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DISTRICT I

February 4, 2020

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

2018AP2400-CR State of Wisconsin v. William Edwards (L.C. # 2002CF6979)

Before Brash, P.J., Dugan 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).

William Edwards, *pro se*, appeals from an order of the circuit court that denied 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] The order is summarily affirmed.

In June 2003, Edwards pled guilty in Milwaukee County to five counts of armed robbery with the threat of force while concealing identity as party to a crime. On each count, he was sentenced[2] to thirteen years of initial confinement and ten years of extended supervision. These sentences were to be concurrent with each other, but consecutive to an armed robbery sentence of ten years of initial confinement and fifteen years of extended supervision previously imposed in Washington County. The sentencing court in the instant case also made Edwards eligible for the Challenge Incarceration Program (CIP), *see* WIS. STAT. § 302.045 (2001-02), after he had served eight years of initial confinement.

According to CCAP[3] records, one of Edwards' co-actors in the Milwaukee County robberies, Julian Spencer, was sentenced by the same judge to a total of eight years of initial confinement and ten years of extended supervision, with CIP eligibility after five years. The Washington County Circuit Court subsequently sentenced Spencer to a concurrent twelve years of initial confinement and eighteen years of extended supervision.

Edwards has previously sought postconviction relief in this case through an assortment of procedural mechanisms, including a no-merit appeal and two *pro se* WIS. STAT. § 974.06

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

[2] The Honorable Mary M. Kuhnmuench imposed sentence. We refer to Judge Kuhnmuench as the sentencing court.

[3] "CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs." We may take judicial notice of CCAP records. The online website reflects information entered by court staff. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

motions. The motion underlying the instant appeal was a motion for sentence modification alleging a new factor, specifically, a change in a Department of Corrections policy. Edwards asserts that, under the new policy, offenders are not considered for participation in the CIP until they have three years or less remaining on their initial confinement sentence. However, this policy was allegedly not in place during Spencer's confinement, so he was released[4] to extended supervision in June 2010.[5] Edwards believes that he is entitled to resentencing because the Department's new policy "created a disparity between similarly situated defendants."

The circuit court[6] denied the motion. It noted that based on the sentencing court's decisions, Edwards and Spencer were not similarly situated, and Edwards had not otherwise demonstrated that he and Spencer were similarly situated. Edwards appeals.

A new factor is a fact or set of facts that is "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); ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333

[4] When a defendant obtains early release through CIP, the remaining portion of initial confinement is converted to extended supervision time. *See* WIS. STAT. § 302.045(3m)(b).

[5] Edwards complains that Spencer was released four years and four months early. However, because Spencer's Milwaukee and Washington County sentences ran concurrently, it appears that Spencer was released from only his Washington County sentence that early; his release from Milwaukee County was about sixteen months early. Indeed, Edwards states in his appellate brief that Spencer had served six years and eight months prior to his release.

[6] The Honorable Michelle Ackerman Havas reviewed and denied the motion for sentence modification. We refer to Judge Havas as the circuit court.

Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court then exercises its discretion to decide whether modification of the sentence is warranted. ***Id.***, ¶37.

We are unpersuaded that any change to the Department's program eligibility policy constitutes a new factor. For one thing, Edwards has not shown what the Department's policy was or any changes thereto. Moreover, although the sentencing court awarded Edwards CIP eligibility, it evidently did not believe that Edwards would be allowed to participate in the program at all.[7] Thus, Edwards' actual eligibility date was not "highly relevant to the imposition of sentences." *See* ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) ("In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing.").

Even assuming that any change to Department policy constitutes a new factor, the circuit court has the discretion to determine whether sentence modification is warranted in light of a new factor. Edwards asserts that under WIS. ADMIN. CODE § SC 1.01(2)(d) (July 1995), "[s]imilarly situated offenders should receive similar sentences." Edwards believes he and

[7] The sentencing court specifically stated:

> I'm only going to make you eligible because I made the same error with the … co-actors in this case, but because of the nature of the violation, it's a 940 crime, and therefore, you're not eligible by statute, however, since I let the other ones be eligible after a certain period of time in prison, I'm going to let you be eligible as well.
>
> I'm letting you know that only because the ultimate determination is made by the Department of Corrections…. And by statute they probably -- not probably, they won't be putting you in it.

(continued)

Spencer are similarly situated primarily because they "committed and were convicted of the same offense(s)," though he also notes that they were both also seventeen years old, and both cooperated with and gave statements to police. Edwards thus argues that his and Spencer's circumstances are "identical in regards to the crimes that were committed, which makes them similarly situated." The circuit court disagreed, determining that sentence modification was not warranted because Edwards and Spencer were not similarly situated. We agree with the circuit court.

As an initial matter, we note that WIS. ADMIN. CODE ch. SC sets forth "rules of the sentencing commission," *see* WIS. ADMIN. CODE § SC 1.01(1) (July 1995), which was governed by WIS. STAT. §§ 973.01-973.012 (1993-94). However, that sentencing commission was abolished by the legislature in 1995. *See* 1995 Wis. Act 27, §§ 7250-7252. Consequently, ch. SC was removed from the administrative code in 1997 and is no longer in effect.

In any event, we are not persuaded that Edwards and Spencer are similarly situated. Edwards cites to ***State v. Kramer***, 2001 WI 132, ¶20, 248 Wis. 2d 1009, 637 N.W.2d 35, for the proposition that "defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making prosecutorial decisions with respect to them." (Quotation marks, brackets, and citations omitted.) But ***Kramer*** was a selective prosecution case, *see* ***id.***, ¶2, not a sentencing disparity or new factor case, and because

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Under WIS. STAT. § 973.01(3m) (2001-02), a court imposing a bifurcated sentence for "a crime other than a crime specified in [WIS. STAT.] ch. 940" or various sections of WIS. STAT. ch. 948 was required to decide whether the defendant was eligible for CIP under WIS. STAT. § 302.045 (2001-02). Armed robbery, however, is an offense under WIS. STAT. ch. 943.

Edwards and Spencer were indeed charged with the same crimes, there is no selective prosecution issue.

"Although a sentence given to a similarly situated codefendant is relevant to the sentencing decision, it is not controlling." ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted). This is because Wisconsin recognizes the importance of "[i]ndividualized sentencing." *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Defendants do not receive the same punishment simply because they are convicted of the same offense. Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). "[N]o two convicted felons stand before the sentencing court on identical footing .... and no two cases will present identical factors." ***Gallion***, 270 Wis. 2d 535, ¶48 (citation omitted; brackets and ellipses in ***Gallion***).

Edwards makes no comparison between the factors the sentencing court considered in his case versus the factors it considered in Spencer's case. For example, we note that in this case, the sentencing court was troubled by Edwards' "serious juvenile record," which included an alleged sexual assault when he was eleven years old, his lack of emotional response, and his lack of remorse. There is no suggestion that the sentencing court perceived Spencer's behavior to be similarly impertinent, which may factor into why Spencer received a lesser sentence.

The circuit court here, in denying Edwards' motion, noted that "it is clear that [the sentencing court] did not intend for Edwards to be released sooner than Spencer." Edwards evidently takes this to refer to a calendar date, arguing he did not mean to suggest he should be

released before Spencer. However, we perceive the circuit court's statement to simply indicate its belief that even if a new factor existed, sentence modification would not be appropriate because the sentencing court did not consider Edwards and Spencer to be similarly situated enough to warrant identical sentences and, rather, intended for Edwards to have a more severe punishment, irrespective of Department policies. We are not convinced the circuit court erroneously exercised its discretion in reaching this conclusion.

Therefore,

IT IS ORDERED that the order is 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