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DISTRICT II

September 30, 2020

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

2019AP445-CR State of Wisconsin v. Jerry Harden (L.C. #2000CF663)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Jerry Harden, pro se, appeals from orders denying his motions for sentence modification and 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] We affirm.

In 2001, Harden was convicted of burglary and attempted burglary for two offenses he committed in June 1999. The circuit court imposed consecutive indeterminate sentences totaling twenty-five years.[2] On direct appeal, we affirmed Harden's judgment of conviction and an order denying his pro se motion for postconviction relief. ***State v. Harden***, No. 2003AP2305-CR, unpublished slip op. (WI App. July 23, 2003). In 2016, Harden filed a pro se WIS. STAT. § 974.06 postconviction motion. The circuit court denied the postconviction motion, and we affirmed. ***State v. Harden***, No. 2016AP1053, unpublished slip op. (WI App. Oct. 4, 2017).

In 2019, Harden filed a pro se postconviction motion asking the circuit court to modify his sentence to make counts one and two concurrent with each other and with all previously-imposed sentences. As grounds, Harden alleged that two new factors justified the requested sentence modification, namely, that: (1) since the time of Harden's sentencing, "Wisconsin's parole policy has changed, shifting the focus for parole release away from acceptance of treatment and rehabilitation, towards lengthier and more punitive sentences []"; and (2) the method used by the Department of Corrections (DOC) to determine Harden's parole eligibility date was "unknown to the court at the time of sentencing …." The circuit court denied the motion without a hearing. In its written decision, the court found that Harden gave "no explanation as to why he waited 18 years to file this motion for sentence modification[.]" On the

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

merits, the court concluded Harden had not shown a new factor warranting sentence modification and denied the motion on that basis.[3] Harden filed a motion for reconsideration, which the circuit court denied by written order. Harden appeals.

A circuit court may modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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." ***Id.***, ¶40 (quoted source omitted). The defendant bears the burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether a new factor exists presents a question of law we review de novo. ***Id.***, ¶33.

The alleged change in parole policy asserted in Harden's motion does not constitute a new factor.

For a change in parole policy to constitute a new factor, parole eligibility must have been a relevant factor in the original sentencing. ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). Harden, himself, concedes that the circuit court did not consider Harden's parole release at his original sentencing. Even assuming that there was a change in parole policy since

[2] On count one, attempted burglary, the circuit court sentenced Harden to ten years in prison, to run consecutive to sentences previously imposed in a separate case. On count two, burglary, the court sentenced Harden to fifteen years in prison, to run consecutive to count one.

[3] The circuit court judge that originally sentenced Harden also denied his 2019 sentence modification motion.

the time of Harden's sentencing, the change was not "highly relevant" to the imposition of Harden's sentence, and as a matter of law, does not constitute a new factor.

Harden appears to assert that ***Franklin*** is inapplicable because it was decided before the 1994 enactment of WIS. STAT. § 973.0135(2)(b), which, according to Harden, required the circuit court to set a parole date at his sentencing. We are not persuaded. First, the 1994 statute was in existence when Harden was sentenced and is not a "new factor." Second, Harden has not demonstrated that § 973.0135(2)(b) applied to his sentencing and "required" the circuit court to set a parole eligibility date.[4] Third, even assuming that § 973.0135(2)(b) applied and required the court to set a parole eligibility date, this claim does not assert a new factor but instead challenges the court's exercise of discretion at Harden's 2001 sentencing hearing. Harden has not provided any reason, let alone a sufficient one, explaining why he failed to raise this issue earlier, in his prior motions and appeals, and he is procedurally barred from raising it now. *See* ***Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (absent a sufficient reason, a defendant is procedurally barred from bringing claims that could have been raised in an earlier postconviction motion or appeal).

[4] WISCONSIN STAT. § 973.0135(2)(b) provides that where the circuit court sentences a "prior offender" for "certain serious felonies," committed between April 21, 1994, and December 31, 1999, "the court shall make a parole eligibility determination" choosing either (1) the standard parole eligibility date under WIS. STAT. § 304.06(1) (twenty-five percent of the indeterminate sentence); or (2) a date set by the court, which cannot occur before the standard eligibility date (twenty-five percent), nor later than two-thirds of the sentence imposed.

In the case at bar, the circuit court did not invoke this statute when sentencing Harden. Despite his arguments to the contrary, Harden's burglary conviction under WIS. STAT. § 943.10(1) (1999-2000), a Class C felony, was not an enumerated "Serious felony" under § 973.0135(2)(b) (1999-2000), which, as to the crime of burglary, included only § 943.10(2) (1999-2000), a Class B felony.

We also reject Harden's argument that the circuit court improperly exercised its discretion by considering that Harden waited eighteen years to file his sentence modification motion. The court did not deny Harden's sentence modification motion based on this eighteen-year delay or on statutory untimeliness grounds, including WIS. STAT. § 973.19, but instead analyzed Harden's new factor claim under the correct law, and denied it on the merits.

Harden has not shown that the manner in which the DOC computed his indeterminate sentence constitutes a new factor.

Finally, we reject as undeveloped and unsupported Harden's claim that the method used by the DOC to calculate his indeterminate sentence release dates was "unknown to the court at the time of sentencing" and constitutes a new factor. Harden does not make any coherent argument explaining why the DOC's computation of his parole eligibility, mandatory release, and maximum discharge dates is unconstitutional, or how this would constitute a new factor warranting sentence modification. [5]

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are 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

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").