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April 24, 2018

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

2017AP412-CR State of Wisconsin v. Richard J. Janda (L.C. # 1998CF5719)

Before Lundsten, P.J., 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).

Richard J. Janda appeals pro se from orders denying his motions for sentence modification and for reconsideration. 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 affirm.

In 1998, upon his guilty pleas, Janda was convicted of two counts of armed robbery by threat of force while concealing his identity. At a 2000 resentencing hearing, Janda received an aggregate indeterminate prison sentence totaling thirty-six years.[2] Janda did not pursue a direct appeal after his 2000 sentencing.

In 2016, Janda filed a motion for sentence modification, citing a 1994 change in parole law, which provided that what had been designated the mandatory release date for serious offenses would now be merely presumptively mandatory.[3] *See* WIS. STAT. § 302.11(1g)(am). Janda's motion did not dispute that he was and is subject to presumptive mandatory release under § 302.11(1g)(am). Instead, Janda asserted that the circuit court acted under the incorrect understanding that he would have a mandatory release date and not merely a presumptive mandatory release date, and that this constituted a new factor justifying sentence modification. In support, Janda pointed to the following statement made by the circuit court at his 2000 resentencing: "If he continues to get involved in difficulties, major, minor violations in the prison, he's going to be there until his MR date." The circuit court denied the motion,

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

[2] Janda was first sentenced in this case in 1999. Pursuant to Janda's postconviction motion and the State's concession, the circuit court vacated that sentence and ordered resentencing.

[3] WISCONSIN STAT. § 302.11(1g)(am), which went into effect in 1994, provides: "The mandatory release date established in sub. (1) is a presumptive mandatory release date for an inmate who is serving a sentence for a serious felony committed on or after April 21, 1994, but before December 31, 1999."

determining that Janda failed to establish the existence of a new factor.[4] Janda filed a reconsideration motion, which the circuit court also denied. Janda appeals.

A circuit court may modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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, even though it was then in existence, it was unknowingly overlooked by all the parties.'" ***Id.***, ¶40 (quoted source omitted). The defendant bears the burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether the defendant has established a new factor presents a question of law we review de novo. ***Id.***, ¶¶36-37.

We conclude that Janda has not established the existence of a new factor. To repeat, Janda contends that the sentencing court's reference to his "MR" date demonstrates that it "unknowingly overlooked" the existing law that made his mandatory release date presumptive. We disagree. The sentencing court's failure to specify that Janda's mandatory release date was presumptive does not demonstrate that the court was unfamiliar with a law that was then six years old. We agree with the State that the circuit court's shorthand reference to "MR" does not even minimally evince, as Janda proposes, "a complete unawareness of the [1994] change in mandatory release law." Janda has not filed a reply brief and we deem the State's arguments conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a

[4] Due to the retirement of Janda's sentencing judge, a different circuit court judge decided his motions.

proposition asserted by a respondent on appeal and not disputed in the appellant's reply is taken as admitted).

Additionally, we agree with the State that Janda has failed to establish that his potential exposure to confinement beyond his mandatory release date was highly relevant to the circuit court's sentence. Instead, the court focused on other factors.

The court began by discussing Janda's poor conduct while in prison. Observing that the resentencing context provided a unique opportunity "to see how well someone is going to adjust in the prison setting," the court found that Janda "certainly has made a poor adjustment to his opportunities to address [his needs] in the prison setting."

Further, in pronouncing sentence, the court acknowledged its obligation to "consider the gravity of the offenses, the character of the defendant and the need to protect the public." It characterized the robberies as "extremely serious offenses," recounted Janda's criminal and correctional history in detail, and focused on the need to protect the public from Janda's "extremely serious" and "very dangerous" conduct.

The difference between mandatory and presumptive mandatory release was not a relevant consideration. In fact, the court's comment about "MR" appears to have been simply a reminder to Janda that his behavior in prison would affect his release date. In sum, Janda has failed to establish that the sentencing court unknowingly overlooked the nature of his presumptive mandatory release date or that this fact was highly relevant to his sentence. He has therefore failed to establish the existence of a new factor.

Janda asserts that the circuit court "violated his constitutional right to equal protection by denying his motion for sentence modification." Janda did not raise this argument in the circuit court, and we will not address it for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).[5]

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are 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

[5] Though we need not discuss the substance of Janda's new equal protection argument, we observe that the State's brief persuasively argues it fails on the merits; Janda has not filed a reply brief disputing the State's arguments. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

To the extent that Janda intends to make any additional argument it is deemed rejected as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).