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DISTRICT I

June 20, 2023

To:

Hon. Joseph R. Wall
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael C. Sanders
Electronic Notice

Terry Lee McKinney 217307
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2021AP1564-CR State of Wisconsin v. Terry Lee McKinney (L.C. # 2005CF7138)
2021AP1568-CR State of Wisconsin v. Terry Lee McKinney (L.C. # 2017CF1453)

Before Brash, C.J., Dugan 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).

Terry Lee McKinney, *pro se*, appeals from an order of the circuit court that denied his 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] The order is summarily affirmed.

In 2006, McKinney was sentenced to twenty years of imprisonment for four counts of armed robbery. In 2014, he was released early to extended supervision after completing the

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

earned release program. In 2016, McKinney's supervision was revoked after he committed additional robberies, and he was reconfined for eight years. McKinney was also charged with the additional robberies; in 2017, he pled guilty to two counts of armed robbery and two counts of robbery of a financial institution; four additional robbery charges and two drug charges were uncharged but read in. The circuit court imposed twenty-four years of imprisonment, to be served consecutive to the revocation sentence. Direct appeal was not taken in either case.

In June 2021, McKinney filed a *pro se* motion for sentence modification "based upon the existence of a 'new factor.'" First, he claimed that there was an "Abuse of Discretion"[2] because the circuit court made his new 2017 sentence consecutive to the revocation sentence, even though both the State and defense counsel had recommended it be concurrent with the revocation sentence.[3] Second, McKinney stated that he did not receive a presentence investigation report, which he felt "would have brought out the trauma that caused [him] to relapse" and commit additional robberies, and he highlighted various programs he has completed while incarcerated.

The circuit court denied the motion without a hearing. It noted while McKinney "denotes his claim as a 'new factor,' what he actually raises is an abuse of discretion claim, which is untimely." The circuit court further noted that "although commendable, evidence of progress or continuing rehabilitation while serving a sentence are not reasons for a court to modify a sentence." Thus, the circuit court denied the motion. McKinney appeals.

[2] Our supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion" in 1992. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

[3] The Honorable Dennis R. Cimpl imposed the 2017 sentence. The Honorable Joseph R. Wall denied the motion for sentence modification.

First, McKinney disputes that his motion was untimely, asserting that "an 'abuse of discretion' motion may be brought at any time." McKinney is incorrect. A defendant can seek sentence modification in one of two ways. *See* ***State v. Noll***, 2002 WI App 273, ¶9, 258 Wis. 2d 573, 653 N.W.2d 895. One option is WIS. STAT. § 973.19, which itself offers two routes. *See* § 973.19(1)(a)-(b). The circuit court was correct that, under those statutory options, McKinney's motion challenging the circuit court's exercise of sentencing discretion was untimely. The other option for seeking sentence modification is by requesting discretionary review that invokes the "inherent power" of the circuit court. *See* ***Noll***, 258 Wis. 2d 573, ¶11.

The circuit court's "inherent authority may be exercised as a matter of discretion and is not governed by a time limitation." *See* ***id.***, ¶12. However, that inherent authority is subject to certain constraints. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The circuit court "cannot base a sentence modification on reflection and second thoughts alone," but it may modify a sentence where: the defendant demonstrates a new factor; a sentence is determined to be illegal or void; the sentence is based upon inaccurate information; or the sentence is unduly harsh or unconscionable. *See* ***id.***, ¶35 n.8. The cases to which McKinney cites to support his claim of timeliness are cases that recognize there must be a new factor or a conclusion that the original sentence was unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. McKinney does not claim his sentence was unduly harsh or unconscionable. Accordingly, the circuit court properly concluded that any "abuse of discretion" challenge is time barred.

That leaves McKinney's "new factor" claim. A new factor is a fact or set of facts that is "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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); ***Harbor***, 333 Wis. 2d 53, ¶¶40, 57. The defendant has the burden of proving a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. Whether the facts presented by the defendant constitute a new factor is a question of law that this court reviews *de novo*. ***Id.***, ¶33. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

First, to the extent that McKinney claims the circuit court's imposition of consecutive sentences rather than the concurrent sentences recommended by the State and defense counsel constitutes a new factor, we disagree. The structuring of multiple sentences as concurrent or consecutive is the result of the sentencing court's consideration of appropriate sentencing factors; it is not an independent factor itself. Further, the record reflects that McKinney was aware of the possibility of consecutive sentences; at the plea colloquy, the circuit court told McKinney, "So if I gave you the maximums and ran them consecutively we would be looking at $400,000 in fines, 160 years in prison, divided into 100 years initial confinement, 60 years extended supervision. Do you understand the maximums?" McKinney answered affirmatively. He also indicated he understood that the circuit court was not a part of any plea deal and "free to decide what to do … and that could include the maximums." The sentence structure imposed is not a new factor.

Second, McKinney complains that the lack of a presentence investigation report (PSI) is a new factor because he believes it would have demonstrated how learning as an adult that he was a "child born out of rape … devastated [his] life, causing [him] to relapse, and go on a robbery spree[.]" However, McKinney knew at the time of sentencing that no PSI report had been prepared, and information known to the defendant at the time of sentencings is not a new factor.

See ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. In any event, the record reflects that defense counsel provided the circuit court with all of the traumatic details McKinney believes would have been revealed in a PSI. This information is not a new factor.

Finally, McKinney makes multiple references to various programs he has completed or participated in while in prison. However, post-sentencing rehabilitation while incarcerated does not qualify as a new factor for sentence modification purposes. *See* ***State v. McDermott***, 2012 WI App 14, ¶15, 339 Wis. 2d 316, 810 N.W.2d 237.

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.

Samuel A. Christensen
Clerk of Court of Appeals