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DISTRICT IV

August 31, 2017

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

2016AP1685-CR State of Wisconsin v. Jael K. Speights (L.C. #1999CF1777)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jael K. Speights appeals an order denying his motion for sentence modification. 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 (2015-16).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 2000, Speights received an aggregate indeterminate prison sentence of thirty-seven years on two counts of second-degree sexual assault, and a forty-year concurrent term of probation for burglary. In 2016, Speights filed a motion for sentence modification citing a 1994 change in parole law which provided that for violent offenses, the mandatory release date would be presumptively mandatory.[2] Speights' sentencing judge had retired and his motion was assigned to a new circuit court judge. Observing that Speights' motion "conceded that no proof exists within the record that [the original sentencing judge] relied upon inaccurate information regarding parole eligibility," the circuit court determined that Speights had failed to establish a new factor justifying sentence modification and denied the motion. Speights appeals.

A trial court may modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 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 (quoted source omitted). The defendant bears the burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether a new factor exists presents a question of law we review de novo. ***Id***.

[2] Speights' crimes were committed in 1999, prior to the advent of truth in sentencing, and Speights is therefore eligible for parole after serving twenty-five percent of his sentence (parole eligibility date). For most offenses, WIS. STAT. § 302.11(1) establishes a mandatory release date at two-thirds of the sentence. However, § 302.11(1g)(am) was created to provide: "The mandatory release date established in sub. (1) is a presumptive mandatory release date for an inmate who is serving a sentence for a serious felony committed on or after April 21, 1994, but before December 31, 1999." *See* 1993 Wis. Act 194, § 2 and 1997 Wis. Act 203, § 201. Speights' offenses constitute "serious felon[ies]" and therefore, his mandatory release date is presumptive.

We conclude that the 1994 change from a mandatory to a presumptive mandatory parole release date for Speights' serious offenses is not a new factor. *Cf.* ***State v. Delaney***, 2006 WI App 37, 289 Wis. 2d 714, 712 N.W.2d 368, *abrogated on other grounds by* ***Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828 (a 1994 letter from then Wisconsin Governor Tommy Thompson to the Department of Corrections referring to a change in parole policy was not a new factor); s*ee also* ***State v. Wood***, 2007 WI App 190, ¶¶11, 14, 305 Wis. 2d 133, 738 N.W.2d 81 (reaffirming and explaining the holding in ***Delaney*** that as a matter of law, the 1994 letter did not constitute a new factor). There is no dispute that the change from mandatory to presumptive mandatory release for violent offenses occurred in 1994 and was "in existence" years before Speights' 2000 sentencing. There is no reason to believe that the sentencing court was not aware of the six-year-old law, and nothing in the record suggests that the sentencing court "unknowingly overlooked" or misunderstood the applicable parole law.

Speights contends that he is entitled to an evidentiary hearing at which the sentencing judge would be asked if he knew about the 1994 change in parole law. That is not permitted. This court's review is limited to the record at sentencing. *See* ***Delaney***, 289 Wis. 2d 714, ¶12 ("We decline to join Delaney's speculation as to [the sentencing judge's] thoughts. Instead, we limit our review to the judge's actual words."). A review of the sentencing hearing transcript demonstrates that the circuit court was focused not on when Speights might be paroled, but on the severity and violence of Speights' offenses, the protection of the public, and Speights' need for confinement, treatment and possible future commitment under WIS. STAT. ch. 980. *See* ***id.***, ¶13 (change in parole policy discussed in governor's 1994 letter not a new factor where "the record demonstrates a sentence carefully fashioned after an express consideration of the relevant factors, and Delaney's parole eligibility was not one of those factors.").

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals