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DISTRICT IV

March 2, 2018

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

2015AP1390-CR State of Wisconsin v. Paul G. Barber, Jr. (L.C. # 2012CF1207)

Before Sherman, Blanchard, and Kloppenburg, 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).

Paul Barber, Jr., pro se, appeals a circuit court order denying his motion for sentence modification and his petition for a writ of habeas corpus. Barber argues that he is entitled to resentencing or other relief because the Department of Corrections declined to admit him into its earned release program (ERP) when he first applied in 2013. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Barber's arguments and affirm.

In 2012, Barber pleaded guilty to operating while intoxicated as a tenth (or subsequent) offense. Barber was sentenced to six years' initial confinement and five years' extended supervision. The circuit court found Barber eligible for ERP, a program that gives inmates the opportunity to reduce their initial confinement period by successfully completing a substance abuse program.[2] *See* WIS. STAT. § 302.05(3)(c)2.; *see also* ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187. However, when Barber sought to enroll in the program in 2013, the department determined that his enrollment would be premature because he had six years of incarceration left to serve. In response to the department's decision, Barber filed a pro se motion for sentence modification or for a writ of habeas corpus. The circuit court denied his motion. Barber then filed a motion for reconsideration, which the circuit court denied. Barber now appeals.

At the outset, the State argues that Barber is improperly raising several new issues on appeal that he did not raise before the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."). At the very least, Barber has the burden of demonstrating that each issue was raised below, and the State points out that Barber has failed to do so. *See* ***id.*** Accordingly, the State contends that Barber has forfeited

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

[2] The State notes that the legislature changed the name of the program from the Earned Release Program to the Substance Abuse Program in 2011. *See* 2011 Wis. Act 38, ¶19.

most of his arguments. Barber did not file a reply brief, so we deem him to have conceded the State's arguments regarding forfeiture. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

We therefore address the two grounds for appeal that the State concedes are properly before this court: (1) whether the department's initial decision on his eligibility for ERP constitutes a new factor warranting sentence modification, and (2) whether Barber is entitled to a writ of habeas corpus.

To support his request for sentence modification, Barber must demonstrate that the department's decision that he was not immediately eligible for ERP is a "new factor." *See* ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor must be "'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing.'" ***Id.***, ¶40 (quoted source omitted). Barber has the burden of demonstrating the existence of a new factor by clear and convincing evidence. *See* ***id.***, ¶36. "Whether something constitutes a new factor is a question of law we review de novo, without deference to the trial court." ***State v. Boyden***, 2012 WI App 38, ¶6, 340 Wis. 2d 155, 814 N.W.2d 505.

Here, we see no indication that Barber's immediate acceptance into ERP was highly relevant to the circuit court's sentence. At sentencing, the circuit court explained that this was Barber's thirteenth drunk driving offense, and that a lengthy sentence was necessary in view of the seriousness of his offense and the need to protect the public from the danger posed by Barber's chronic drinking and driving. The court specified that its sentence was designed "mostly" to punish Barber. However, the court expressed hope that Barber would get the

rehabilitation and services he needs while incarcerated. The court determined that Barber was eligible for ERP and urged him to cooperate with the institution in obtaining services. In sum, the transcript indicates that the court was primarily concerned with imposing a lengthy sentence in order to punish Barber and protect the public from his chronic drunk driving, and was aware that the department would ultimately determine whether to enroll Barber in ERP. Accordingly, we reject Barber's argument that the department's decision not to allow Barber to enroll in ERP right away, due to the remaining time on his sentence, is a new factor that warrants sentence modification.

Barber also sought a writ of habeas corpus from the court. Habeas corpus is an extraordinary form of relief and it is only available where an inmate has no other adequate remedy at law. ***State ex rel. Fuentes v. Wisconsin Court of Appeals, District IV***, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999). The purpose of a habeas action is to "'protect and vindicate a person's right of personal liberty by freeing him from illegal restraint.'" ***State ex rel. Szymanski v. Gamble***, 2001 WI App 118, ¶8, 244 Wis. 2d 272, 630 N.W.2d 570 (quoted source omitted). Barber has the burden of demonstrating by a preponderance of the evidence that his confinement is illegal. *See* ***State ex rel. Hager v. Marten***, 226 Wis. 2d 687, 694, 594 N.W.2d 791 (1999). We see no developed argument from Barber to establish that the department's 2013 decision regarding his enrollment in the ERP means that he is being detained illegally.

To the contrary, the State points out that Barber appears to be challenging a condition of confinement, which is properly brought as a writ of certiorari, with the Secretary of the Department of Corrections as the respondent. *See* ***State ex rel. Myers v. Smith***, 2009 WI App 49, ¶10, 316 Wis. 2d 722, 766 N.W.2d 764 (circuit court lacks jurisdiction where a petitioner has failed to name the proper respondent). Here, the circuit court dismissed Barber's action upon

determining that Barber had not named and served the proper party. We see no error in the circuit court's dismissal of Barber's petition for a writ of habeas corpus.

Upon the foregoing reasons,

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.

Sheila T. Reiff
Clerk of Court of Appeals