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DISTRICT III

November 28, 2017

To:

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

2016AP2293-CR

State of Wisconsin v. Kari J. Wilson (L. C. No. 2016CF30)

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).

Kari Wilson appeals a judgment convicting her of three felonies and an order denying her motion for resentencing. The circuit court sentenced Wilson to concurrent terms totaling three years' initial confinement and seven years' extended supervision with eligibility for the Substance Abuse Program after two years. Under that program, an inmate's term of initial confinement is reduced upon completion of the program. *See* WIS. STAT. § 302.05(3)(c)

(2015-16).¹ However, the prison will not recommend an inmate for the program unless she is eligible at least twelve months prior to her release date, a condition Wilson does not meet because of jail time credit. Wilson argues her ineligibility for the program constitutes a new factor justifying a sentence modification. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Wilson's argument and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

The existence of a new factor presents a question of law that we review de novo. *State v. Harbor*, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828. A defendant has the burden of proving 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 trial judge at the time of 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. We reject Wilson's argument because, as a matter of law, her inability to take advantage of the Substance Abuse Program does not constitute a new factor.

The sentences the circuit court imposed were jointly recommended by the parties. The circuit court's only reference to eligibility for the program occurred as the court was pronouncing sentence for attempted armed burglary: "Now this one involved more planning and violence, so there is eligibility for the Challenge Incarceration and the Substance Abuse Program, but I believe under these circumstances, it's beyond the nonviolent situation, so I put eligibility after April 25 of 2018." While the court made Wilson eligible for the Substance Abuse Program, its

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

primary concern was to ensure Wilson spent at least two years in prison based on the planning and violence associated with that charge.

As the circuit court noted in its order denying Wilson's postconviction motion, her ability to participate in the Substance Abuse Program was not highly relevant to the sentence the court imposed and therefore does not constitute a new factor. The court was required by statute to determine Wilson's eligibility for the program at sentencing, but the court did not encourage her participation or base its sentencing decision on her acceptance in the program. The court was aware that the Department of Corrections determines whether an inmate is admitted to the program after the court determines an eligibility date. Because Wilson's sentence was not based on her eligibility for the Substance Abuse Program and she has not demonstrated by clear and convincing evidence that the circuit court based her sentences on an incorrect understanding of the eligibility process, she has not established a new factor justifying a sentence modification.

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