.[2] Accordingly, we conclude that the circuit court properly denied Heckert's motion.

Upon the foregoing reasons,

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

[2] At one point, the circuit court observed, "The problem with giving [Heckert] a jail term less than the maximum is that if I give him say 10, at the end of 10 years, he's free of the system. In fact, he's free of the system earlier than 10 years because *if he reaches his minimum mandatory time and gets out on parole*, they don't revoke, they don't send him back to prison; he's finished his minimum mandatory time." (Emphasis added.) The court's use of the word "if" shows that it did not believe that Heckert's release on parole was guaranteed.