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November 22, 2017

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

2017AP118-CR State v. Timothy G. Tackett (L.C. #2007CF522)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Timothy G. Tackett appeals pro se from an order denying his request for sentence modification. He contends a change in a policy of the Wisconsin Department of Corrections (DOC) that increased the amount of money DOC takes from inmates' trust fund accounts and a downswing in his financial status constitute new factors that warrant sentence modification.

Upon reviewing the briefs and the record, we conclude at conference this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the order.

In 2007, while on probation after serving time for the sexual assault of a fourteen-year-old cousin, Tackett was charged with and, in 2008, found guilty of second-degree sexual assault of his fifteen-year-old daughter. His probation was revoked and the court sentenced him on this case to a total term of twenty-five years, consecutive to the revocation sentence.

The "Condition" section of the original judgment of conviction (JOC) directed how Tackett's financial obligations should be managed in the alternate scenarios of discharge or revocation of his probation. An amended JOC removed the probation reference and provided instead that "DOC shall withhold 25% of all inmate monies to pay fines/costs/surcharges/restitution." After this court affirmed Tackett's conviction in 2011, the JOC, while retaining the "25%" withholding language, once again was amended to include his appellate attorney's fees, bringing the amount he owed the county for his two appointed attorneys to more than $9900 and his total court-ordered obligations to $11,710.29.[2]

Effective July 1, 2016, the DOC changed its policy and began to withhold fifty percent from prisoners' trust accounts to satisfy court-ordered obligations. Prior to that point, the DOC's practice had been to deduct either the amount set out in the JOC or, where none was specified, twenty-five percent.

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

[2] The circuit court appointed counsel for Tackett after the State Public Defender (SPD) found him ineligible for its services.

In 2016, Tackett moved to modify both his sentence and the JOC on "new factor" grounds. He contended that the new DOC policy is "in direct violation of the court[-]ordered 25%" and that his 2011 divorce and continued incarceration have put him "far below the Federal Poverty Guidelines." He therefore asked to be relieved of reimbursing the court for monies it paid for his attorneys' fees and for an alternate presentence investigation report (PSI). The court denied the motion without a hearing, stating that it has no authority over DOC policies and that the changed policy is neither relevant to the obligations he incurred nor a new factor, as it does not frustrate the purpose of the original sentence. *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451.

On appeal, Tackett renews his same arguments, with no better success. A new factor consists of facts highly relevant to the sentence but unknown to the judge at the time of the sentencing because they were not then in existence or unknowingly overlooked by the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must establish by clear and convincing evidence that a new factor exists, but whether a fact constitutes a new factor is a question of law. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828.

The court explained the basis for the sentence: the "disgusting" nature of Tackett's crime, his failures on probation and in sex offender treatment programs, his need for rehabilitation and punishment, and, given his history of sexually preying on several young girls, the public's need for protection. The term of imprisonment imposed is not tied to the costs listed on the JOC, which are legislatively mandated. *See* WIS. STAT. §§ 973.045 (crime victim and witness assistance surcharge), 973.06(1)(e) (attorney's fees), 973.20(1r) (restitution—here, for airfare for the daughter, who lives in Washington state with her mother, to return to testify at trial).

The circuit court did not err in denying Tackett's motion to modify the JOC to reflect the prior withholding amount. A court may set conditions upon a term of extended supervision or probation, *see* WIS. STAT. §§ 973.01(5), 973.09, but it "is not permitted to place conditions on a sentence." ***State v. Gibbons***, 71 Wis. 2d 94, 98, 237 N.W.2d 33 (1976). Its control over the sentence ends when the defendant is sentenced and the sentence is executed. ***Id.*** at 99. Imposing conditions on a sentence would impinge on the DOC's authority to supervise the confinement portion of a prisoner's sentence, *see* WIS. STAT. §§ 301.01(1) and 301.03(2), and to control prisoners' wages, money, and property, WIS. STAT. §§ 301.31 and 303.01(8).

Further, courts have no authority over DOC's policy and regulatory determinations. *See* ***Kirsch v. Endicott***, 201 Wis. 2d 705, 718 n.4, 549 N.W.2d 761 (Ct. App. 1996); *see also* ***State v. Bush***, 185 Wis. 2d 716, 723-24, 519 N.W.2d 645 (Ct. App. 1994). That DOC now requires Tackett to honor prior obligations at a rate higher than he anticipated is not, as the State notes, even marginally relevant to the term of sentence the court imposed.

Tackett alleges that another new factor warranting sentence modification is the change in his financial status occasioned by his 2011 divorce. In 2008, the SPD had found him nonindigent after factoring in Tackett's legal access to marital funds and assets, access he no longer has. Coupled with his inability to work due to his incarceration, he contends he should not be required to reimburse the court for attorneys' fees and the alternate PSI.

Tackett's marital status is not a new factor within the meaning of ***Rosado***. The sole mention of his responsibility for the cost of court-appointed counsel, coming at the tag end of the 2009 sentencing hearing, merely was a reminder of earlier advisements. It was not highly relevant to the substance of, or rationale for, the sentence.

Tackett himself petitioned the court to appoint both trial and appellate counsel and requested an alternate PSI; he does not dispute that he incurred the associated bills to advance his defense. For a change in circumstances to constitute a new factor, the prior circumstances "must have been a relevant factor in the original sentencing." ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). "It is not a relevant factor unless the court expressly relies on [it]." ***Id.*** The court here did not. Tackett's 2011 divorce thus is not a new factor and does not negate the valid obligations he assumed.[3]

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

[3] Tackett's insistence that ***State v. Dean***, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991), and ***State v. Nieves-Gonzales***, 2001 WI App 90, 242 Wis. 2d 782, 625 N.W.2d 913, demonstrate that the JOC should be modified due to his indigency is unpersuasive. In ***Dean***, this court held that a circuit court must not base its decision of whether to appoint counsel at county expense on blind deference to the SPD's ineligibility determination but, in its discretion, may appoint a lawyer "when the necessities of the case and demands of justice require" it. ***Dean***, 163 Wis. 2d at 516. In ***Nieves-Gonzales***, we held that the circuit court's determination that the defendant was not indigent for purposes of appointing postconviction counsel at county expense was an erroneous exercise of discretion because the court improperly applied federal poverty guidelines without first conducting its own hearing to explore the defendant's financial and marital status. *See* ***Nieves-Gonzales***, 242 Wis. 2d 782, ¶14. Tackett had both an indigency hearing at which his wife testified, and received court-appointed counsel after the SPD determined that he was ineligible.