COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2227 **Cir. Ct. No. 1993CF931714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. KEIZER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Steven J. Keizer, *pro se*, appeals an order denying his motion for resentencing or sentence modification. He also appeals the order denying reconsideration. Because we conclude that Keizer fails to demonstrate the existence of a new factor warranting relief from his sentence, we affirm.

BACKGROUND

¶2 In 1993, after ingesting alcohol and cocaine, Keizer murdered his wife, hid her body in a closet, and pawned her rings to buy more cocaine. The State charged him with first-degree intentional homicide. A jury found him guilty as charged. The circuit court imposed a life sentence and declared that he would be eligible for parole in thirty-two years. His parole eligibility date is September 17, 2025.

¶3 In August 2014, Keizer filed the postconviction motion underlying this appeal.[1] He sought sentence modification or resentencing, alleging that a new factor, namely, a change in parole board policy, warranted an earlier parole eligibility date than the one selected by the sentencing court. In support, Keizer included with his postconviction motion a 1993 letter written by a Dane County prosecutor to a representative of the Department of Justice regarding a case unrelated to Keizer's. In the letter, the prosecutor advised that, as of 1991, Wisconsin inmates convicted of first-degree intentional homicide were statutorily eligible for parole after thirteen and one-half years and served an average of 15.25 years in prison. The prosecutor went on to opine that a person convicted of first-degree intentional homicide in 1993 would spend twenty-five years in prison before release on parole.

¶4 Next, Keizer pointed to documents that, in his view, reveal changes in Wisconsin parole policy in the years since his sentencing. He offered

[1] The current litigation is Keizer's second effort to obtain postconviction relief. Keizer previously pursued a direct appeal of his conviction, challenging a jury instruction and alleging the ineffectiveness of his trial counsel for failing to present an expert witness. We affirmed. *See* ***State v. Keizer***, No. 1994AP2881-CR, unpublished slip op. (WI App Aug. 15, 1995).

information purporting to show that, after 2000, the parole board reduced the number of discretionary parole releases generally and would not consider granting parole to offenders convicted of first-degree intentional homicide until they had served eleven years and four months past their eligibility dates.

¶5 The circuit court rejected Keizer's claim, concluding that statistics regarding parole board policy and the amount of time parole-eligible inmates are required to serve before release from prison is not a new factor warranting relief. Keizer moved to reconsider, asserting error in the analysis of his new factor claim and further asserting that the circuit court overlooked his contention that his sentence is unduly harsh in light of the alleged new factor he presented. The circuit court denied reconsideration, and Keizer appeals.

DISCUSSION

¶6 Keizer claims that information about parole policy is a new factor warranting sentencing relief. A new factor is "'a fact or set of facts 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 ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶7 The circuit court sentenced Keizer under WIS. STAT. § 973.014(1) (1993-94).[2] The statute permits a court sentencing a person convicted of first-degree intentional homicide to defer to a statutory parole eligibility date determined under WIS. STAT. § 304.06(1), or to choose a parole eligibility date no earlier than that mandated under § 304.06(1). *See* § 973.014(1). The chosen parole eligibility date may exceed the defendant's lifetime. *See* ***State v. Setagord***, 211 Wis. 2d 397, 414, 565 N.W.2d 506 (1997).

¶8 At Keizer's sentencing, the circuit court noted that the relevant considerations in setting parole eligibility "are the same considerations that we go through in sentencing hearing after sentencing hearing," and the circuit court explained that those considerations involve the gravity of the offense, Keizer's

[2] WISCONSIN STAT. § 973.014(1) (1993-94), provides:

> Except as provided in sub. (2) [providing for life imprisonment with no possibility of parole under certain circumstances] when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under s. 304.06 (1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06(l).

All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

background and character, and the interests of the community.[3] The circuit court discussed the violence and tragedy of the offense, the need to punish Keizer, his drug and alcohol abuse, the warning signs that he ignored about how substance abuse adversely affected his life, his history of domestic violence, and the effect of his crime on others, including his children. The circuit court then concluded:

> setting no parole date would result in substantial and significant punishment for you. And as I've also noted, the request that you lose, at least in an incarceration setting, what your wife Christine has lost is a reasonable request. [A citizen] also suggested in her letter that there might be some room for mercy here, and I think without excluding anything, and without putting aside the awfulness of what happened, there is room for some mercy in this case, but I do not believe there is room to allow you to be eligible for parole at anything close to the earliest possible date.

The circuit court elected to choose a parole eligibility date for Keizer, and established that date as September 17, 2025, the date thirty-two years after sentencing.

¶9 Keiser seeks a different parole eligibility date based on the alleged new factor of parole board policy governing release of parole-eligible inmates. In light of the information he has provided regarding past and current policies of the

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[3] The primary factors that a sentencing court considers are (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public. As part of these primary factors, the sentencing court may consider: the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992) (citations omitted).

parole board, he contends the date of his parole eligibility should be September 17, 2015.

