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DISTRICT I

June 23, 2016

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

2015AP1356-CR State of Wisconsin v. Alonzo J. Gray (L.C. # 2000CF4559)

Before Curley, P.J., Kessler and Brash, JJ.

Alonzo J. Gray, *pro se*, appeals an order denying his claim that a new factor warrants sentence modification. He also appeals the denial of his motion for reconsideration. 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 (2013-14).[1] We affirm.

Gray shot and killed another person on November 23, 1998. In due course, he pled guilty to first-degree reckless homicide while armed. *See* WIS. STAT. §§ 940.02(1), 939.63 (1997-98).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In February 2001, he received a forty-year sentence. In April 2015, after pursuing several *pro se* postconviction motions and two appeals, Gray filed the sentence modification motion at issue here, claiming that a new factor warrants relief. Specifically, Gray alleged that the sentencing court erroneously believed he would be entitled to mandatory release from prison to parole after serving two-thirds of his sentence when, in fact, he is subject to the law of presumptive mandatory release under which a convicted person may be required to remain incarcerated throughout the entire sentence imposed. The circuit court rejected the claim and then denied reconsideration.[2] Gray appeals.

Generally, a prisoner sentenced for a crime committed in Wisconsin before December 31, 1999, is entitled to mandatory release on parole after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony, including first-degree reckless homicide, between April 21, 1994, and December 31, 1999. The parole commission is authorized to deny such prisoners presumptive mandatory release for the reasons listed in § 302.11(1g)(b).[3]

According to Gray, the remarks of the sentencing court show it intended him to remain imprisoned for no more than two-thirds of his sentence and further show that the court did not

[2] The Honorable John J. DiMotto presided over Gray's sentencing hearing. The Honorable Jeffrey A. Wagner presided over the postconviction proceedings underlying this appeal.

[3] Pursuant WIS. STAT. § 302.11(1g)(b)1.-2., the parole commission may deny presumptive mandatory release "on one or more of the following grounds: 1. Protection of the public. 2. Refusal by the inmate to participate in counseling or treatment that the social service and clinical staff of the institution determines is necessary."

know he was subject to WIS. STAT. § 302.11(1g) and therefore might remain incarcerated for forty years. Gray directs our attention to the following remarks:

> [Your family] can be with you. Both when you are in prison on a limited basis and then when you are finally released on parole, because this is not a truth in sentencing case.[4] You have to serve one-quarter of the sentence I impose, the maximum is two-thirds, at which time you would be paroled. Your family will get you back.
>
> ...
>
> The sentence I have imposed is a substantial sentence. But as I indicated, it's not a truth in sentencing. This is a sentence where you can prove by your behavior and conduct in prison that perhaps you need to be released or should be released short of your mandatory release date.

Gray argues that, because he is not guaranteed release upon reaching his presumptive mandatory release date, a new factor exists warranting sentence modification.

A circuit court may modify a criminal sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden of proving that a new factor exists. *See* ***id.***, ¶36. 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 (citation omitted). Whether a fact or set of facts satisfies this standard presents a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need not go any further in its analysis. ***Id.***, ¶38. If the defendant shows that a new

[4] Truth-in-sentencing laws first applied to crimes committed on or after December 31, 1999. *See* ***State v. Stenklyft***, 2005 WI 71, ¶16, 281 Wis. 2d 484, 697 N.W.2d 769. Under truth-in-sentencing, offenders receive determinate bifurcated sentences and are not eligible for parole. *See* ***id.***, ¶¶16-17.

factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

Gray contends that WIS. STAT. § 302.11(1g), the presumptive mandatory release statute, is a new factor as defined in ***Harbor*** because the remarks of the sentencing court reflect it either did not know about or overlooked the statute at the time of sentencing. *See* ***id.***, 333 Wis. 2d 53, ¶40. Gray fails, however, to carry his burden to prove either that the statute was not in existence at the time of sentencing or that the statute was overlooked by all of the parties. *See* ***id.*** First, the statute was in existence in 2001: the law governing presumptive mandatory release went into effect on April 21, 1994. *See* 1993 Wis. Act 194, §§ 1-7; WIS. STAT. § 991.11 (1993-94). Second, Gray has not shown that the statute was overlooked by all of the parties. Specifically, he has not demonstrated that he and his lawyer were unaware of the statute—even if the trial judge may have overlooked the statute when discussing Gray's future release. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. Thus, Gray does not show that § 302.11(1g) is a new factor here.

Gray also contends that "the new factor in this case is the sentencing court's firm position that Gray would not have to serve more than two-thirds of the sentence handed down.... [T]he court sentenced him to forty years under the impression that he would serve only two-thirds of that sentence." In his view, he is entitled to sentence modification now because the parole commission may in the future rely on WIS. STAT. § 302.11(1g) to keep him in custody for any or all of the final third of his sentence.

Our analysis of this argument is guided by the discussion in ***State v. Franklin***, 148 Wis. 2d 1, 434 N.W.2d 609 (1989). There, our supreme court considered how to assess a new

factor claim when the alleged new factor involves parole policy. *See* ***id.*** at 13-15. The ***Franklin*** court explained that, before a circuit court may modify a sentence based on alleged changes in parole policy, the defendant must show that the new parole policy has '"thwarted"' the sentencing judge's intent. *See* ***id.*** at 14 (citation omitted).

In this case, Gray cannot show that any parole decision has thwarted the sentencing judge's intent because Gray has not yet served the time in prison that he concedes the judge contemplated he might serve before he is paroled. To the contrary, the record reflects that Gray is approximately twelve years away from his presumptive mandatory release date. WISCONSIN STAT. §302.11(1g) allows, but does not require, the Department of Corrections to keep an inmate in custody beyond his or her presumptive mandatory release date. Thus, Gray may be paroled at any time within the next twelve years, before he reaches or passes his presumptive mandatory release date.[5]

Accordingly, as the circuit court determined, Gray's new factor claim is premature because Gray fails to show he must serve more of his sentence than he believes the circuit court intended. Any contention that the circuit court's intent has been thwarted by application of WIS. STAT. § 302.11(1g) is simply not ripe for decision. We do not decide issues based on hypothetical or future facts. *See* ***State v. Armstead***, 220 Wis. 2d 626, 635, 583 N.W.2d 444 (Ct. App. 1998).

Therefore,

[5] Gray's postconviction submissions include an attachment showing that the parole commission considered him for parole in July 2014, and he received a twenty-four month deferral at that time.

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

Diane M. Fremgen
Clerk of Court of Appeals