COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2563-CR **Cir. Ct. No. 2008CF5416**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEONTA LAMAR DUNCAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Deonta Duncan, pro se, appeals an order denying sentence modification. Duncan argues the circuit court erred by finding him ineligible for Wisconsin's Substance Abuse Program. We affirm.

¶2 Duncan was convicted of conspiracy to commit armed robbery by use of force and false imprisonment, each as party to a crime. In exchange for his guilty pleas, charges of sexual assault while armed and burglary while armed were dismissed and read in. The court imposed a sentence consisting of ten years' initial confinement and five years' extended supervision on the armed robbery charge, and three years' initial confinement and three years' extended supervision concurrently on the false imprisonment charge.

¶3 At the time of Duncan's sentencing, the sentencing court was required to find whether he was eligible for the earned release program, now called the substance abuse program, which is administered by the Wisconsin Department of Corrections. *See* WIS. STAT. § 302.05;[1] ***State v. Owens***, 2006 WI App 75, ¶¶5-6, 291 Wis. 2d 229, 713 N.W.2d 187. During the confinement period of a bifurcated sentence, the successful completion of the program will result in the conversion of the remaining confinement period to extended supervision. *See* WIS. STAT. § 302.05(3)(c)2.; ***Owens***, 291 Wis. 2d 229, ¶5. The language of WIS. STAT. § 973.01(3g) clearly establishes that deciding eligibility to participate in the program is discretionary.

¶4 When sentencing Duncan, the circuit court in the present case found him ineligible for earned release. The court stated: "I will not find you eligible for the Challenge Incarceration or Earned Release. These are violent, serious offenses that are not appropriate for the eligibility for those programs, nor are there any drug needs identified by anyone here."

[1] References to Wisconsin Statutes are to the 2011-12 version.

¶5 Duncan filed a notice of appeal. However, he voluntarily dismissed that appeal. Duncan subsequently moved for sentence modification seeking eligibility for earned release. Duncan asserted he was statutorily eligible and that the DOC had identified an alcohol and other drug abuse (AODA) need. Duncan requested the court find the result of his AODA assessment to be a new factor warranting modification. The court denied his motion, stating:

> At the time of sentencing, the court indicated it would not allow eligibility for CIP or ERP due to the violent nature of the offenses. Given the seriousness of the offenses, the court did not find an early release program to be appropriate. Although the defendant has demonstrated that he has made progress in the prison system, evidence of progress of a defendant's continuing rehabilitation while incarcerated are not reasons for a court to modify sentence. ***State v. Prince***, 147 Wis. 2d 134, 136 [432 N.W.2d 646] (Ct. App. 1988). The court declines to alter its original determination with or without an identifiable AODA need. The court intended the defendant serve every day of initial confinement without the benefit of an early release program.

¶6 The above order was entered on January 9, 2012, and Duncan did not seek review. Instead, more than twenty-two months after his first post-conviction motion was decided, Duncan filed a new motion again seeking sentence modification, alleging his AODA assessment as a "new factor" entitling him to early release program eligibility. He also argued the court failed to exercise its discretion when it found him ineligible. The court denied the motion and Duncan now appeals.

¶7 A matter previously litigated may not be re-litigated in a subsequent postconviction proceeding, no matter how a defendant rephrases the issue. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Duncan's claim that his alleged statutory eligibility is a new factor was previously considered and he is procedurally barred from re-raising the claim. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).[2]

¶8 In addition, Duncan's challenge to the court's sentencing discretion comes over four years after the imposition of his sentence on May 28, 2009. A court's exercise of sentencing discretion may be challenged only in a first post-conviction motion or appeal as of right under WIS. STAT. § 973.19 or § 974.02. The deadlines for bringing such motions have long since passed, as a challenge not based on a new factor must be filed within ninety days of sentencing. WIS. STAT. § 973.19. Therefore, Duncan's sentencing discretion claim is untimely.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] While the circuit court did not deny Duncan's new factor claim on procedural grounds, we may approve the actions of the circuit court for reasons other than those relied upon below. *See* ***Badtke v. Badtke***, 122 Wis. 2d 730, 735, 364 N.W.2d 547 (Ct. App. 1985).