



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

January 28, 2015

To:

Hon. Wilbur W. Warren, III
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Christopher G. Wren
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Wade A. Hawkins 486553
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2014AP1182-CR

State of Wisconsin v. Wade A. Hawkins (L.C. #2008CF258)

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

Wade A. Hawkins 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 August 2008, Hawkins was convicted following a guilty plea of armed robbery as a party to a crime. The circuit court sentenced him to ten years of initial confinement followed by

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

eight years of extended supervision. The court declined to make Hawkins eligible for either the Challenge Incarceration Program (CIP) or the Earned Release Program (ERP).

In October 2009, Hawkins filed a motion for sentence modification under WIS. STAT. RULE 809.30. In it, he asked the circuit court to reconsider his eligibility for CIP and ERP. The court granted the motion and ordered that the judgment of conviction be amended to make Hawkins eligible for both programs after he had served six years of initial confinement.

In December 2013, Hawkins filed another motion for sentence modification on the basis of alleged new factors. Specifically, Hawkins maintained that (1) it was unknown to the parties that the department of corrections' policy governing entrance into CIP/ERP superseded the circuit court's eligibility date, (2) a recent misdemeanor contempt conviction stemming from the same case shed new light on the court's sentencing considerations,² and (3) the presentence investigation report (PSI) was both inaccurate and unreliable. 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

² Hawkins was convicted of misdemeanor contempt for refusing to testify at a trial of a co-defendant.

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.

Here, we are not persuaded that the items identified by Hawkins amount to new factors. To begin, there is nothing in the record to suggest that the department of corrections’ policy governing entrance into CIP/ERP is a fact highly relevant to the imposition of Hawkins’ sentence. Again, all the circuit court did was make Hawkins eligible for the programs; it did not mandate his participation in them. Likewise, there is nothing in the record to suggest that Hawkins’ subsequent misdemeanor conviction is a fact highly relevant to his sentence. As for the PSI, we note that Hawkins’ various complaints concerning it were either brought to the court’s attention at sentencing or otherwise already known. For these reasons, we conclude that the court properly denied Hawkins’ motion.³

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

³ Hawkins also contends that the department of corrections does not have any discretion to deny an inmate participation in ERP if the circuit court has declared the inmate eligible to participate. Because this argument was not raised in the circuit court, we do not address it. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved generally will not be considered on appeal).