¶10 "In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing." ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). The supreme court explained the rationale underlying the holding: "[i]f the court does base its sentence on the likely action of the parole board, [the court] has the power to protect its own decree by modifying the sentence if a change in parole policy occurs." *See* ***id.***

¶11 The sentencing court here never said it based Keizer's sentence on "the likely action of the parole board." *See* ***id.*** Accordingly, Keizer fails to show that parole board policy was relevant to the sentencing decision or that the circuit court has any need to protect its decree by adjusting his sentence.

¶12 Keizer nonetheless contends that the circuit court must have taken into account the amount of time the parole board would require him to remain incarcerated after reaching his parole eligibility date, and therefore the parole board's release policy must be relevant to his sentencing. We reject this argument.

¶13 The sentencing court correctly recognized that the factors influencing a parole eligibility determination are the same factors that courts must consider when sentencing convicted defendants. *See* ***State v. Borrell***, 167 Wis. 2d 749, 774, 482 N.W.2d 883 (1992). As the supreme court observed in 1992, those factors "are already well-established." ***Id.*** at 774. The factors do not include the possible actions of the parole board. *See* ***id.*** at 773-74. Thus, contrary to Keizer's assertion, the parole board's future decision is not necessarily integral to the sentencing court's determination of a parole eligibility date.

¶14 As the ***Franklin*** court held, parole policy is not a relevant sentencing factor "unless the court expressly relies on parole eligibility." ***Id.***, 148 Wis. 2d at 15. Here, the circuit court did not rely on parole eligibility when sentencing Keiser. Rather, the circuit court *established* parole eligibility, relying on various appropriate sentencing factors relevant to Keizer, the offense, and the community.

¶15 Accordingly, parole board policy is not a basis for sentence modification here. The ***Franklin*** court explained: "[w]e agree with the Third Circuit in ***Musto v. United States***, 571 F.2d 136, 140 (3rd Cir. 1978), which held that a court may 'correct a sentence only where the sentencing judge's *express* intent is thwarted by the promulgation of new parole policies contemporaneous or subsequent to the original imposition of sentence.'" ***Franklin***, 148 Wis. 2d at 14 (emphasis in ***Franklin***). The circuit court did not expressly intend to key the sentence to the policies of the parole board, and those policies therefore earn Keizer no relief.

¶16 In sum, because the sentencing court did not rely on parole board policy when imposing Keizer's sentence, the information Keizer offered in his postconviction motion did not constitute a new factor. That information was not highly relevant to the sentencing decision.

¶17 Before we leave this issue, we briefly address Keizer's citations to the supreme court's decision in ***State v. Byrge***, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. The portion of the opinion that Keizer quotes is part of a discussion about information a circuit court must give a defendant when he or she enters a guilty or no-contest plea to a charge for which the circuit court has the authority to establish a parole eligibility date. *See* ***id.***, ¶¶54-68. Keizer's

quotations are words from ***Byrge*** in regard to the parole eligibility date, but they are words taken out of the plea context in which the court wrote them, and they do not aid Keizer in his pursuit of a new factor claim. *Cf.* Curtis E.A. Kurnow, *Similarity in Legal Analysis & the Post-Literate Blitz*, 15 GREEN BAG 2d 243, 245 (2012) ("It may be expedient to latch onto the similarity of words and so invoke an opinion; but that attachment to the surface of the text can lead one astray.").

¶18 We turn to the second issue Keizer presents on appeal. He alleges he received an unduly harsh and excessive sentence that constituted an erroneous exercise of sentencing discretion, and he complains because the circuit court did not address this claim. The circuit court did not err.

> [I]n deciding whether a sentence is unduly harsh, the circuit court's inquiry is confined to whether it erroneously exercised its sentencing discretion *based on the information it had at the time of sentencing*. A circuit court's authority to modify a sentence based on events that occur after sentencing is defined by "new factor" jurisprudence.

State v. Klubertanz, 2006 WI App 71, ¶44, 291 Wis. 2d 751, 713 N.W.2d 116 (emphasis added).

¶19 In this case, as Keizer admits, he alleged "an unduly harsh and excessive sentence upon discovering the new evidence of DOC statistical data and expert testimony in the form of legal communications between the Dane County District Attorney's Office and the United States Department of Justice." He further admits that the basis for his claim of an unduly harsh and excessive sentence "was not known to exist at the time of Keizer's sentencing or direct appeal."

¶20 Because Keizer's request for relief from his sentence is based on information that was not presented to the sentencing court, the claim is governed

by "new factor" jurisprudence. *See* ***id.*** The circuit court fully addressed Keizer's claim for relief from his sentence using the applicable analysis. Accordingly, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).