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DISTRICT IV

July 23, 2020

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

2019AP1598-CR State of Wisconsin v. Dennis L. Moore (L.C. # 1999CF212)

Before Fitzpatrick, P.J., 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).

Dennis Moore, pro se, appeals an order denying Moore's motion for sentence modification. Moore contends that he established the following new factors warranting sentence modification: (1) that the sentencing court overlooked presumptive mandatory release (PMR) law and its application to Moore's sentencing; and (2) that the sentencing court relied on inaccurate information that Moore was in absconder status from his Illinois probation at the time he committed the offenses in this case. 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 summarily affirm.

In October 1999, Moore pled no contest to three counts of second-degree sexual assault and one count of kidnapping, all as a habitual offender. He was sentenced to a total of seventy-five years in prison, plus fifty years of probation with an imposed and stayed additional forty-year prison sentence. In Moore's direct appeal, Moore's appointed counsel submitted a no-merit report concluding that there were no issues of arguable merit to pursue. *See* ***State v. Moore***, No. 2000AP1822-CRNM, unpublished op. and order (WI App Nov. 21, 2000). This court accepted counsel's no-merit report and affirmed Moore's conviction and sentence. *See* ***id.*** Moore then filed a pro se WIS. STAT. § 974.06 motion, which the circuit court denied, and this court affirmed on appeal. *See* ***State v. Moore***, No. 2006AP2643, unpublished slip op. (WI App Feb. 7, 2008). In February 2019, Moore filed the motion for sentence modification underlying this appeal. The circuit court denied the motion on grounds that the court had been aware of PMR law at the time of sentencing and that Moore's claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the

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

parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant establishes the existence of a new factor, the circuit court must then determine whether the new factor justifies sentence modification. ***Harbor***, 333 Wis. 2d 53, ¶37. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. ***Id.***, ¶33. However, whether a new factor warrants sentence modification lies within the circuit court's discretion. ***Id.***, ¶37. If a court determines either that the defendant has failed to demonstrate a new factor or that the new factor would not warrant sentence modification, the court need not address the other part of the test. ***Id.***, ¶38.

Moore contends that he established two new factors that warrant sentence modification.[2] First, he argues that the circuit court was unaware of PMR law and its application to Moore at the time of sentencing. Moore argues that the court's lack of awareness of PMR law was demonstrated by the following at the sentencing hearing: the court did not reference WIS. STAT. § 302.11(1g)(am) during sentencing; the court stated that Moore would have a mandatory release date; and when the prosecutor interjected that there had been a change in the parole law, the court responded that, under the old law, Moore would be released in fifty years, and the court did not believe "that the interests here demand more incarcerative power than that on this sentence." Moore contends that the court's statement that more incarcerative power was not necessary shows that the court was unaware that the change in parole law could result in Moore being

[2] To the extent that Moore raised other arguments in his motion for sentence modification that he does not pursue on appeal, we deem those arguments abandoned. Additionally, to the extent that we do not address any arguments raised in Moore's briefs, we deem those arguments insufficiently developed to warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

confined beyond fifty years. Thus, Moore asserts, the court was unaware of PMR law, as well as its application to Moore, at the time of sentencing.

The second new factor Moore asserts is that, in 2008, the Illinois Department of Corrections withdrew a parole violation warrant it had issued against Moore and discharged Moore from parole effective March 22, 1999. Moore asserts that, at sentencing, the circuit court wrongly believed that Moore was in absconder status as to his Illinois parole at the time of the offenses in this case in February 1999. Moore points to the court's comments at sentencing that Moore had absconded from his Illinois parole and that he should not have been in Wisconsin at the time he committed the crimes in this case. He asserts that, when the Illinois Department of Corrections withdrew Moore's parole violation warrant and discharged Moore from parole effective March 22, 1999, it clarified that Moore was not in absconder status when he committed the offenses in this case. Thus, he asserts, the court relied on inaccurate information as to his absconder status at the time of sentencing.

Moore also contends that the circuit court erred by denying his claims for sentence modification without a hearing based on the procedural bar under ***Escalona***. He argues that the ***Escalona*** procedural bar applies to WIS. STAT. § 974.06 motions, and that no case has applied the procedural bar to a motion for sentence modification. He cites ***State v. Starks***, 2013 WI 69, ¶50, 349 Wis. 2d 274, 833 N.W.2d 146, *abrogated on other grounds by* ***State ex rel. Warren v. Meisner***, 2020 WI 55, __ Wis. 2d __, 944 N.W.2d 588, for the proposition that "sentence modification and § 974.06 motions are two separate forms of relief, such that the filing of one does not preclude the filing of the other." He argues that he set forth sufficient facts in his motion that, if true, would entitle him to relief, and that he was therefore entitled to a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

The State responds that, to the extent that Moore is claiming that he was sentenced based on inaccurate information as to his parole absconder status at the time of his offenses, Moore is procedurally barred from raising that claim absent a sufficient reason for failing to raise it in response to his counsel's no-merit report in his direct appeal. *See* ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124. It then contends that information as to Moore's absconder status at the time the crimes were committed does not constitute a new factor. The State points out that Moore's Illinois parole status was discussed at sentencing, and that it was therefore both in existence and not unknowingly overlooked by the parties or the court at sentencing. It contends that, when the Illinois Department of Corrections subsequently withdrew its warrant and retroactively terminated Moore's parole, it merely validated Moore's assertion at sentencing that his parole was discharged as of May 1999.

