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June 9, 2020

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

2019AP832-CR State of Wisconsin v. Kenneth M. Gray (L.C. # 1996CF961362)

Before Brash, P.J., Dugan 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).

Kenneth M. Gray, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification. Gray also appeals from an order denying 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.

On December 30, 1995, Gerardo Fonseca died from a gunshot wound to the head. Then-fourteen-year-old Gray confessed to the shooting, which occurred after Fonseca asked Gray to leave the house from which Gray was selling cocaine. The State filed a delinquency petition alleging one count of first-degree intentional homicide as a party to a crime and one count of obstructing or resisting an officer. The juvenile court waived jurisdiction and Gray was charged as an adult with one count of first-degree intentional homicide as a party to a crime. Gray accepted a plea offer and pled guilty to one count of first-degree reckless homicide as a party to a crime. At sentencing, the sentencing court commented, in part:

> We have a parole system in this state. I'm often concerned in sentencing that that system may function based on overcrowded prisons, rather than appropriate parole considerations. In this case some decisions will have to be made about this particular individual, and those are not my decisions to make. And no doubt the defendant's age, to some extent, will continue to be a factor.

Gray was sentenced to thirty years' imprisonment out of a maximum possible forty years' imprisonment, based on considerations including the community's interest in deterrence and protection, the "extremely aggravated" nature of the offense, and Gray's "needs and circumstances."[2]

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

[2] The Honorable John A. Franke imposed sentence; we will refer to him as the sentencing court. The Honorable Joseph R. Wall reviewed the motions for sentence modification and reconsideration; we will refer to him as the circuit court.

In June 2016, thirty-five-year-old Gray was denied parole, in part because the parole commission believed that he "could highly benefit from some additional opportunities and resources prior to release, along with a more realistic/workable parole plan" and that he should "remain confined for further protection of the public." In July 2016, Gray wrote to the circuit court, claiming that the parole commission had "frustrated [the] sentence. By NOT releasing me on my Mandatory Release Date." Circuit court staff responded with a letter, informing Gray that if he did not agree with the parole commission's decision, his remedy was "to file a timely petition for writ of certiorari within 45 days of the final decision made by the commission." Gray did not seek certiorari review but, in October 2016, asked the parole commission to reconsider its decision. The commission denied the request in November 2016, telling Gray that his next review would take place in March 2017.

In January 2019, Gray filed the motion for sentence modification that underlies this appeal. He alleged there was a new factor warranting modification. Specifically, Gray claimed that the sentencing court had "considered and referenced Wisconsin parole policy" at the time of sentencing, but "[s]ince that time, Wisconsin parole policy has changed, shifting the focus for parole release away from acceptance of treatment and rehabilitation, toward lengthier and more punitive sentences." Gray also complained that he "has not been granted parole despite his clear acceptance and completion of education and treatment and serving his Presumptive Mandatory Release date."

The circuit court denied the motion. It noted that "there is absolutely no indication in the record that [the sentencing court] expressly relied on parole eligibility as a factor in determining sentence" and found that Gray's sentence "was not based on any presumption that the defendant would be paroled on any date certain or that he would automatically be paroled when he became

parole eligible. The sentence [the court] imposed did not factor any particular belief about when the defendant would be released into the equation." Gray moved for reconsideration, asserting that the sentencing court had "made its assumptions that Gray would be released earlier due to 'overcrowded prisons' on parole." The circuit court denied reconsideration. Gray appeals.

An inmate sentenced under Wisconsin's parole system is generally first eligible for release on parole after serving one-quarter of his or her sentence and is "entitled" to release on the mandatory release date, which occurs when an inmate has served two-thirds of the sentence. *See* ***State v. Stanley***, 2014 WI App 89, ¶4, 356 Wis. 2d 268, 853 N.W.2d 600; *see also* WIS. STAT. §§ 304.06(1)(b); 302.11(1). However, a different rule applies for offenders who, like Gray, are serving time for "a serious felony committed on or after April 21, 1994, but before December 31, 1999." *See* ***Stanley***, 356 Wis. 2d 268, ¶5 (citation omitted). For these offenders, the mandatory release date is instead a "presumptive mandatory release date." *See* § 302.11(1g)(am). "The parole commission may deny presumptive mandatory release to an inmate" on the grounds of protection of the public. *See* § 302.11(1g)(b)2.

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); *and see* ***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 Wis. 2d 53, ¶36. Whether a new factor exists is a question of law this court reviews *de novo*. *See* ***id.*** If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

"[A] change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the [sentencing] court." ***State v. Franklin***, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1989). Gray argues that the sentencing court here "directly stated [its] expectation that if Mr. Gray accepted treatment and due to *prison overcrowding*, Wisconsin sentencing law and parole policy would in fact result in his release from prison after he reached his parole eligibility date." Gray asserts that the sentencing court's intent was to structure a sentence of 84 to 240 months—one-quarter to two-thirds of a 360-month sentence.[3]

We disagree with Gray's interpretation of the sentencing court's comments. The sentencing court first said, "We have a parole system in this state." This simply states a fact about the structure of the correctional system at the time. The sentencing court next said, "I'm often concerned in sentencing that that system may function based on overcrowded prisons, rather than appropriate parole considerations." This is an expression of the sentencing court's concern that parole decisions are improperly based on prison overcrowding rather than legitimate parole considerations. Next, the sentencing court stated, "In this case some decisions will have to be made about this particular individual, and those are not my decisions to make." This is an acknowledgement that parole decisions are not made by the court. Finally, the sentencing court remarked that "no doubt the defendant's age, to some extent, will continue to be a factor." This is simply an acknowledgement that Gray's youthfulness was a distinctive feature in the case, one that the parole commission would be likely to consider in its reviews.

