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DISTRICT II

April 10, 2019

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

2018AP1007-CR State v. Kevin A. Sodermark (L.C. # 2004CF383)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

Kevin A. Sodermark appeals from an order denying his motion for sentence modification. 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 (2017-18).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

In 2005, Sodermark was convicted following a no contest plea to first-degree sexual assault of a child. The circuit court sentenced him to eight years and four months of initial confinement and twenty years of extended supervision.

After his release from confinement, Sodermark transferred his extended supervision to Michigan, where he had to comply with that state's sex offender registration law. The Michigan sex offender registration law is more restrictive than Wisconsin's sex offender registration law.

In December 2017, Sodermark filed a motion for sentence modification, seeking to shorten his period of extended supervision. He argued that the application of the more restrictive sex offender registration law to his extended supervision constituted a new factor. The circuit court denied the motion in a written decision. This appeal follows.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶37-38.

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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See Harbor*, 333 Wis. 2d 53, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See id.*, ¶¶37, 66.

We need not decide whether Sodermark has shown the existence of a new factor because, even if we assume he has, we conclude the circuit court did not erroneously exercise its discretion in denying his motion for sentence modification. In its written decision, the court noted that its intent at sentencing was “to insure the public safety by ordering long-term monitoring” of Sodermark, and whether Sodermark lived in Wisconsin or Michigan did not change that intent. The court acknowledged the facts and factors in Sodermark’s motion but concluded that “[t]he degree of legislative or administrative regulations upon the daily lives of the sex offender does not compel nor justify this Court to shorten the length of sentence, thereby increasing the risk and danger to the community.” Because the court’s decision reflects a proper exercise of discretion, we affirm it.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court 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