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DISTRICT I

October 27, 2020

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

2019AP495-CR State of Wisconsin v. Parnell Terrance Graham
(L.C. # 1997CF975165)

Before Brash, P.J., Blanchard and White, 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).

Parnell Terrance Graham, *pro se*, appeals from an order denying his third postconviction 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] Therefore, we summarily affirm the order.

In 1998, Graham pled guilty to six felonies, including two counts of first-degree sexual assault by use of a dangerous weapon, two counts of armed robbery, one count of burglary, and one count of attempted burglary. The sentencing court imposed a forty-year prison sentence for each sexual assault and each armed robbery conviction, and it ordered Graham to serve those four sentences consecutively.[2] The sentencing court imposed a ten-year concurrent sentence for the burglary and a five-year concurrent sentence for the attempted burglary.

In a postconviction motion, Graham sought sentence modification on grounds that his sentence was unduly harsh or unconscionable. The trial court denied the motion.[3] On appeal, we summarily affirmed Graham's conviction, rejecting his arguments that his trial counsel was ineffective and that his sentences were unduly harsh and excessive. *See* ***State v. Graham***, No. 2000AP643-CR, unpublished op. and order (WI App Aug. 28, 2001).

In 2013, Graham filed a *pro se* motion for sentence modification alleging the existence of a new factor: the applicability of a presumptive mandatory release ("PMR") law that took effect in 1994, pursuant to which defendants who committed certain crimes are not automatically released after serving two-thirds of their sentences. Graham argued that the sentencing court was not aware of the law and that it was "extremely likely that the sentences on [the four consecutive

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

[2] The Honorable Timothy G. Dugan sentenced Graham. In this decision, we will refer to Judge Dugan as "the sentencing court."

[3] The Honorable M. Joseph Donald denied Graham's first postconviction motion.

counts] were, at least in part, based upon the [sentencing court's] belief that [Graham] would be released, as a matter of law, after serving 2/3 of the sentences imposed."

The sentencing court denied Graham's 2013 motion. It concluded that the PMR law was not a new factor, explaining:

> Although neither the parties nor the court referenced the presumptive mandatory release law at sentencing, the court was aware of its provisions…. In the context of the entirety of its sentencing remarks, the court did not consider whether or when the defendant was released on parole as "highly relevant" to the sentence it imposed. Moreover, failure to release the defendant on parole in no way frustrates the purposes of the sentence, which were principally punishment and protection of the community. In sum, the application of the PMR law is not a new sentencing factor warranting sentence modification.

(Citation and footnote omitted.) The sentencing court also rejected Graham's untimely claim that it had erroneously exercised its sentencing discretion. In doing so, the sentencing court stated:

> Again, the defendant's parole was not relevant to the court's sentencing decision, and therefore, the court did not rely upon a belief that the defendant would be released at a time certain at sentencing. The court imposed maximum consecutive sentence[s] on these counts taking into consideration the gravity of the defendant's crimes, the impact on the victims, the defendant's character and rehabilitative needs, and the public interest in punishment[,] deterrence and community protection.

Graham appealed the denial of his motion for sentence modification, and we affirmed. *See* ***State v. Graham***, No. 2013AP2075-CR, unpublished slip op. (WI App July 15, 2014).

In 2019, Graham, again acting *pro se*, filed his third motion for sentence modification, asserting that three new factors justified sentence modification. First, he argued that the parties and the sentencing court unknowingly overlooked a policy established by the Department of Corrections ("DOC") in 1994 requiring sex offenders to remain in prison until their mandatory

release dates. Second, he argued that the sentencing court "was unaware the sentence imposed would exceed Graham's life expectancy" and that scientific research from 2013 suggests that incarceration shortens life expectancy. Finally, Graham alleged that there is now a Global Positioning System ("GPS") tracking requirement for certain sex offenders and that if WIS. STAT. ch. 980 proceedings were brought against him, he could be released on a GPS tracker and "provide all the necessary 'protection to the public' which was the [sentencing] court's intent." (Some capitalization omitted.) The trial court denied the motion without a hearing, and this appeal follows.[4]

On appeal, Graham continues to argue that new factors warrant sentence modification. 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.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). It is the defendant's burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether a new factor exists is a question of law that this court reviews independently. ***Id.*** Applying those standards, we conclude that Graham has not established the existence of any new factors.

First, Graham argues that the 1994 DOC policy is a new factor, and he emphasizes that the 1994 DOC policy is different than the PMR law he cited in his last sentence modification motion. We agree with the State that "whether Graham's current mandatory-release-date claim is precisely

[4] The Honorable Mark A. Sanders denied the 2019 motion for sentence modification.

the same as his last does not matter, because either way he cannot show," as ***Harbor*** requires, that the information was "highly relevant to the imposition of sentence." *See* ***id.***, ¶40. Both the transcript of the sentencing hearing and the sentencing court's decision denying Graham's second sentence modification motion indicate that whether and when Graham would be released from prison were not important considerations for the sentencing court. Instead, the sentencing court's goals were "principally punishment and protection of the community." For these reasons, the existence of the 1994 DOC policy is not a new factor.

Next, we turn to Graham's arguments about his life expectancy. Although Graham concedes that the sentencing court knew that Graham was thirty-three years old at the time of sentencing, he asserts that the "sentencing court thought if Graham rehabilitated himself while in [p]rison, he could be released before his life expectancy expired." Graham argues that recent scientific research demonstrating that incarceration decreases life expectancy is, therefore, a new factor that justifies sentence modification. We disagree. For reasons noted above, the sentencing court's sentencing decisions were not dependent on whether Graham would be released from prison. The sentencing court did not even indicate that it anticipated Graham would be released on parole, much less estimate when that would be. Instead, the sentencing court told Graham at sentencing: "[Y]ou cannot be supervised in the community, and there is an overwhelming, strong need for—to protect our community from your conduct." In short, whether and when Graham would be released on parole was not "highly relevant" to the sentences imposed. *See* ***id.*** Therefore, putting aside the question whether the cited research represents information that would not have been understood by the sentencing court, it is not a new factor justifying sentence modification.

Finally, Graham argues that the enactment of WIS. STAT. § 301.48, which requires GPS tracking for certain sex offenders, is a new factor because in certain contexts it may provide an

alternative to incarceration. In response, the State asserts that § 301.48 would apply to Graham only if he were released from prison, committed under WIS. STAT. ch. 980, and then placed on supervised release or discharged from that commitment. Graham disagrees, asserting that the Department of Corrections could choose to use GPS tracking with Graham. Even if we assume that GPS tracking could be used with Graham, we are not persuaded that the availability of an alternative to incarceration was "highly relevant" to the sentences imposed. *See* ***Harbor***, 333 Wis. 2d 53, ¶40. The sentencing court explicitly stated: "[I]f you are going to rehabilitate yourself, it would have to be in a confined setting, that of a prison system." Moreover, the sentencing court emphasized that the sentences included "a very strong punishment component" and said that it wanted "to send a message to [Graham] and then to others in the community that this conduct cannot and will not be tolerated." Neither of those goals would be achieved by GPS tracking. We conclude that the remote possibility of using GPS tracking with Graham is not a new factor that warrants sentence modification.

For the foregoing reasons, we conclude that Graham has not established, by clear and convincing evidence, any new factors warranting sentence modification. Accordingly, we summarily affirm the trial court's order denying Graham's third motion for sentence modification.

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