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April 16, 2020

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

2018AP2225-CR State of Wisconsin v. Steven D. Beach (L.C. # 2001CF42)

Before Kloppenburg, Graham and Nashold, 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).

Steven Beach appeals an order denying his postconviction motion. Beach argues that the circuit court erroneously exercised its discretion in denying his motion for sentence modification based on a new factor. He also argues that his sentence after revocation was imposed in violation of his constitutional right to due process. After reviewing 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 summarily affirm.

Beach was convicted in 2001 after pleading no contest to second-degree sexual assault of a child. He was sentenced to 5 years of initial confinement and 10 years of extended supervision. This court affirmed his conviction in a no-merit appeal. Beach then filed a petition for review, which was denied.

On May 9, 2006, Beach was released to extended supervision. In November 2006, his extended supervision was revoked and he was returned to prison for 2 years and 6 months. Beach again was released to extended supervision on February 3, 2009. Again his extended supervision was revoked on July 9, 2014, and he was returned to prison for 2 years, 3 months, and 2 days. Beach was then released to extended supervision on November 10, 2015. The Department of Corrections (DOC) determined that his overall maximum discharge date was March 23, 2021, which included additional consecutive sentences that were incorporated into his sentence calculation. The DOC determined that Beach had served a total of 9 years, 8 months, and 23 days in confinement and that he had 5 years, 3 months, and 7 days left to serve on extended supervision, for a total of 15 years. Beach's extended supervision was revoked once again in 2018. His maximum discharge date after the 2018 revocation was set for September 5, 2023.

Beach filed a motion for sentence modification. He argued that he was entitled to resentencing based on a new factor and that his due process rights had been violated. The circuit court denied the motion after a hearing, and Beach now appeals.

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

A defendant seeking sentence modification based on a new factor has the burden of showing that a new factor exists by clear and convincing evidence. *State v Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is defined as “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” *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 we review independently. *Harbor*, 333 Wis. 2d 53, ¶33. We review a circuit court’s decision as to whether a new factor justifies sentence modification for erroneous exercise of discretion. *Id.*

Beach argues that the “new factor” entitling him to sentence modification came about as a result of a change to Wisconsin’s Truth-in-Sentencing law. Beach received his 15-year bifurcated sentence in 2001, during the first phase of Truth-in-Sentencing (TIS-I). *See* 1997 Wis. Act 283. The second phase, TIS-II, went into effect on February 1, 2003, and thus, was in effect for all of Beach’s revocation proceedings. *See* 2001 Wis. Act 109. WISCONSIN STAT. § 302.113(9)(am) was amended to its current form by TIS-II, and provides:

If the extended supervision of the person is revoked, the reviewing authority shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence. The order returning a person to prison under this paragraph shall provide the person whose extended supervision was revoked with credit in accordance with ss. 304.072 and 973.155.

Beach argues that the effect of this provision on him was that, each time his extended supervision was revoked, the DOC extended his sentence further into the future by eliminating any credit for time he spent on extended supervision.

Beach's argument that there is a "new factor" fails because, under the state of the law as it existed both before and after Truth-In-Sentencing, Beach was not entitled to credit for time spent on extended supervision prior to revocation. Even prior to the enactment of TIS-I in 1998, case law made clear that, for purposes of calculating credit, "custody" does not include time spent on parole or extended supervision. See *State ex rel. Ludtke v. Department of Corr., Div. of Prob. & Parole*, 215 Wis. 2d 1, 6, 572 N.W.2d 864 (Ct. App. 1997) (rejecting the defendant's argument that time served on parole constitutes custody for purposes of sentence credit).

The transcript of Beach's original sentencing hearing reflects that the judge properly informed Beach that, if he violated the terms of his extended supervision, he may be returned to prison to serve "not more than" the time remaining on his sentence. The court further stated, "The time remaining on your sentence is the total length of your sentence less any time served in custody." The sentencing transcript reflects that the judge properly stated the law governing the calculation of Beach's reconfinement sentence, should his extended supervision be revoked. The enactment of TIS-II did not change that calculation scheme. Because Beach has failed to show the existence of a new factor by clear and convincing evidence, the circuit court properly denied his motion for sentence modification.

We turn next to Beach's due process arguments. Beach argues that the sentencing court deprived him of due process by failing to notify him at the time of sentencing that, if he violated the terms of his extended supervision, he would not receive credit for time spent on extended supervision. We reject this argument because, as stated above, the sentencing transcript reflects that the judge correctly stated the law governing extended supervision, revocation, and reconfinement. We also reject Beach's argument that the DOC violated due process by calculating a maximum discharge date more than 15 years from his original sentencing. For each of Beach's

sentences after revocation, he received credit toward his 15-year sentence for time spent in confinement, but not for time spent on extended supervision, consistent with WIS. STAT. § 302.113(9). Beach fails to point to anything in the record that would support a due process challenge to his sentencing after revocation.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals