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DISTRICT III

March 16, 2021

To:

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

2020AP1252-CR

State of Wisconsin v. Garland Dean Barnes
(L. C. No. 2013CF118)

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).

Garland Barnes appeals an order denying his postconviction motion seeking sentence modification, compassionate release, and release pending his direct appeal. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we affirm. *See* WIS. STAT. RULE 809.21 (2019-20).¹

Barnes was convicted in 2015 of delivery of methamphetamine and sentenced to a total of thirty years' incarceration, consisting of fifteen years' initial confinement and fifteen years' extended supervision. On June 23, 2020, he filed a motion titled, "§809.14, WIS. STAT. MOTION FOR COMPASSIONATE RELEASE/SENTENCE MODIFICATION." The motion alleged that the SARS-CoV-2 pandemic ("COVID-19") constituted a new factor warranting sentence modification; that Barnes was entitled to compassionate release because of the health risks to him presented by COVID-19; and that, in the alternative, he should be released pending the direct appeal of his conviction.² The circuit court denied the motion by a letter order, and Barnes now appeals.

As an initial matter, Barnes argues the risk of potential bias required the circuit court judge to disqualify himself from ruling on Barnes' motion. Barnes' allegation of bias is predicated on his belief that recusal was required because he previously filed an ethics complaint

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The motion for release pending appeal has been effectively rendered moot by our decision denying Barnes' direct appeal, also released on the same date as this decision and order. In any event, his motion for release pending appeal fails on its merits. The circuit court considered the proper factors under WIS. STAT. RULE 809.31(3) and specifically found that Barnes' substantial criminal record, the nature of his offenses, the fact that he had previously failed to appear for hearings, and the lengthy sentence he was given made him a poor candidate for release. Because the court applied the correct legal standards to the relevant facts and reached a reasonable conclusion, we conclude it appropriately exercised its discretion. *See State v. Salmon*, 163 Wis. 2d 369, 373, 471 N.W.2d 286 (Ct. App. 1991).

Barnes suggests the circuit court additionally should have considered his likelihood of success on appeal when determining whether he should be released. He also contends, for various reasons, that he has been a model prisoner. Neither argument is sufficient to demonstrate that the court erroneously exercised its discretion when it denied his motion for release pending appeal, as neither is a statutory factor under WIS. STAT. RULE 809.31(3).

against the judge, in which Barnes asserted that the transcripts of his jury trial and sentencing were edited. Barnes argues his submission of a complaint against the judge creates an objective appearance of bias under *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385. “Whether a circuit court’s partiality can be questioned is a matter of law that we review independently.” *Id.*, ¶7.

We reject Barnes’ assertions of bias. “[T]he mere fact that a party files a complaint against a judge is not sufficient to establish judicial bias.” *State v. McBride*, 187 Wis. 2d 409, 418, 523 N.W.2d 106 (Ct. App. 1994). Barnes offers no other basis to conclude the circuit court was objectively biased. In any event, we agree with the State that Barnes’ sparse and conclusory assertions regarding bias do not warrant relief.

Barnes next argues that COVID-19 constitutes a new factor justifying sentence modification. To prevail on a motion for sentence modification, the defendant must show two things. First, “[t]he defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *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 that is highly relevant to the imposition of the sentence, but that was not known to the circuit court at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by the parties. *Id.*, ¶40. Whether the defendant has presented a new factor is a question of law. *Id.*, ¶36. Second, the defendant must show that the new factor warrants sentence modification. *Id.*, ¶37. The circuit court exercises its discretion when making that determination. *Id.*

Barnes summarily argues that there is “no question the coronavirus is a new factor that did not exist” at the time of his sentencing. Barnes does not explain how COVID-19 constitutes

a fact that was highly relevant to the imposition of his sentence. At sentencing, the circuit court emphasized what it perceived as Barnes' arrogant behavior and statements, the significant quantity of methamphetamine Barnes was delivering, Barnes' lengthy criminal record, and the high likelihood that Barnes would commit additional criminal offenses.³ The likelihood of a global pandemic or the health risks associated with one were obviously not at the forefront of the court's sentencing decision.

In any event, in arguing that sentence modification was warranted, Barnes primarily focuses on the health risks associated with COVID-19, as well as the prison conditions that can exacerbate viral spread, including overcrowding in his prison facility. We agree with the State that Barnes primarily challenges the conditions of his confinement, which challenges are to be made by the appropriate writs and not by a motion seeking sentence modification. *See State v. Krieger*, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991). Barnes' motion for sentence modification is not the proper vehicle for his assertions that the prison conditions violate his Eighth Amendment rights.

Finally, Barnes argues he is entitled to compassionate release under WIS. STAT. § 302.113(9g). Barnes asserts COVID-19 poses a particular risk to him as a fifty-five-year-old African American who suffers from diabetes and hypertension. Even so, for an individual of Barnes' age, compassionate release under subsec. (9g) is available only if the inmate demonstrates he or she has an "extraordinary health condition." Sec. 302.113(9g)(b). An

³ Certain portions of Barnes' appellate brief appear directed at the notion that the circuit court miscalculated Barnes' risk of reoffending. To the extent Barnes suggests his aging or rehabilitation constitute new factors, this argument is foreclosed by *State v. McDermott*, 2012 WI App 14, ¶15, 339 Wis. 2d 316, 810 N.W.2d 237.

“extraordinary health condition” requires the inmate to demonstrate he or she has a condition that warrants release or a need for medical treatment or services that are not available within a correctional institution. Sec. 302.113(9g)(a)1.

Barnes has not demonstrated that he suffers from an extraordinary medical condition, in part because he did not follow the proper statutory procedure for establishing such a condition.⁴ A petition for release under WIS. STAT. § 302.113(9g)(b)3. must be submitted to the program review committee at the correctional institution in which the inmate is confined. Sec. 302.113(9g)(c). The petition must be accompanied by affidavits from two physicians diagnosing the inmate with an extraordinary health condition. *Id.* The review committee must then determine whether to deny the petition or refer the matter to the sentencing court. Sec. 302.113(9g)(cm). Nothing in § 302.113(9g) provides a circuit court with the initial authority to consider a petition for compassionate release.

Moreover, nothing Barnes has presented establishes his need for sentence modification under WIS. STAT. § 302.113(9g). His medical conditions—diabetes and hypertension—are common conditions that apparently have been adequately treated in prison. Rather, his argument appears to be that these conditions would exacerbate the effects of COVID-19, should he become infected with the virus that causes that disease. Yet the only affidavit attached to Barnes’ petition was his own; he did not submit any medical opinions regarding his individualized risk

⁴ No reported case law establishes the standard of review governing a compassionate release determination under WIS. STAT. § 302.113(9g). Nonetheless, even applying the least deferential standard of review, we conclude Barnes is not entitled to relief.

profile for COVID-19.⁵ Accordingly, even assuming this court or the circuit court could grant Barnes' petition for compassionate release as an initial matter, Barnes has failed to provide a basis upon which to do so.

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

⁵ The only medical substantiation Barnes submitted was a general declaration regarding the risks of COVID-19 to confined persons and correctional staff issued by three health professionals through the Joseph J. Zilber School of Public Health at the University of Wisconsin—Milwaukee. This general declaration clearly does not satisfy the requirement that an inmate's petition for compassionate release be supported by affidavits from two physicians.