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DISTRICT I

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

2016AP1966-CR	State of Wisconsin v. Gerald Deshea Anderson (L.C. # 2015CF2166)
2016AP1967-CR	State of Wisconsin v. Gerald Deshea Anderson (L.C. # 2016CF173)

Before Kessler, 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).

In these consolidated appeals, Gerald Deshea Anderson appeals the judgments, entered on his guilty pleas, convicting him of being a felon in possession of a firearm, misdemeanor bail jumping, criminal damage to property, and felony bail jumping. *See* WIS. STAT. §§ 941.29(2)(a)

(2013-14), 946.49(1)(a), 943.01, 946.49(1)(b) (2015-16).[1] He also appeals the order denying his postconviction motion for sentence modification. Anderson challenged his sentence on two bases: (1) the sentence was harsh and unconscionable; and (2) the improvements he made before and after sentencing were new factors justifying sentence modification. The circuit court rejected both arguments. Based on our review of the briefs and the records, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the judgments and the order.

Background

In Milwaukee County Case No. 2015CF2166, Anderson pled guilty to one count each of being a felon in possession of a firearm, misdemeanor bail jumping, and criminal damage to property. In Milwaukee County Case No. 2016CF173, Anderson pled guilty to felony bail jumping. The circuit court accepted his pleas, and six additional charges were dismissed, but read in at sentencing: burglary while armed with a dangerous weapon; stalking while using a dangerous weapon; intentionally pointing a firearm at a person; battery; and two separate charges for contact after a domestic abuse arrest.

The charges against Anderson stemmed from incidents with his former live-in girlfriend, T.P. Anderson was charged with criminal damage to property after he kicked in the front door of T.P.'s home and entered without her permission. Anderson was charged with possession of a

[1] WISCONSIN STAT. § 941.29(2) was repealed by 2015 Wis. Act 109, § 8 (eff. Nov. 13, 2015). *See* WIS. STAT. § 991.11 (Unless otherwise specified, the effective date of an act is the day after publication.). Anderson, however, was charged under § 941.29(2) prior to its repeal. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The complaint in Milwaukee County Case No. 2016CF173 charged Anderson with one count of felony bail jumping. All the other charges were part of Milwaukee County Case No. 2015CF2166.

firearm by a felon and bail jumping for a separate incident in which he entered T.P.'s home without her permission and found her in bed with another man. T.P. told police she heard footsteps and a clicking noise and saw Anderson pointing a shotgun at the other man. The other man told police that Anderson chased him and pointed the shotgun at him. The charges that were dismissed but read in at sentencing also concerned Anderson's interactions with T.P.

After accepting Anderson's pleas, the circuit court ordered a presentence investigation report ("PSI"). The PSI report writer recommended that, at minimum, Anderson serve a total sentence of three years of initial confinement and two years of extended supervision. At maximum, the writer recommended four and one-half years of initial incarceration and three years of extended supervision.

At sentencing, T.P. addressed the circuit court and asked that it be lenient in sentencing Anderson. The State recommended that the circuit court sentence Anderson to five years of initial confinement and four years of extended supervision.

The circuit court imposed a total sentence of nine years and six months of imprisonment, comprised of five years and six months of initial confinement and four years of extended supervision.[2] The circuit court did not make Anderson eligible for the Earned Release Program (ERP) or the Challenge Incarceration Program (CIP).

Anderson then filed a postconviction motion for sentence modification, which the circuit court denied.

[2] Anderson discusses the various sentences he received in the aggregate. We will do the same.

Discussion

A. *Exercise of sentencing discretion*

Anderson first claims his total sentence was harsh and unconscionable. "'We review a [circuit] court's conclusion that a sentence it imposed was *not* unduly harsh and unconscionable for an erroneous exercise of discretion.'" ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). A sentence that is well within the maximum available sentence is not unduly harsh or unconscionable. ***Id.***, ¶31. Anderson faced seventeen years and six months on the offenses to which he pled guilty.[3]

With regard to the sentences, the record reveals that the circuit court's discretionary decision had a "'rational and explainable basis.'" *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning the sentences, the circuit court considered the following: the "extremely serious" nature of the offenses; Anderson's character; his extensive criminal background, which included prior revocations while on supervision and the violation of the circuit court's no-contact order; and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. "It remains within the discretion of the circuit court to discuss only those factors it believes are relevant, and the weight that is attached to a relevant factor in sentencing is also within the wide discretion of the sentencing court." ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20 (citation omitted).

[3] The maximum sentences for the charges to which Anderson pled guilty were as follows: felon in possession of a firearm, ten years, *see* WIS. STAT. §§ 941.29(2)(a) (pre-2015 Wis. Act 109, § 8), 939.50(3)(g); misdemeanor bail jumping, nine months, *see* WIS. STAT. §§ 946.49(1)(a), 939.51(3)(a); criminal damage to property, nine months, *see* WIS. STAT. §§ 943.01(1), 939.51(3)(a); and felony bail jumping, six years, *see* WIS. STAT. §§ 946.49(1)(b), 939.50(3)(h).

Postconviction, the circuit court emphasized in its written decision denying Anderson's motion for sentence modification that "[i]mposing anything less than the total of five years and six months of initial confinement followed by four years of extended supervision would have unduly depreciated the seriousness of the offenses." The circuit court additionally explained that it was "stand[ing] by its decision not to make the defendant eligible for early release programs as the court already imposed the minimum amount of confinement necessary for punishment, deterrence, and community protection." *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (A circuit court has an additional opportunity to explain its sentencing rationale in postconviction proceedings.). Although greater than what the PSI report writer and the State recommended, Anderson's total sentence does not reflect an erroneous exercise of sentencing discretion. Additionally, the circuit court acted within its discretion in denying Anderson eligibility in the early release programs. *See* ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880; WIS. STAT. § 973.01(3g)-(3m).

B. *New factors*

As another basis for sentence modification, Anderson asks for consideration of "the improvements he made, prior to and after sentencing." (Uppercasing omitted.) He claims that "[a]ll of [his] recent actions, and prior actions, demonstrate character traits, which were not taken into consideration at sentencing." These positive character traits, Anderson argues, should be considered new factors justifying sentence modification.

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 the 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.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quotation marks and citation omitted). We review *de novo* the circuit court's determination that a defendant has not shown the existence of a new factor. *See* ***id.***, ¶36.

"[C]ourts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentencing modification." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997); *see also* ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988) ("Changes in attitude and prison rehabilitation are not new factors justifying sentence modification."). Accordingly, this argument fails. An inmate's progress, response to treatment, or rehabilitation does not constitute a new factor meriting a sentence modification. ***State v. Krueger***, 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984).

We agree with the circuit court that Anderson did not show the existence of a new factor warranting sentence modification.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

Diane M. Fremgen
Clerk of Court of Appeals