[3] Gray contends that if the sentencing court had intended for him to actually serve thirty years, it would have imposed a fifty-year sentence. We note, however, that the maximum penalty for first-degree reckless homicide in 1995 was only forty years of imprisonment. *See* WIS. STAT. §§ 940.02(1) (1995-96); 939.50(3)(b) (1995-96).

Thus, the circuit court properly concluded that the sentencing decision "did not factor any particular belief about when the defendant would be released into the equation" nor was it based "on any presumption that the defendant would be paroled on any date certain or that he would automatically be paroled when he became parole eligible." Further, the supreme court noted in ***Franklin*** that a change to parole policy should only be a basis for correction of sentence where new policies thwart the sentencing court's *express* intent. *See* ***id.*** While the sentencing court expressly referenced the parole system, there is no express intent that Gray receive any particular parole release.[4] Accordingly, to the extent there is a new parole policy in place,[5] Gray has not shown such policy is a new factor, because he does not show that parole policy was highly relevant to the imposition of his sentence. The circuit court did not err in denying the motion for sentence modification or the motion for reconsideration.

We observe that Gray additionally complains that the Department of Corrections and parole commission "have decided that treatment no longer provides an inmate with the key to his

[4] In full context, the sentencing court's remarks on the parole system actually appear intended as part of its explanation for a "very lengthy prison sentence," albeit one short of the maximum, necessary to satisfy all the sentencing considerations.

[5] In an effort to show a change in parole policy, Gray cites to statistics showing a decrease in parole releases from 2009-10 under Governor Jim Doyle to 2012-13 under Governor Scott Walker. The supreme court rejected a similar line of reasoning in ***State v. Franklin***, 148 Wis. 2d 1, 434 N.W.2d 609 (1989). There, the defendant attempted to show a parole policy change by citing statistics showing that at the time of his sentencing in 1972, mandatory parole releases accounted for only 16% of all releases, but by 1979, they accounted for 46%. *See* ***id.*** at 10-11. The defendant insisted that these statistics proved that the length of sentence became more important to parole decisions than factors like good behavior and hard work. *See* ***id.*** at 11.

The supreme court disagreed, stating that the "statistics alone … do not establish there was a change in parole policy" because the statistical change could result from factors other than a policy change. *See* ***id.*** For example, the statistics do not necessarily reflect whether the current prison population involves prisoners who committed more serious crimes than in prior years or whether less serious offenders received probation more frequently. *See* ***id.*** Similarly here, the mere difference in release statistics is insufficient to establish a change in parole policy.

release and their mind was already made up prior to his" 2016 review hearing. He notes that he has "accepted and completed treatment and then some as noted in the Parole Commissioner's comments, yet all he has accomplished just isn't enough!"

To the extent that Gray is attempting to claim that his continued incarceration violates the Eighth, Thirteen, and Fourteenth Amendments to the United States Constitution, we note that these claims are both raised for the first time on appeal and undeveloped; we therefore decline to consider them.[6] *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). To the extent that Gray is attempting to directly challenge the parole commission's decision, he was previously informed that his remedy—in fact, his exclusive remedy—was to seek review by writ of certiorari. *See* WIS. STAT. § 302.11(1g)(d) ("An inmate may seek review of a decision by the parole

[6] Gray's reliance on two particular cases is misplaced. First, he cites—without any particular pinpoint—to ***Jenkins v. Board of Parole and Post-Prison Supervision***, 309 P.3d 1115 (Or. Ct. App. 2013). In that case, the Oregon Court of Appeals concluded that Oregon state statutes required the parole board's decision postponing Jenkins' scheduled release date to include "some explanation of the rationale for concluding that the inmate's parole date should be postponed." *See* ***id.*** at 1117. The court thus "reverse[d] the board's order for lack of substantial reason" and remanded the matter. *See* ***id.*** In his brief, Gray writes that "the Court found that an order by the Board postponing the release date of prisoner Michael W Jenkins was '***legally insufficient***.'" Presumably, Gray means to argue that the parole commission's decision in this case, which effectively postpones Gray's release date, was similarly insufficient. However, the Oregon Supreme Court reversed the Court of Appeals after concluding that the board's decision actually did satisfy statutory requirements. *See* ***Jenkins v. Board of Parole and Post-Prison Supervision***, 335 P.3d 828, 830 (Or. 2014).

Gray also cites to ***State ex rel. Olson v. Litscher***, 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425, again without a pinpoint, to argue "'that petitioner, or any other prisoner, could not be held beyond his mandatory release date' should be held as Unconstitutional." However, ***Olson*** involves a case where the defendant, a sex offender, was approved for mandatory release but continued to be imprisoned because the Department of Corrections was unable to find appropriate housing for him. *See* ***id.***, ¶5. This court concluded that a lack of housing was not a justification for holding Olson past his release date. *See* ***id.*** ("Whether or not a place has been found for an inmate, he or she must be released on his or her mandatory release date."). ***Olson*** does not apply because Gray has not been approved for release.

commission relating to the denial of presumptive mandatory release only by the common law writ of certiorari.").

Upon the foregoing, therefore,

IT IS ORDERED that the orders appealed from 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