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April 6, 2018

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

2017AP328-CR State of Wisconsin v. Rufus Patterson West
(L.C. # 1994CF942994)

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).

Rufus Patterson West, *pro se*, appeals orders denying his motions for sentence modification and for reconsideration. He contends that the presumptive mandatory release statute, which permits the Department of Corrections (DOC) to confine him after he has served two-thirds of his sentences, and certain alleged changes in Wisconsin's parole policy constitute new factors warranting relief. Upon our review of the briefs and record, we conclude at

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

On August 8, 1994, West robbed a woman at gunpoint. A jury found him guilty of armed robbery with identity concealed and possessing a firearm while a felon. *See* WIS. STAT. §§ 943.32(2) (1993-94), 939.641(2) (1993-94), 941.29(2) (1993-94). The trial court found that he was a habitual offender. *See* WIS. STAT. § 939.62 (1993-94). As a consequence of the convictions and penalty enhancer, he faced a maximum of sixty-three years in prison. The matter proceeded to sentencing in February 1996. The trial court imposed an indeterminate sentence of twenty-eight years in prison for the armed robbery and a concurrent six-year indeterminate sentence for possessing a firearm while a felon.[2] West, by counsel, pursued a no-merit appeal. *See* WIS. STAT. RULE 809.32. We affirmed. Proceeding *pro se*, West subsequently pursued numerous postconviction motions and appeals, none of which led to reversal of his convictions or modification of his sentences.

In November 2016, West filed the first of the two postconviction motions underlying the instant appeal.[3] He alleged that changes in law and policy relating to parole constituted new factors warranting sentence modification. Specifically, he asserted that the parties and the circuit court did not know he would be subject to WIS. STAT. § 302.11(1g), governing presumptive

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

[2] The Honorable John A. Franke presided over West's trial and pronounced sentence in this matter. We refer to Judge Franke both as the trial court and as the sentencing court.

[3] The Honorable Jeffrey A. Conen presided over the postconviction motions underlying this appeal. We refer to Judge Conen as the circuit court.

mandatory release, or that Wisconsin parole policy would be affected by passage of 42 U.S.C. § 13701, *et seq*., the Violent Crime Control and Law Enforcement Act of 1994 (the VCCLEA). He also asserted that the parties and the circuit court were not aware of a letter written in 1994 by then-Governor Tommy Thompson to the secretary of the DOC instructing the secretary and the DOC to "pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date. The policy of this Administration is to keep violent offenders in prison as long as possible under the law."

The circuit court denied the motion for sentence modification on the ground that West had not demonstrated a new factor. The circuit court next denied West's motion to reconsider, and he appeals.

A circuit court may modify a sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The 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 original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties."' ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, the circuit court has discretion to determine whether the new factor warrants sentence modification. ***Id.***, ¶37.

West's claim that a new factor exists is premised primarily on WIS. STAT. § 302.11(1g), which provides for presumptive mandatory release of certain inmates. As a general rule, a

prisoner sentenced for a crime committed before December 31, 1999, is entitled to mandatory release after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g)(am), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony between April 21, 1994, and December 31, 1999. Armed robbery is a serious felony within the meaning of the statute. *See* § 302.11(1g)(a)2. The parole commission may, for the reasons set forth in § 302.11(1g)(b)1.-2., deny presumptive mandatory release to an inmate such as West who is serving a sentence for a serious felony. West asserts that the trial court was unaware of the law of presumptive mandatory release at the time of his sentencing and that this constitutes a new factor in his case. The claim fails.

WISCONSIN STAT. § 302.11(1g) went into effect in April 1994, nearly two years before the trial court sentenced West in 1996. *See* 1993 Wis. Act 194, § 2; WIS. STAT. § 991.11. Nothing in the sentencing transcript suggests that the trial court sentenced West without knowledge of § 302.11(1g). West asserts that he has nonetheless proved that the trial court was unaware of § 302.11(1g) because he has identified several cases in which Wisconsin judges—judges who did not preside over West's case—admitted that they did not know about the law of presumptive mandatory release at the time of original sentencing and therefore granted sentence modification motions. These cases do not aid West. We will not impute some judges' lack of knowledge to other members of the judiciary. To the contrary, we presume that judges know the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. We adhere to that presumption here.

West also argues that he has demonstrated a new factor because, he says, the trial court was unaware of a change in parole policy, namely, reductions in parole grants that followed in

the wake of policy preferences expressed in the 1994 VCCLEA and in the 1994 Thompson letter. Assuming solely for the sake of argument that the VCCLEA and the Thompson letter describe a change in Wisconsin parole policy, we nonetheless reject the claim.

