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DISTRICT III

November 7, 2017

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

2016AP1602-CR State v. Steven N. Loomis (L. C. No. 2011CF884)

Before Stark, P.J., Hruz and Seidl, 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).

Steven Loomis, pro se, appeals an order denying his postconviction 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. We reject Loomis's arguments, and summarily affirm the order. *See* WIS. STAT. RULE 809.21.[1]

The State charged Loomis with one count of repeated sexual assault of the same child under the age of thirteen and one count of repeated sexual assault of the same child under the age of sixteen. Pursuant to a plea agreement, Loomis entered a no-contest plea to repeated sexual assault of the same child under the age of sixteen. At the plea hearing, neither defense counsel nor the State placed the exact terms of the plea agreement on the record; however, the plea questionnaire and waiver of rights form indicated that in exchange for Loomis's plea: "Dismiss Count I. State to recommend 5 years IC, 5 years ES."

At the sentencing hearing, the State recommended five years of initial confinement and ten to fifteen years of extended supervision. Defense counsel did not object. The circuit court ultimately imposed a fifteen-year sentence consisting of five years' initial confinement followed by ten years' extended supervision. Loomis did not directly appeal his conviction or sentence.

Loomis subsequently filed a WIS. STAT. § 974.06 postconviction motion claiming the State breached the plea agreement by failing to recommend five years of extended supervision, and his trial counsel was ineffective by failing to object to the breach. Loomis did not seek to withdraw his plea. Instead, he asked only for enforcement of the plea agreement that he claimed existed. At a motion hearing, Loomis did not present testimony but, rather, relied on the plea questionnaire and waiver of rights form along with documents, including an e-mail message from his trial counsel to his postconviction counsel. In that e-mail, his trial counsel stated:

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

> After reviewing my file (electronic and hard file) I could not find anything to corroborate a 5 and 5 offer. … Bottom line is I cannot say there was any agreement as to the length of the ES the State would be recommending. I believe I may have written it wrong on the Plea form.

The State filed a letter asserting it had never made a promise to cap its extended supervision recommendation. The circuit court ultimately denied Loomis's motion on the merits, finding that Loomis had failed to prove the State agreed to recommend five years of extended supervision under the plea agreement. Loomis appealed, and this court affirmed, concluding the record supported the circuit court's finding that Loomis failed to prove the terms of the plea agreement included a cap on the State's extended supervision recommendation. *See* ***State v. Loomis***, No. 2014AP1361, unpublished slip op. (WI App May 22, 2015).

Loomis subsequently filed the underlying motion to modify his sentence based on a new factor. Specifically, Loomis claimed he entered into the plea agreement based on what turned out to be defense counsel's misrepresentation regarding the State's extended supervision recommendation, thus violating his "constitutional right" to enforcement of what he believed were the terms of the plea agreement. Loomis further claimed that because the sentencing court was unaware of the alleged constitutional violation, the existence of such a violation constituted a new factor justifying sentence modification. The circuit court denied Loomis's motion for sentence modification, and 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 defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the [circuit court] 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. Whether a fact or set of facts constitutes a new factor is a question of law this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

The existence of a new factor, however, does not automatically entitle a defendant to sentence modification. ***Id.***, ¶37. If a new factor is present, the circuit court, in the exercise of its discretion, determines whether the new factor justifies sentence modification. ***Id.*** When reviewing a circuit court's discretionary act, we use the deferential erroneous exercise of discretion standard. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. ***Krebs v. Krebs***, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989).

In the present matter, we conclude that even assuming Loomis demonstrated the existence of a new factor, the circuit court properly exercised its discretion when refusing to modify the sentence. As the circuit court noted in denying Loomis's motion for sentence modification, "the sentencing court is not in any way bound by or controlled by a plea agreement between the defendant and the State." ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990). The circuit court further recounted that in determining an appropriate sentence for Loomis, it considered the gravity of the offense, Loomis's character, and the need to protect the public, as required by ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Ultimately the circuit court was satisfied that Loomis's claimed new factor did not warrant modification of what was an appropriate sentence. On appeal, Loomis fails to develop any cognizable argument challenging the circuit court's discretionary decision. Because the circuit

court properly exercised its discretion in refusing to modify Loomis's sentence, we affirm the order.

Upon the foregoing,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals