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DISTRICT I

December 17, 2019

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

2019AP959-CR State of Wisconsin v. Tyrone M. Wesley (L.C. # 2005CF1633)

Before Brash, P.J., Fitzpatrick and Donald, 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).

Tyrone M. Wesley, *pro se*, appeals from orders of the circuit court that denied his motion for sentence modification and his motion 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 (2017-18).[1] The orders are summarily affirmed.

In March 2005, Wesley was charged with seven offenses: one count of armed robbery with the threat of force occurring on November 30, 2004; two counts of armed robbery and one count of attempted armed robbery, all with the threat of force, occurring on March 22, 2005; and one count of armed robbery with the threat of force, one count of attempted armed robbery with the threat of force, and one count of possession of a firearm by a felon as a habitual offender, occurring on March 24, 2005. A jury acquitted Wesley of the first four counts but convicted him on the charges from March 24.

At sentencing, the sentencing court[2] first noted its objectives of punishment, deterrence, and rehabilitation, and identified the relevant factors that it would consider, including the nature of the offenses, "who [Wesley is] as an individual," his prior criminal record, and the interests of society. The sentencing court went on to discuss those objectives and factors in relation to the crimes of conviction, then commented, in relevant part:

> The sentence that I'm about to impose I think is justified just upon that conduct alone. However … you were also accused of additional charges of an armed robbery of [a tavern and] an armed robbery of an individual … along with two of his friends. There were admissions that you made as to that conduct, and I don't know where the jury … found that you weren't guilty of those. But I'm satisfied you committed those crimes as well.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The Honorable Timothy G. Dugan presided at trial and sentencing; we refer to him as the sentencing court. The Honorable Dennis R. Cimpl denied Wesley's motions at issue in this appeal; we refer to him as the circuit court.

Wesley received consecutive and concurrent sentences totaling thirty years of initial confinement and fifteen years of extended supervision. He had a direct appeal, in which he challenged only the sentencing court's denial of a motion to suppress. *See* ***State v. Wesley***, No. 2007AP1177-CR, unpublished slip op. ¶1 (WI App May 6, 2008). We affirmed.

In April 2019, Wesley filed a *pro se* "motion for sentence modification and affidavit in support" in which he sought sentence modification based on a new factor and an "abuse of discretion."[3] He asserted that the sentencing court had unknowingly overlooked the Seventh Amendment to the United States Constitution when it stated it was satisfied that Wesley had committed the crimes on which the jury acquitted him. He also asserted that the sentencing court's statement that it was "satisfied [Wesley] committed those crimes" constituted an erroneous exercise of discretion.

The circuit court noted that a motion for sentence modification based on an erroneous exercise of discretion must be brought within ninety days of sentencing or within the appellate time limits under WIS. STAT. RULE 809.30, but those deadlines had lapsed. The circuit court further noted that an erroneous exercise of discretion claim was not cognizable under WIS. STAT. § 974.06. Thus, the circuit court concluded, "as a matter of law, [Wesley] cannot seek sentence modification because of an [erroneous exercise] of discretion." The circuit court additionally pointed out that the sentencing court was permitted to consider the charges of acquittal under

[3] Our supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion" more than twenty-five years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

State v. Damaske, 212 Wis. 2d 169, 195, 567 N.W.2d 905 (Ct. App. 1997). The circuit court therefore denied the motion.

Wesley moved for reconsideration, complaining that the circuit court "neglected to perform its judicial duties by not referring to 'any' of the actual factors in Wesley's motion." He argued that the circuit court had improperly recharacterized his motion and violated the Administrative Procedures Act and that he had "established the existence of a new factor by clear and convincing evidence." The circuit court denied reconsideration, noting that the Seventh Amendment "is inapposite to [this] case" and that Wesley's "'new factors' were not actually new factors under the law in Wisconsin." Wesley appeals.

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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Harbor***, 333 Wis. 2d 53, ¶36. Whether the facts constitute a new factor is a question of law. ***Id.*** If the circuit court determines that a new factor exists, it then determines, in its exercise of discretion, whether sentence modification is warranted. ***Id.***, ¶37.

The Seventh Amendment to the United States Constitution provides, in its entirety:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States*, than according to the rules of the common law.

U.S. CONST. amend. VII (emphasis added). It is this "re-examination" clause that Wesley believes was "unknowingly overlooked" at sentencing, thus constituting a new factor. We do not agree.

