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DISTRICT IV

September 12, 2019

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

2018AP1255-CR State of Wisconsin v. Jael K. Speights (L.C. # 1999CF1777)

Before Fitzpatrick, 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).

Jael K. Speights appeals 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 unless otherwise noted.

In 1999, Speights broke into a woman's apartment, repeatedly hit and choked her, and then forcibly penetrated her vagina and anus with his penis. Speights was identified as the perpetrator through DNA evidence, and the State charged him with two counts of second-degree sexual assault and one count of burglary. Speights pled no contest to all three counts. The sentencing court imposed a twenty-year indeterminate sentence on the first count of sexual assault, and a seventeen-year indeterminate sentence on the second, to run consecutive. On the burglary, the court withheld sentence in favor of probation.

Speights has sought relief from this court on multiple occasions. In 2016, we affirmed the circuit court's denial of Speights' sentence modification motion in which he alleged that a 1994 change in parole law making his mandatory release date presumptive constituted a new factor. ***State v. Speights***, No. 2016AP1685, unpublished slip op. and order (WI App Aug. 31, 2017). In rejecting Speights' claim, we explained that the 1994 law was not "new" since it existed at the time of his 1999 sentencing, and that the sentencing transcript demonstrated that the circuit court was not focused on "when Speights might be paroled." ***Id.*** at 3.

More recently, in May 2018, Speights sought to modify his sentence so that counts one and two would run concurrent to each other, "for a total of 20-years." As grounds, Speights alleged that the Department of Corrections' practice of delaying an inmate's placement in sex offender treatment until the inmate is close to his or her release date constitutes a new factor. The circuit court denied the motion, explaining that the "[a]vailability of D.O.C. Programming does not constitute a 'new factor' under Wisconsin law," and also that "here, the court expressly delegated such an assessment to the D.O.C." Speights 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 of the parties." ***Id.***, ¶40 (quoted source omitted). The defendant bears the burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. For a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing. ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). Whether a new factor exists presents a question of law we review de novo. ***Harbor***, 333 Wis. 2d 53, ¶33.

As a matter of law, Speights has not established his entitlement to sentence modification. First, Speights essentially argues that, by attaching the availability of sex offender treatment to his presumptive mandatory release date, the DOC is lengthening Speights' incarceration in a manner not contemplated by the sentencing court. This is simply a rehash of arguments previously raised and rejected in connection with his 2016 sentence modification motion and the appeal therefrom,[2] and is procedurally barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990,

[2] For example, Speights' appellant's brief argues that the sentencing court "knew that Speights would do a minimum amount of 25%, in which he would be eligible for release in the year 2008" and posits that "if the Court wanted Speights to do 66% (24-years) of the prison term" it imposed, "then it would have sentenced Speights to 'nearly a century' …." Here, Speights is rephrasing his 2016 argument that the sentencing court would have structured its sentence differently had it known that Speights was subject to a presumptive mandatory release date calculated at two-thirds of his sentence.

Further, Speights argues that the practice of using an inmate's presumptive mandatory release date to determine program enrollment "has been ongoing for well over 2-decades." As with the 1994 change in parole law addressed in his prior appeal, Speights cannot demonstrate that the practice of tying sex offender treatment to an offender's release date is "new" and was not "in existence" at the time he was sentenced.

473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

Second, even if we reach the merits of Speights' motion, he has failed to establish that the delayed availability of sex offender treatment constitutes a new factor. The sentencing court's comments demonstrate that it was aware that the availability and timing of Speights' treatment would be determined by the DOC. The sentencing court stated it "would hope" that Speights "is going to get sex offender treatment while in the prison system," but acknowledged that the availability and benefit of any treatment, including its impact on Speights' release, would "depend[] on how the Department of Corrections addresses this case." Recognizing that there was no guarantee Speights would receive treatment in prison, the sentencing court left "the ordering of sex offender treatment … to the discretion of the agent," specifying that if Speights received treatment in prison and "if treatment needs to be ongoing and continuing and Mr. Speights is out of the penal structure, I expect that treatment to be continued … as the agent deems appropriate." Nothing in Speights' motion or the record suggests that the early availability of sex offender treatment was highly relevant to the circuit court's sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶40; ***Franklin***, 148 Wis. 2d at 15.

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