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DISTRICT II

July 20, 2016

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

2015AP2096-CR

State of Wisconsin v. Terrill K. Lawhorn (L.C. #2014CF916)

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

Terrill Lawhorn appeals from a judgment convicting him of possessing heroin with intent to deliver as a second and subsequent offense and from an order denying his postconviction motion seeking sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

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

Lawhorn pled guilty to possessing heroin with intent to deliver. At sentencing, the circuit court found that Lawhorn was forty years old, committed a grave offense, and had at least two prior drug convictions (possession with intent to deliver cocaine in 2005 and possession of cocaine in 2008). The court deemed not credible Lawhorn's claim that he was merely a middleman and not a heroin dealer. The court observed that substance abuse treatment would not change Lawhorn's conduct because Lawhorn denied a substance abuse problem, claiming that he rarely drank, did not have a problem with marijuana and had only used heroin for the three weeks preceding his arrest in this case. The court found that confinement was necessary to protect the public from drug dealers and deter other drug dealers. The court deemed Lawhorn ineligible for the Challenge Incarceration Program and the Substance Abuse Program because Lawhorn denied having a substance abuse problem and the court saw no indication that Lawhorn wanted to change his life. Therefore, the court declined to give Lawhorn an opportunity for early release without making the necessary changes. The court imposed an eight-year term (four years of initial confinement and four years of extended supervision).

Postconviction, Lawhorn sought sentence modification.² In his motion, Lawhorn conceded a substance abuse problem, which he alleged was a new factor. The circuit court denied the motion without an evidentiary hearing.³ In so doing, the court noted the evidence that Lawhorn was a drug dealer, the court previously stated its reasons for denying eligibility for the

² Lawhorn also sought plea withdrawal, which he does not raise on appeal.

³ The appendix to the appellant's brief filed by counsel does not comply with WIS. STAT. RULE 809.19(2)(a). The appendix merely contains the circuit court's order denying Lawhorn's postconviction motion for reasons stated on the record. The appendix should have contained that portion of the postconviction motion hearing transcript that would inform this court of the circuit court's findings and its reasons for denying the motion. Future appendices filed in this court must comply with the Rules of Appellate Procedure or sanctions may be imposed.

Challenge Incarceration Program and the Substance Abuse Program, and the need to protect the public by confining Lawhorn. Lawhorn appeals.

On appeal, Lawhorn argues that the circuit court erroneously denied his sentence modification motion without a hearing. We disagree.

A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

We conclude that the circuit court properly exercised its discretion when it denied Lawhorn’s motion without a hearing because the record does not demonstrate a new factor or any other basis to modify his sentence.

Lawhorn had the burden to establish a new factor by clear and convincing evidence. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. 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.” *Id.*, ¶40 (citation omitted). Whether Lawhorn has demonstrated a new factor presents a question of law that we decide independently of the circuit court. *Id.*, ¶36.

On this record, Lawhorn's postconviction motion admission that he has a substance abuse problem does not constitute a new factor. The circuit court's primary focus at sentencing was on the gravity of the offense and the need to protect the public in light of Lawhorn's refusal to accept responsibility for his criminal conduct. Therefore, the fact that Lawhorn later acknowledged a substance abuse problem is not a fact highly relevant to the imposition of sentence. *Id.*, ¶40. Lawhorn did not establish a new factor warranting sentence modification.

The circuit court stated its reasons for the sentence it imposed and its refusal to deem Lawhorn eligible for either the Challenge Incarceration Program or the Substance Abuse Program. *State v. Owens*, 2006 WI App 75, ¶¶4-6, 291 Wis. 2d 229, 713 N.W.2d 187 (the circuit court has discretion to determine program eligibility). Clearly, the circuit court placed greater weight on the gravity of the offense, the need to protect the public from further criminal activity, and Lawhorn's failure to take responsibility for his conduct. The overall sentencing rationale supported the court's program eligibility decisions. *Id.*, ¶9. Lawhorn's postconviction motion did not change this record or undermine this rationale.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals