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November 6, 2017

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

2016AP2490-CR State of Wisconsin v. Terrence Lee Martin
(L.C. # 2014CF2078)

Before Brennan, P.J., Brash and Dugan, 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).

Terrence Lee Martin appeals from a judgment of conviction for one count of possession of a firearm after being an adjudicated delinquent, contrary to WIS. STAT. § 941.29(2)(b) (2013-

14).[1] He also appeals from an order denying his postconviction motion seeking sentence modification. The sole issue on appeal is whether Martin is entitled to sentence modification based on the post-sentencing elimination of seventy-four days of sentence credit. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment and order.

In April 2015, Martin pled guilty pursuant to a plea agreement. The State agreed to recommend two years of initial confinement and two years of extended supervision and not to take a position on whether the sentence should be concurrent or consecutive to Martin's sentences in two prior criminal cases. The defense was free to offer a different recommendation.

At sentencing, the State summarized Martin's criminal history, which included convictions for 2014 crimes for which Martin was serving consecutive prison sentences. Trial counsel urged the trial court to impose a concurrent sentence of two years of initial confinement or a shorter consecutive sentence. Trial counsel also addressed sentence credit, asserting that Martin did not receive sentence credit for one of his 2014 cases and received 273 days of sentence credit for the other case. Trial counsel and the trial court then calculated that if a consecutive sentence were imposed, Martin would receive seventy-four days of sentence credit.

Next, the trial court asked trial counsel questions about Martin's lack of alcohol and drug issues, his children, his prison placement, and whether he had been declared eligible for earned release programs in his other cases. The trial court also heard directly from Martin, who apologized for his crime.

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

The trial court then pronounced its sentence. In doing so, it discussed the gravity of the offense, Martin's character, and the protection of the public. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The trial court said that Martin's character was the driving factor. *See* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197 (The weight to be given to each factor is committed to the trial court's discretion.). It discussed Martin's criminal history and his past failure on probation, and it concluded that probation would not be appropriate. It also discussed the gravity of the offense, including the court's concern with having semiautomatic firearms in the hands of those who are forbidden to possess them.

The trial court addressed whether Martin's sentence should be concurrent or consecutive to his prior cases. It concluded that because "the criminal thinking and acting" in his other cases "were separate in time, separate in thinking and acting, and separate in consequences" from each other and from Martin's possession of a firearm, the sentence should be consecutive to Martin's other sentences. The trial court sentenced Martin to eighteen months of initial confinement and twenty-four months of extended supervision. The trial court added: "It's a consecutive sentence, so you get credit for the 74 days." The trial court then said it was not making Martin eligible for early release programs, explaining: "Those programs would reduce by too great an amount the amount of punishment that I've determined is appropriate in this case." The trial court did not again reference sentence credit.

About a month after sentencing, the Department of Corrections wrote a letter that it sent to both the trial court in this case and the trial court in one of Martin's 2014 cases, questioning the sentence credit that had been awarded in each case. The Department explained that the sentences in all three of Martin's cases were imposed consecutively. Therefore, the Department said, Martin was not entitled to sentence credit for any time served after June 30, 2014, the date

he was sentenced in the first of the three cases. The letter was forwarded to a new judge who was assigned to Martin's firearm possession case due to judicial rotation.[2] The trial court agreed with the Department's analysis and eliminated the seventy-four days of sentence credit.

Represented by counsel, Martin filed a postconviction motion seeking sentence modification.[3] Implicitly accepting the Department's successful argument that Martin was not entitled to seventy-four days of sentence credit, Martin argued that his lack of eligibility for that credit was a "new factor" that justified sentence modification. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). He explained: "[L]oss of the 74 days [of] credit is a fact highly relevant to the imposition of sentence but not known to the trial judge."

