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DISTRICT III

January 12, 2021

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

2019AP813-CR State of Wisconsin v. Jamie Dean Jardine
(L. C. No. 1993CF678)

Before Stark, P.J., Hruz and Seidl, 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).

Jamie Jardine, pro se, appeals from an order that denied his motion for sentence modification. He contends the circuit court erred by: (1) quashing subpoenas for witnesses whose presence Jardine sought at his sentence modification hearing; (2) determining that no new factor existed warranting sentence modification; and (3) refusing to order a WIS. STAT. ch. 980

(2017-18)[1] evaluation for an end-of-confinement review. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm.

Jardine is currently serving an aggregate sixty-year indeterminate sentence on a 1994 conviction for attempted first-degree homicide and four counts of first-degree sexual assault. This appeal arises from his latest challenge to those convictions.

Jardine filed a postconviction motion seeking sentence modification based on two alleged new factors: (1) his progress toward rehabilitation; and (2) changes in parole board policy regarding how much time should be served and what programs need to be completed before parole is granted. Jardine further argued that his sentence had become unduly harsh because it was damaging to his mental health to be in a situation where he could not be paroled until he completed an evidence-based sex offender treatment program, while also being unable to participate in the sex offender treatment program because he was not close enough to his mandatory release date. Alternatively, Jardine asked the circuit court to order a WIS. STAT. ch. 980 evaluation for an end-of-confinement review, which he believed would show that he had already completed other treatment programs and education sufficient to warrant release into the community.

Jardine subpoenaed five witnesses from the parole commission and the Department of Corrections whom he believed could support his assertions regarding the reasons for his parole denials and his lack of access to the required sex offender treatment program. The circuit court

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

quashed the subpoenas and denied the motions for sentence modification and for a WIS. STAT. ch. 980 evaluation.

As a threshold matter, we note that a substantial portion of Jardine's brief is devoted to arguing that current parole commission policies violate the Eighth Amendment and the ex post facto clause, and that conditioning parole eligibility on nonconfidential sex offender treatment violates the Fifth Amendment. None of these issues are directly before us because this appeal is not a review of a decision denying parole. Rather, the proper focus of this appeal is on whether Jardine's motion contained allegations sufficient to warrant sentence modification or a WIS. STAT. ch. 980 evaluation, and whether the circuit court properly quashed the subpoenas.

The subpoena issue is intertwined with the allegations supporting the sentence modification motion because a party is entitled to subpoena only those witnesses who can offer relevant and material evidence. *See* ***State v. Groppi***, 41 Wis. 2d 312, 323, 164 N.W.2d 266 (1969), *vacated on other grounds by* ***Groppi v. Wisconsin***, 400 U.S. 505 (1971). In order to determine the relevance of the requested witnesses, we first address the substance of the motion for sentence modification.

A court has ongoing inherent authority to modify a previously imposed sentence based upon a new factor. ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the circuit court at the time of sentencing, either because the fact was not then in existence or because it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

A defendant bears the burden of establishing a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a particular fact or set of facts constitutes a new factor is a question of law subject to de novo review. ***Id.***, ¶¶33, 36. However, whether a new factor warrants a modification of sentence is a discretionary determination, to which we will defer. ***Id.***, ¶¶33, 37. If this court determines that a fact or set of facts does not constitute a new factor, we need not examine the circuit court's exercise of discretion. ***Id.***, ¶38. Conversely, if the circuit court has determined that a particular set of facts would not warrant sentence modification, we need not determine whether those facts constitute a new factor as a matter of law. ***Id.***

A defendant's rehabilitation does not constitute a new sentencing factor, as a matter of law. ***State v. Kluck***, 210 Wis. 2d 1, 8, 563 N.W.2d 468 (1997) (citation omitted). In order for a change in parole policy to constitute a new factor, parole policy must have been a highly relevant factor in the original sentencing. ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989).

This court has already determined in a prior appeal that parole policy was not highly relevant to Jardine's sentence because the circuit court did not expressly rely upon it. *See* ***State v. Jardine***, No. 2015AP2285-CR, unpublished slip op. (WI App Feb. 1, 2017). Therefore, any subsequent change in parole policy does not constitute a new factor. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue"). It follows that any witness testimony or documents relating to parole policy were not relevant or material to Jardine's sentence modification motion. Accordingly, the circuit court properly quashed the subpoenas and concluded that Jardine was not entitled to sentence modification based upon a new factor.

The circuit court also properly determined that Jardine was not entitled to sentence modification on the grounds that his sentences were unduly harsh. A sentence may be

considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). The court observed that Jardine's assault on the victim in this case was one of the most heinous crimes that the court had ever encountered, and that it would be appropriate if Jardine was not released until his maximum discharge date.

Finally, the circuit court correctly determined that it had no authority to order an end-of-confinement review because no WIS. STAT. ch. 980 petition had been filed and the statutes do not authorize the courts to initiate ch. 980 proceedings. Moreover, even if the court had the authority to initiate a ch. 980 proceeding, under WIS. STAT. § 980.015, a ch. 980 petition cannot be filed more than ninety days before a defendant's anticipated discharge or release on parole.

Therefore,

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