COURT OF APPEALS DECISION DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP2296-CR
2014AP2297-CR

Cir. Ct. Nos. 1999CF5822
1999CF5948

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOVAN T. MULL,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Jovan T. Mull, *pro se*, appeals orders denying his motion for modification of the sentences he received for crimes he committed in

1999.[1] The circuit court concluded that an alleged change in parole policy does not constitute a new factor warranting sentencing relief. We agree and affirm.

BACKGROUND

¶2 A jury found Mull guilty of three counts of first-degree recklessly endangering safety by use of a dangerous weapon and one count of intimidating a witness. *See* WIS. STAT. §§ 941.30(1) (1999-2000),[2] 939.62, 940.45(3). The circuit court found that Mull committed each crime as a habitual offender. *See* WIS. STAT. § 939.62. At sentencing, the circuit court imposed an aggregate forty-one year sentence.[3]

¶3 In August 2014, Mull filed the *pro se* postconviction motion underlying these appeals.[4] He asserted that, due to a change in parole policy, he has been denied discretionary release on parole despite his parole eligibility and

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[1] The circuit court entered an identical order in each of the two cases underlying this appeal.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] The Honorable Bonnie L. Gordon presided over the trial and sentencing in these matters.

[4] Mull has an extensive litigation history in both the circuit court and this court. After sentencing, Mull filed postconviction motions and pursued a direct appeal of his convictions with the assistance of appointed counsel. The circuit court denied his claims and we affirmed. ***State v. Mull***, No. 2001AP3166-CR, unpublished slip op. (WI App Nov. 5, 2002). In 2003, Mull filed a *pro se* postconviction motion for a new trial pursuant to WIS. STAT. § 974.06 (2003-04). The circuit court denied his claims and we affirmed. *See* ***State v. Mull***, No. 2003AP2254, unpublished slip op. (WI App Aug. 26, 2004). In August 2008, Mull moved to correct what he claimed was an excessive sentence. The circuit court denied the motion. In June 2009, Mull moved for sentence modification alleging as new factors that his trial counsel was ineffective, the sentencing court erroneously exercised discretion, and his aggregate sentence is unduly harsh. The circuit court denied the motion. In October 2009, Mull moved to vacate a DNA surcharge. The circuit court denied the motion and then denied Mull's motion to reconsider.

his rehabilitation while in prison. He asked the circuit court to conclude that this constitutes a new factor warranting sentence modification. The circuit court denied the claim, and he appeals.

DISCUSSION

¶4 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 its analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the trial court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶5 The circuit court sentenced Mull under Wisconsin's indeterminate sentencing scheme. An inmate serving an indeterminate sentence "is generally eligible for release on parole 'after serving the greater of six months or one-quarter of the sentence.'"[5] ***State v. Stanley***, 2014 WI App 89, ¶4, 356 Wis. 2d 268, 853 N.W.2d 600 (citation omitted). After serving the required minimum, an eligible

[5] The legislature thoroughly revised Wisconsin's sentencing scheme with the passage of 1997 Wis. Act 283 and 2001 Wis. Act 109. *See* ***State v. Delaney***, 2006 WI App 37, ¶11 n.2, 289 Wis. 2d 714, 712 N.W.2d 368, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48, 333 Wis. 2d 53, 797 N.W.2d 828. Unlike Mull, offenders sentenced under the revised system receive determinate sentences and are ineligible for parole. *See* ***State v. Crochiere***, 2004 WI 78, ¶7, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶¶47-48.

inmate may be granted parole at the discretion of the Parole Commission. *See* ***id.*** Further, pursuant to WIS. STAT. § 302.11(1), the indeterminate sentencing system provides that, "absent 'extenuating circumstances,' an inmate is entitled to release on parole on his or her mandatory release date, when the inmate has served two-thirds of the sentence."[6] ***Stanley***, 356 Wis. 2d 268, ¶4 (citation omitted).

¶6 Mull complains that he became parole eligible in 2009 but has been refused parole four times. To support his contention that this is a new factor warranting sentence modification, he points to a 2014 newspaper article. In the article, a Wisconsin judge is quoted as saying that the length of the sentences imposed under Wisconsin's indeterminate sentencing scheme reflected an expectation that inmates would be paroled. The article goes on to discuss an alleged change in parole policy that went into effect after Wisconsin moved to a system of determinate sentencing. Under the alleged new policy, parole-eligible prisoners are generally not paroled until long after they reach their parole eligibility dates. According to Mull, the article demonstrates that if the sentencing judge in his case had "known he would still be incarcerated almost 16 years after [sentencing ... the judge] may have given him a lighter sentence."

¶7 "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). In ***Franklin***, our supreme

[6] An inmate serving an indeterminate sentence for a serious felony is not entitled to mandatory release on parole but instead has a presumptive mandatory release date. ***State v. Stanley***, 2014 WI App 89, ¶5, 356 Wis. 2d 268, 853 N.W.2d 600; *see also* WIS. STAT. § 302.11(1). The Parole Commission has discretion to deny an inmate release on parole if he or she has a presumptive mandatory release date. *See* ***Stanley***, 356 Wis. 2d 268, ¶5. Nothing in the record indicates that Mull's mandatory release date is presumptive.

court explained that "[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.*** Before a circuit court may modify a sentence based on alleged changes in parole policy, however, the defendant must show that "'the sentencing judge's *express* intent is thwarted by the promulgation of new parole policies contemporaneous or subsequent to the original imposition of sentence.'" ***Id.*** at 14 (citation omitted, emphasis in ***Franklin***).

¶8 ***Franklin***'s focus on the sentencing judge's express intent directs us not to speculate about the sentencing judge's unspoken expectations but instead to review the sentencing judge's actual words. In this case, nothing in the sentencing judge's remarks shows the judge expressly considered parole policy when fashioning Mull's sentences.

¶9 As Mull concedes, the circuit court mentioned parole only once during the sentencing proceeding. Specifically, after pronouncing Mull's sentences, the circuit court ordered Mull to pay court costs and surcharges from his prison wages and then added, "upon being paroled, 25% of [Mull's] gross monthly wages shall be applied to" those costs and surcharges, unless they were already fully paid. This court order does not reflect an express intent to key Mull's sentences to the likely actions of the parole board in granting discretionary parole. The remark merely provides the structure for Mull to continue paying restitution "upon being paroled," an event that does not require discretionary action by a parole board and may occur pursuant to statute after Mull serves two-thirds of his aggregate sentence. *See* WIS. STAT. § 302.11(1) (2013-14). Because the sentencing court did not expressly base the length of Mull's sentences on parole policy, Mull's new factor claim fails.

By the Court.—Orders affirmed.

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