OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

November 18, 2020

To:

Hon. Daniel J. Borowski
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th St.
Sheboygan, WI 53081

Connie Daun
Clerk of Circuit Court
Calumet County Courthouse
206 Court St.
Chilton, WI 53014

Nathan F. Haberman
District Attorney
206 Court St.
Chilton, WI 53014

Maura F.J. Whelan
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Sammy L. Cole, #274988
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2019AP440-CR State of Wisconsin v. Sammy L. Cole (L.C. #2001CF106)

Before Neubauer, C.J., Gundrum and Davis, 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).

Sammy L. Cole appeals pro se from an order of the circuit court denying his motion to modify his sentence. 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] For the following reasons, we affirm.

Background

In 2001, Cole was sentenced to thirty-five years of initial confinement followed by ten years of extended supervision in connection with an armed robbery conviction. The legislature subsequently created the Earned Release Program (ERP), a substance abuse program that affords a participating inmate an opportunity to lessen his/her period of initial confinement. *See* ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187 ("An inmate serving the confinement portion of a bifurcated sentence who successfully completes the ERP will have his or her remaining confinement period converted to extended supervision, although the total length of the sentence will not change."); WIS. STAT. § 302.05(3)(c)2. As authorized by § 302.05(3)(e), Cole petitioned the sentencing court in 2011 to determine his eligibility to participate in ERP. The same judge who sentenced Cole also held a hearing on his ERP petition and ordered that Cole be "eligible for the [program] but not until he has served at least 15 years of initial confinement."

In 2016, when Cole had served fifteen years of initial confinement, he moved the circuit court to direct the Department of Corrections (DOC) to transfer him to the ERP based upon the court's 2011 order. The court denied Cole's request, explaining that in 2011, it merely determined that Cole was "eligible" for the ERP after he served fifteen years of confinement but that the DOC determines if and when a person actually participates in the program.

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

In 2018, Cole filed the instant motion for modification of his sentence, based upon a "new factor"—he claims that at the 2011 hearing, the circuit court was not aware that the DOC had the authority to decide if and when an inmate gets to participate in the ERP. He also asserts that, based on a "new" DOC policy he "will not be placed in the ERP program until 3 to 1 years prior to his release on extended supervision" which "was not the [court's] intention." In a written order following a hearing, the court denied Cole's motion, explaining inter alia that Cole failed to establish a "new factor." Cole appeals.

Discussion

Cole asserts on appeal that he is entitled to sentence modification because a new factor exists. Whether a defendant has established the existence of a new factor is a question of law we review independently. ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). To succeed on a motion for sentence modification based upon a new factor, a defendant must first establish by clear and convincing evidence that a new factor in fact exists. ***State v. Harbor***, 2011 WI 28, ¶36, 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, 52 (citation omitted). Thus, a defendant cannot succeed on a motion for sentence modification based upon a new factor unless he/she establishes in the first instance that there is "a fact or set of facts highly relevant to the imposition of sentence" that was "not known to the trial judge at the time of original sentencing." ***Id.*** Cole has failed to establish that here.

While it is not entirely clear from his appellate briefs, Cole appears to assert that the new factor is either the fact that the DOC, not the circuit court, actually controls if and when Cole will be able to participate in the ERP, *see* ***State v. Schladweiler***, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *overruled on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶¶47-48 & n.11, (concluding that "[o]nce the trial court has made an eligibility determination, the final placement determination is made by the DOC"), or because, according to Cole, the DOC policy has changed since the 2011 hearing on his petition—from him having the potential opportunity to begin the program after having served just twenty-five percent of his "time" to a "new policy" prohibiting him from participating in the program until he has "a maximum of 36 months to adjusted release date." In either case, his overarching position is that when the circuit court determined at the 2011 hearing that Cole was *eligible* for the ERP after serving fifteen years of confinement, it actually was ordering that he be *placed into* that program at or around the time he completed fifteen years of confinement. The record shows that this is not what the court said or intended. Moreover, there is no new factor as the court clearly expressed at the 2011 hearing that it was fully aware that the DOC would ultimately determine if and when Cole was placed into the program.

At the 2011 hearing, the circuit court began its substantive comments by stating: "[I]t is true even though the Court may determine that [Cole is] eligible for the Earned Release Program, it is up to the Department of Corrections to determine whether he meets their criteria for participation in the … program." After the State confirmed this was correct, the court continued: "So all the Court is doing is determining that he is eligible for the program. He, nonetheless, must be selected for the program." The court ordered that Cole be made "eligible for the Earned Release Program but not until he has served *at least* 15 years of initial confinement." (Emphasis

added.) The court then stated: "Good luck, and keep up the good work, Mr. Cole. I hope that you can be released … and that you don't have to die in prison."

To begin, the circuit court clearly recognized at the time of the 2011 hearing that it was only making Cole *eligible* for the program but that it "is up to the Department of Corrections to determine whether he meets their criteria for participation in the … program," adding "[s]o *all* the Court is doing is determining that he is eligible for the program. He, nonetheless, must be selected for the program." (Emphasis added.) Cole's appeal fails for this reason alone as he clearly cannot meet his burden of showing that the DOC's control over if and when Cole would get into the program is a fact that was not known to the court, regardless of what criteria the DOC uses for determining participation in the program.

Furthermore, the circuit court's order that Cole be eligible for the ERP "but not until he has served at least 15 years of initial confinement" clearly indicates that the court did not intend for Cole to be placed into the program as soon as Cole hit fifteen years of confinement. Additionally, the court recognized at the hearing that Cole was thirty-eight years old at that time and that he had already served nine years of confinement, leaving only six more years before he reached fifteen years of confinement. Thus, the court's comments making him eligible for ERP but stating that it "hope[s] that you can be released … and that you don't have to die in prison" further undermines Cole's suggestion that the court envisioned him entering the ERP around the time he was forty-four years old (thirty-eight years old plus six more years of confinement), which would lead to his early release from confinement upon completion of the program. We would not expect a court to state that it hopes a defendant "do[esn't] have to die in prison" if the court was contemplating that the defendant would be released when in his or her forties.

Because the circuit court never ordered for Cole to be *placed into* the ERP program upon reaching fifteen years of confinement and because Cole has failed to show the existence of a new factor, we affirm.

THEREFORE,

IT IS ORDERED that the order of the circuit court 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