The trial court denied Martin's motion for sentence modification in a written order, without a hearing.[4] It concluded, after reviewing the sentencing transcript, that the sentence credit was "not highly relevant to the sentence imposed" and that "vacating the sentence credit on the basis that the defendant had previously received the credit toward his other sentences was

[2] The Honorable Jonathan D. Watts accepted Martin's plea and sentenced him. The Honorable Thomas J. McAdams amended the judgment of conviction to reflect zero days of sentence credit.

[3] Martin previously raised the same issue in a *pro se* motion that was denied by the Honorable Frederick C. Rosa—who was assigned the motion due to judicial rotation—without consideration of its merits so that Martin could raise the issue with his newly appointed postconviction counsel.

We also note that the motion filed by postconviction counsel raised an additional issue concerning the denial of a suppression motion. Martin's request for relief was denied. On appeal, Martin has not briefed any issues related to the suppression motion and, therefore, we will not discuss that issue. *See* ***Reiman Assoc., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues not briefed are deemed abandoned.).

[4] The Honorable Timothy M. Witkowiak, who was assigned the case due to judicial rotation, denied the postconviction motion.

entirely consistent with the court's stated sentencing objective of imposing a separate sentence for a separate offense." This appeal follows.

A trial court has discretion to modify a criminal sentence if the defendant "demonstrate[s] by clear and convincing evidence the existence of a new factor" and the trial court determines that the "new factor justifies modification of the sentence." *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 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.

Rosado, 70 Wis. 2d at 288. Whether a new factor exists presents a question of law that is reviewed *de novo*. ***Harbor***, 333 Wis. 2d 53, ¶33. "However, whether a new factor justifies a sentence modification is a discretionary decision for the [trial] court." ***State v. Armstrong***, 2014 WI App 59, ¶11, 354 Wis. 2d 111, 847 N.W.2d 860. "[I]f a court determines that the facts do not constitute a new factor as a matter of law, 'it need go no further in its analysis' to decide the defendant's motion." ***Harbor***, 333 Wis. 2d 53, ¶38 (citation omitted).

With those standards in mind, we turn to Martin's appeal of the trial court's denial of his sentence modification motion. At the outset, we agree with the State that Martin's allegations are "conclusory" and inadequately supported. Martin's brief provides limited background on the procedural history of the case and refers to certain pages in the transcript, but it does not adequately explain why Martin believes "[t]he unavailability of the intended 74 days [of

sentence] credit was highly relevant to the imposition of sentence."[5] This court could decline to examine the merits of Martin's claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."). However, we will address the merits of Martin's claim.

We have carefully reviewed the sentencing transcript. Although the trial court asked several follow-up questions after trial counsel indicated that he believed Martin would receive sentence credit, the trial court's comments later in the hearing, when it actually imposed the sentence, do not indicate that the anticipated seventy-four days of sentence credit were "highly relevant" to the sentence it was imposing. The trial court did not explicitly state that it had factored in Martin's sentence credit when it decided to impose eighteen months of initial confinement. Rather, as we noted above, the trial court emphasized that Martin should serve a separate sentence for his new crime. The trial court's comments, read as a whole, do not explicitly or implicitly indicate that it would have imposed a shorter period of initial confinement if it had been told Martin would receive zero sentence credit. The transcript in this case stands in sharp contrast to cases where we have held sentence credit was a highly relevant factor. *See, e.g.*, ***Armstrong***, 354 Wis. 2d 111, ¶¶14-16 (concluding sentence credit was a highly relevant factor where the sentencing "court pointedly and repeatedly drew attention to the amount of sentence credit to which Armstrong would be entitled, and made clear why the topic was important to the court" and where the court told Armstrong, who had over two years of sentence

[5] This language comes from page three of Martin's brief, which was missing from the printed version. This court reviewed page three by consulting the electronically filed brief.

credit, that because he had "a lot of credit … [t]he time that you are going to be serving in confinement is not going to be long").

For the foregoing reasons, we agree with the trial court that Martin has not demonstrated, by clear and convincing evidence, the existence of a "new factor." *See* ***Harbor***, 333 Wis. 2d 53, ¶36. Accordingly, he is not entitled to sentence modification. *See* ***id.***

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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