COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2480-CR **Cir. Ct. No. 1997CF972944**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. GRAY,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. David L. Gray, *pro se*, appeals an order denying his motion to modify his sentence. He argues that a mistake in the judgment of conviction entered in 1998, which has since been remedied, is a

"new factor" that entitles him to resentencing. He also argues that his sentence exceeded the maximum term allowed by statute. We affirm.

¶2 Gray was convicted of two crimes after a jury trial, attempted first-degree intentional homicide and armed robbery, both class B felonies. The judgment of conviction incorrectly listed attempted first-degree intentional homicide as a class A felony. The circuit court corrected this error at the behest of the Department of Corrections on January 7, 2014.

¶3 Gray first argues the error in the original judgment of conviction is a new factor that entitles him to resentencing. He contends the error rendered him ineligible for certain prison treatment programs and caused him to be held in a higher security status.

¶4 Sentence modification involves a two-step process in Wisconsin. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the defendant must demonstrate by clear and convincing evidence the existence of a new factor. ***Id.*** The phrase a "new factor" refers to:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the 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.

Id., ¶40 (citation and quotation marks omitted). If the defendant shows the existence of a new factor, the circuit court must then decide whether the new factor justifies a modification in the sentence. ***Id.***, ¶37.

¶5 According to the warden's letter that Gray attached to his postconviction motion, Gray's eligibility for the prison program that he wanted to participate in was based on *the length of his sentence*, not on whether his crime

was classified as a class A or a class B felony. Gray has not shown how the classification error of his crime as a class A felony impacted his eligibility for prison programming. Even if Gray had shown that the error affected his program eligibility, however, the circuit court did not consider his potential eligibility for prison programming in imposing the sentence. Because the classification error was therefore not "highly relevant to the imposition of sentence," Gray would not be able to meet his burden of showing the existence of a new factor. *See* ***id.***, ¶40.

¶6 Gray next argues that his sentence exceeded the maximum allowed by law.[1] He contends that he was sentenced to forty years of initial confinement plus twenty-five years of probation for attempted first-degree intentional homicide. He argues that the maximum penalty in 1996 for a class B felony was forty years of imprisonment. Gray's argument is based on a factual mistake. He was sentenced to forty years of imprisonment for attempted first-degree intentional homicide; no probation was imposed for that count. He was ordered to serve a consecutive twenty-five-year term of probation for his armed robbery conviction, not for the attempted homicide conviction. Gray's sentence for attempted first-degree intentional homicide did not exceed the maximum allowed by law.

By the Court.—Order affirmed.

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

[1] Gray did not raise this claim in the circuit court. Although we will not usually address claims raised for the first time on appeal, *see* ***State v. Hayes***, 2004 WI 80, ¶21, 273 Wis. 2d 1, 681 N.W.2d 203, we address the issue to forestall additional litigation by Gray on this point.