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DISTRICT IV

January 8, 2019

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

2018AP127

State of Wisconsin v. Patrick James Carter (L.C. # 2016CF1740)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, 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).

Patrick James Carter appeals a judgment of conviction and an order denying Carter's postconviction motion for sentence modification. Carter contends that he presented a new factor in his motion for sentence modification by showing that he would not be able to participate in the Substance Abuse Program (SAP) until he is within three years of release. 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 summarily affirm.

Pursuant to a plea agreement, Carter pled guilty to armed robbery as a party to a crime, and the State agreed to cap its sentencing recommendation at ten years of initial confinement and ten years of extended supervision. At sentencing, the State recommended ten years of initial confinement and ten years of extended supervision, and Carter argued for a sentence of four years of initial confinement and six years of extended supervision.

The court imposed a sentence of eight years of initial confinement and eight years of extended supervision. The court explained that it found Carter eligible for SAP because “[i]t’s clear that’s the one key that you need to hopefully stay out of this jam again.” The court stated that it was going to “build hope into” Carter’s sentence by giving Carter “an opportunity to lower [his] sentence by completing” SAP. The court stated that Carter could “lower [his] sentence by completing the program,” and that “[t]he quicker [he] get[s] in the program, the quicker [he] get[s] out of prison.” The court stated that if Carter refused to participate in SAP, he would serve his full sentence, but that if he successfully completed the program, he could “lower that by quite a bit of time.” The court stated that the sentencing transcript would follow Carter to prison, and would “say the purpose of this sentence is to permit [Carter] a chance to complete” SAP, and that if Carter “complete[d] it early, [the court] want[ed] [Carter] out of there because [Carter would have] earned it then.” The court also stated that the only thing it had identified that Carter needed to do to improve himself was to complete SAP.

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

Carter moved for sentence modification, citing a Department of Corrections (DOC) policy that prevents inmates from participating in SAP until they are within three years of release. Carter argued that the DOC policy was a new factor because it was highly relevant to his sentence and it was unknowingly overlooked by the court. The circuit court denied sentence modification, finding that Carter had not shown a new factor because the court understood at sentencing that it had no control over whether the DOC would allow Carter to participate in SAP.

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A “new factor” for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence, but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant establishes the existence of a new factor, the circuit court must then determine whether the new factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶38. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. *Id.*, ¶33.

Carter contends that he demonstrated a new factor warranting sentence modification. He contends that his inability to participate in SAP until he is within three years of release is highly relevant to the court’s sentencing, and that the circuit court unknowingly overlooked that fact. Carter contends that the court indicated at sentencing that the purpose of the sentence was to allow Carter to complete SAP as soon as possible. Carter contends that, contrary to the court’s stated sentencing intent, Carter will not be able to participate in SAP until he is within three years of his release, after serving the first five years of his sentence. He argues that the fact that

he will not be able to enter SAP until he has already served five years of his sentence is contrary to the court's explanation that it intended the sole purpose of the sentence to be to allow Carter to participate in SAP.

The State responds that the fact that Carter will not be able to participate in SAP until he is within three years of release is not a new factor. It argues that the court was aware, at the time of sentencing, that the DOC would determine if and when Carter would participate in SAP. It contends that the fact that Carter will not be able to participate in SAP until he is within three years of release is not highly relevant to sentencing because the court considered factors and objectives in addition to rehabilitation in imposing sentence and because the court did not indicate that the court expected Carter would be eligible for SAP on a particular date.

We conclude that the fact that Carter will not be able to participate in SAP until he is within three years of release is not a new factor because the delayed eligibility date is not highly relevant to the sentence imposed by the circuit court. First, while the court explained that Carter's rehabilitation was the most significant component of the sentence, the court did not say that rehabilitation was the court's only sentencing consideration. To the contrary, the court stated that it also intended its sentence to serve as specific deterrence and punishment, and that the court considered Carter's character, criminal history, and risk to the public, as well as the severity of the offense. Moreover, nothing about the court's sentencing comments indicated that the length of the sentence was based on the court's belief that Carter would be immediately eligible for SAP. The court stated that the purpose of the sentence it imposed was to allow Carter the opportunity to participate in SAP, which it identified as the only thing it could see that Carter needed to do to improve himself; that SAP would provide Carter with an opportunity to lower his sentence by quite a bit; and that the earlier Carter entered the program, the earlier he

would get out of prison because he would have earned it. The court's sentencing statements are not thwarted by Carter being unable to participate in SAP until he is within three years of his release date, after serving the first five years of his sentence. It remains that the sentence will allow Carter an opportunity to participate in SAP; that successful completion of the program will lower Carter's term of initial confinement by quite a bit; and that the sooner Carter is able to get into the program, the sooner he will get out of prison.

In sum, nothing in the court's sentencing comments indicates that Carter's inability to participate in SAP until he is within three years of release is highly relevant to sentencing. Thus, the fact that Carter will not be able to participate in SAP until he is within three years of release is not a new factor.

Therefore,

IT IS ORDERED that the judgment and order 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