The State also contends that Moore's claim that the sentencing court was unaware of PMR law does not establish a new factor. It contends that Moore cannot show that PMR law was highly relevant to the sentence or that the court and parties overlooked the law. The State points out that the court stated that it intended Moore to serve a lengthy term of incarceration followed by a lengthy period of supervision and that, following the prosecutor's expressed uncertainty as to whether mandatory release applied following a change in the law, the court responded that "I guess it doesn't really make any difference. The point is that there would be – if there were mandatory release, it would be way down the road." The State contends that the court's sentencing remarks establish that PMR law was not highly relevant to sentencing and it was not overlooked by the parties or the court.

We conclude that Moore has not established a new factor for sentence modification purposes. As to Moore's first contention, that the court was unaware of PMR law at the time of

sentencing, we conclude that PMR law was not highly relevant to the sentence imposed. At sentencing, the court noted that the State had recommended a 100-year sentence, but that the court believed that a lesser sentence would be adequate. The court imposed a seventy-five-year term of incarceration, and stated its belief that, with that sentence, Moore would be eligible for parole in eighteen years and would have a mandatory release date. The prosecutor interjected that there had been a change in parole law and therefore it was unclear whether mandatory release would apply to Moore's sentence. The court responded that "I guess it doesn't really make any difference. The point is that there would be -- if there were mandatory release, it would be way down the road." The court noted that, "[u]nder the old rules, it would be 50 years, and the defendant would be 78 years old." The court stated that, in any event: "I don't see that the interests here demand more incarcerative power than that on this sentence."

The court's statements, as a whole, indicate that PMR law was not highly relevant to the court's sentencing. The court acknowledged that there had been a change in parole law and that mandatory release may not apply to Moore's sentence. The court expressly stated that lack of mandatory release did not make a difference to the court's sentencing decision, and noted that the point the court was making was that the court was imposing a lengthy period of incarceration. We do not agree with Moore's reading of the court's statement that more "incarcerative power" was not necessary as an expression that the court believed that Moore would have a mandatory release date in fifty years. Rather, we read that statement as an

explanation as to why the court did not follow the State's lengthier sentencing recommendation.[3] Because PMR law was not relevant to the court's sentencing decision, PMR law cannot form the basis of a new factor for sentence modification purposes.[4] *See* ***Rosado***, 70 Wis. 2d at 288 (stating a "new factor" must be highly relevant to sentencing).

As to Moore's second new factor contention, based on the Illinois Department of Corrections' withdrawing Moore's parole violation warrant in 2008 and retroactively discharging Moore from parole as of March 22, 1999, we conclude that Moore's parole absconder status was not unknowingly overlooked by the parties or the court at sentencing. Rather, at sentencing, defense counsel conveyed that Moore believed that he was discharged from Illinois parole in May 1999. The State argued that Moore was on absconder status from his Illinois parole at the time of his offenses in February 1999. In its sentencing comments, the court stated that Moore was on absconder status at the time he was in Wisconsin and committed the offenses in this case. The court then clarified that Moore's position was that his parole was discharged in May of 1999, which the court noted was after the date of the offenses. The court went on to note that

[3] To the extent that Moore is arguing that the circuit court was unaware of the length of the sentence it was imposing based on the lack of clarity as to whether mandatory release applied, we reject that contention. The circuit court imposed seventy-five years of prison, and there was no lack of clarity as to the length of that sentence. At most, the circuit court was unsure of the date at which Moore would be released to parole. As the circuit court explained, Moore's parole release date did not matter to the court's sentencing decision.

[4] Moore also argues that the circuit court erred by failing to articulate in its postconviction decision how it was aware of PMR law, to specifically deny that it had overlooked PMR law, or to address the law's application and consequences. The State responds that Moore forfeited those arguments on appeal by failing to raise those arguments in the circuit court. Moore replies that he could not raise those arguments because those arose from the court's decision on his motion. We need not resolve this dispute. We conclude, based on our review of the sentencing transcript, that PMR law was not highly relevant to sentencing, and that it thus did not constitute a new factor. Because our review of whether a new factor has been established is de novo, we do not address whether the circuit court failed to adequately explain its new factor decision in its postconviction decision.

Moore was not deterred from committing the offenses in this case by his parole supervision at the time.

Thus, the issue of Moore's parole absconder status at the time of the offenses was discussed by the court and the parties at the sentencing hearing. Because the issue of Moore's parole absconder status was raised and discussed at the sentencing hearing, it is not a new factor for sentence modification purposes. ***Id.*** (stating a "new factor" must have been not in existence at time of sentencing or unknowingly overlooked by the court and parties). We are not persuaded by Moore's contention that the Illinois Department of Corrections' subsequent withdrawal of Moore's parole violation warrant and retroactive discharge of Moore's parole alters this analysis. At most, the action by the Illinois Department of Corrections in 2008 corroborated Moore's assertion at sentencing that he was discharged from his Illinois parole as of May 1999. That is insufficient to establish a new factor.

Finally, to the extent that Moore is seeking resentencing on grounds that he was sentenced based on inaccurate information under ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, we agree with the State that Moore's argument is barred by ***Escalona***. *See* ***State v. Crockett***, 2001 WI App 235, ¶¶6-10, 248 Wis. 2d 120, 635 N.W.2d 673 (stating that a constitutional due process claim, such as an inaccurate information resentencing motion, falls within the ambit of WIS. STAT. § 974.06 and, thus, may be procedurally barred by ***Escalona***). Therefore, Moore was required to provide a sufficient reason to overcome the procedural bar as to his inaccurate information claim, *see* ***Crockett***, 248 Wis. 2d 120, ¶1.

Therefore,

IT IS ORDERED that the order 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