A change in parole policy is not a new factor for purposes of sentence modification unless the sentencing court expressly relied on parole eligibility when imposing sentence. *See* ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). "If the court does base its sentence on the likely action of the parole board, [the court] has the power to protect its own decree by modifying the sentence if a change in parole policy occurs." ***Id.*** Before a court may modify a sentence based on alleged changes in parole policy, however, the defendant must show that "'the sentencing judge's *express* intent is thwarted by the promulgation of new parole policies *contemporaneous or subsequent* to the original imposition of sentence.'" ***Id.*** at 14 (citation omitted; some emphasis added).

West fails to show that any change in parole policy allegedly reflected in the Thompson letter and the VCCLEA can constitute a new factor within the meaning of ***Franklin***. Both the Thompson letter and the federal law existed as of 1994, well before West's 1996 sentencing hearing. Because the alleged change in parole policy that West relies on is not "contemporaneous or subsequent" to his sentencing, the alleged change cannot serve as a new factor. *See* ***id.***, 148 Wis. 2d at 14.

Moreover, were we to conclude that West has somehow alleged a change in parole policy that occurred subsequent to his sentencing, we would nonetheless reject his claims. The record lacks any indication that the trial court's intent has been "thwarted" by a rigorous parole policy. *Cf.* ***id.***

West disagrees and directs our attention to the trial court's statement that "there has to be a lengthy period of minimum - - minimum period of confinement here followed by a long period of supervision where, if you demonstrate again that you cannot function in the community, that you can be confined again as a means of protecting the community." West appears to believe that these remarks reflect that the trial court wanted him confined only until he served a quarter of his sentence and became eligible for parole under WIS. STAT. § 304.06(1)(b). He asserts: "the 'long period of supervision' that the Court referenced was the [twenty-one] years left after the seven years minimum period of confinement." We are not persuaded.

The trial court explained to West:

> I don't know how long your own needs and circumstances require confinement, but despite the positives that there appear to be, despite the abilities that you apparently have, it clearly has to be a significant period of time for your own needs, as well as the needs the community clearly has here.
>
> ....
>
> While the maximum is not necessary given your age and the absence of a prior clearly violent offense, there has to be a lengthy period of confinement.

These remarks are self-evidently not an "express intent" to ensure West's release from prison after service of a minimum term. To the contrary, they are a plain statement of the trial court's intent that West serve a "significant" and "lengthy" period of confinement. That intent is not thwarted by the allegedly restrictive release policies that West claims the parole commission now follows. Accordingly, the policies do not constitute a "new factor." *See* ***Franklin***, 148 Wis. 2d at 14.

Finally, we note West's complaints that the circuit court "abused its discretion" in resolving the postconviction motions for sentence modification and reconsideration that underlie

this appeal. According to West, the circuit court misconstrued his arguments and misinterpreted the trial court's sentencing remarks. He also complains because the circuit court relied in part on a determination that the changes in parole policy West alleged did not frustrate the purpose of the original sentences. *Cf.* ***Harbor***, 333 Wis. 2d 53, ¶52 (withdrawing language from past decisions suggesting that an alleged new factor must also frustrate the purpose of the original sentence). We will not address these allegations.[4] As we have explained, the question of whether a fact or set of facts constitutes a new factor is a question of law that we consider *de novo*. *See* ***id.***, ¶33. We have independently determined that West failed to show a new factor here. Consequently, we need go no further with the analysis. *See* ***id.***, ¶38. We affirm. *See* ***State v. Marhal***, 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758 (Ct. App. 1992) (explaining that we affirm the circuit court if it reaches the right result, even when the result is reached for the wrong reason).

IT IS ORDERED that the orders are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] We nonetheless take this opportunity to remind all parties that our supreme court has overruled cases holding that a litigant seeking sentence modification must show that an alleged new factor frustrates the purpose of the original sentence. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40-52, 333 Wis. 2d 53, 797 N.W.2d 828. Concluding that a requirement for such a showing could undercut the purpose of sentence modification, the ***Harbor*** court expressly "withdr[e]w any language from [***State v.***] ***Michels***[, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989)] and the cases following ***Michels*** that suggests ... an alleged new factor must also frustrate the purpose of the original sentence." *See* ***Harbor***, 333 Wis. 2d 53, ¶¶51-52.