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DISTRICT IV

March 16, 2023

To:

Hon. John M. Wood
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Timothy John Johnson 267515
Black River Correctional Cntr.
W6898 E. Staffon Rd.
Black River Falls, WI 54615-0433

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

2021AP1959-CR

State of Wisconsin v. Timothy John Johnson (L.C. # 2017CF1075)

Before Blanchard, P.J., Kloppenburg, and Nashold, 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).

Timothy Johnson appeals a circuit court order that denied Johnson's 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 (2021-22).¹ We summarily affirm.

Johnson was convicted of operating while intoxicated (OWI) as a seventh offense, which requires a mandatory minimum of three years of initial confinement. *See* WIS. STAT.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

§ 346.63(1)(a); WIS. STAT. § 346.65(2)(am)6. (providing that, for seventh offense OWI, “[t]he court shall impose a bifurcated sentence ... and the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years”). The circuit court sentenced Johnson to four years of initial confinement and four years of extended supervision, consecutive to the sentence that Johnson was then serving. The court also found Johnson eligible to participate in the Substance Abuse Program (SAP). SAP allows an inmate who successfully completes the program to “reduce the term of confinement in prison portion of the inmate’s bifurcated sentence” by converting the remainder of the confinement term to extended supervision. *See* WIS. STAT. § 302.05(3)(c)2.a.

Johnson was informed by the Department of Corrections (DOC) that he would begin SAP in January 2021. However, in November 2020, this court issued a decision in *State v. Gramza*, 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836, stating that a defendant subject to a mandatory minimum sentence must serve out the full mandatory minimum term before being released upon completion of SAP. As a result of this rule stated in *Gramza*, Johnson was not allowed to begin SAP as planned.

Johnson moved for sentence modification. He argued that the change in his eligibility for release upon successful completion of SAP under *Gramza* is a new factor warranting sentence modification. The circuit court denied the motion.

A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A “new factor” for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence but not known to the sentencing judge,

either because it 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). If a defendant establishes the existence of a new factor, the circuit court must then determine whether the new factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶38. Whether the defendant has established the existence of a new factor is a question of law that we review de novo. *Id.*, ¶33. However, whether a new factor warrants sentence modification lies within the circuit court’s discretion. *Id.*, ¶37. If a court determines either that the defendant has failed to demonstrate a new factor or that the new factor would not warrant sentence modification, the court need not address the other part of the test. *Id.*, ¶38.

Johnson argues that he is entitled to sentence modification based on the change in his eligibility for release through participation in SAP following *Gramza* because his immediate eligibility for SAP was highly relevant to sentencing.² Johnson points out that the circuit court rejected the State’s request to delay Johnson’s eligibility for SAP.³ Thus, Johnson argues, the court specifically relied on Johnson’s immediate eligibility for SAP in imposing four years of initial confinement.

² Johnson also now argues that: (1) he had a legitimate expectation of early release based on his immediate eligibility for SAP; (2) the circuit court “did not impose a 3 year mandatory sentence” because the statute he was convicted under, WIS. STAT. § 346.63(1)(a), “does not carry a mandatory minimum sentence;” and (3) *Gramza* should not be imposed retroactively to delay his eligibility for early release through participation in SAP. Each of these arguments is both insufficiently developed, *see State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and also not preserved for appeal because none were raised in the circuit court, *see State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999). We therefore decline to address these arguments further.

³ The State recommended six years of initial confinement, and that the circuit court delay Johnson’s eligibility for SAP until he served the first four years of confinement.

We conclude that Johnson has not established a new factor for sentence modification purposes. The circuit court's sentencing comments, as a whole, indicate that Johnson's immediate participation in SAP was not highly relevant to the court's sentencing.

The circuit court explained that it considered that Johnson's conviction for OWI seventh was "a very serious offense," describing it as a "dangerous activity" that "put the lives and safety" of the community at risk. The court also considered Johnson's case as particularly serious because it included a hit and run. The court considered Johnson's criminal history, including that he was on probation at the time of the current offense. It also considered the need to protect the public, noting that no one who needs treatment is a "good risk" without treatment, and that confinement was necessary to protect the public from Johnson's criminal acts and because Johnson needed treatment that could most effectively be provided in a confined setting.

The circuit court imposed four years of initial confinement, explaining that it believed that was the amount of time necessary to both punish Johnson for his conduct and to allow Johnson to take full advantage of the programming that would be offered to him. The court found Johnson eligible for SAP, explaining: "That seems critical to me that you address that programming and I am going to make you eligible for that." In response to the State's request for clarification, the court confirmed that it was making Johnson immediately eligible for SAP.

Thus, contrary to Johnson's assertion, the circuit court did not rely on Johnson's immediate eligibility for SAP in its decision to impose four years of initial confinement. Rather, the court explained that, after considering the relevant facts, it believed that four years of initial confinement was the minimum amount of time necessary to meet the court's sentencing objectives. Then, after finding Johnson eligible for SAP, the court simply confirmed that it was

finding Johnson eligible immediately. We conclude that the timing of Johnson’s eligibility for SAP was not highly relevant to the court’s sentencing decision.

Because Johnson’s immediate eligibility for SAP was not highly relevant to the circuit court’s sentencing decision, the change in Johnson’s eligibility for early release through participation in SAP under *Gramza* cannot form the basis of a new factor for sentence modification purposes. See *Rosado*, 70 Wis. 2d at 288 (“new factor” must be highly relevant to sentencing).

Therefore,

IT IS ORDERED that the order of the circuit court 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