A new factor must be unknown to the court at the time of sentencing, *see* ***Rosado***, 70 Wis. 2d at 288, but we presume that the sentencing court knows the law, *see* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Wesley makes no showing that would defeat the presumption. Moreover, the Seventh Amendment applies only to civil cases, not to criminal cases. *See* ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 348-49 (1979) (Rehnquist, J., dissenting); ***United States v. Hutul***, 416 F.2d 607, 626 (7th Cir. 1969). It also applies only to actions in federal courts, not state courts. *See* ***Minneapolis & St. Louis R.R. Co. v. Bombolis***, 241 U.S. 211, 217 (1916); ***Richie v. Badger State Mut. Cas. Co.***, 22 Wis. 2d 133, 142-43, 125 N.W.2d 381 (1963). Whether the amendment was known or unknown to the sentencing court, its inapplicability to a state criminal action means that the re-examination clause cannot have been highly relevant to the sentencing court's imposition of sentence. Thus, as a matter of law, the re-examination clause of the Seventh Amendment is not a new factor.

Even if the re-examination clause were a new factor, the circuit court had the discretion to determine whether sentence modification was warranted. The circuit court here signaled it would not have modified the sentence when it correctly noted that a sentencing court is permitted to consider conduct for which a defendant has been acquitted. *See* ***Damaske***, 212 Wis. 2d at 195; *see also* ***State v. Salas Gayton***, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459; ***State v. Bobbitt***, 178 Wis. 2d 11, 17, 503 N.W.2d 11 (Ct. App. 1993); ***United States v. Fonner***, 920

F.2d 1330, 1332-33 (7th Cir. 1990). We thus conclude that the circuit court properly denied the motion for sentence modification claiming a new factor.[4]

In his reconsideration motion, Wesley took issue with what he claims was the circuit court's recharacterization of his motion, despite a "warning" in his affidavit that he "does not agree to any … re-characterization in this said sentence modification by the court[.]" He asserts that the circuit court has violated ***Castro v. United States***, 540 U.S. 375 (2003), by failing to consider his original motion as a new factor motion.

The circuit court does not appear to have mischaracterized, or even recharacterized, Wesley's original motion. While the circuit court did not expressly address the new factor claim in its denial order, the sentence modification motion did in fact allege that the sentencing court had erroneously exercised its discretion, which the circuit court addressed in its order.

In any event, ***Castro*** is inapplicable. That case imposes a limit on federal district courts that seek to recharacterize a *pro se* litigant's motion as a first motion under 28 U.S.C. § 2255 (2019)[5] because of certain restrictions on second or subsequent § 2255 motions. *See* ***Castro***, 540 U.S. at 383; 28 U.S.C. § 2255(h). ***Castro*** does not prohibit all recharacterizations and, indeed, the rule in Wisconsin is that we are not bound by a *pro se* defendant's choice of labels. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983).

[4] While a new factor motion is not subject to a time limit, the circuit court correctly noted that the erroneous exercise of discretion claim was time barred. *See* ***State v. Noll***, 2002 WI App 273, ¶¶9-12, 258 Wis. 2d 573, 653 N.W.2d 895 (ways to seek sentence modification); WIS. STAT. § 973.19(1)(a)-(b) (time limits on statutory relief). On appeal, Wesley does not dispute the timeliness determination.

[5] All references to the United States Code are to the 2019 version unless otherwise noted.

Wesley's reconsideration motion also asserted a violation of the Administrative Procedures Act, 5 U.S.C. § 500, *et. seq*., claiming without specific citation that he had a "right to a decision based solely on papers actually entered in the proceeding." However, the Administrative Procedures Act is a "statute that Congress wrote to define the relationship between courts and agencies." ***Kisor v. Wilkie***, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring). It is a federal rule that applies only to federal agencies, not courts. *See* 5 U.S.C. § 551(1)(B); ***United States v. Johnson***, 703 F.3d 464, 467 (8th Cir. 2013). The Administrative Procedures Act has no import to this litigation.

In sum, Wesley has not identified a new factor as a matter of law and the circuit court has not violated ***Castro*** or the Administrative Procedures Act. Thus, the circuit court properly denied both the motion for sentence modification and the motion for reconsideration.

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* 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