COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP426-CR **Cir. Ct. No. 1994CF188**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY L. BEHNKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Randy L. Behnke appeals pro se from an order denying his motion for sentence modification. He contends that he is entitled to sentence modification based upon the existence of new factors. He also contends that the circuit court erred when it removed a sentence credit awarded in his case. We disagree and affirm.

¶2 In November 1994, Behnke was convicted following a jury trial of three counts of battery, one count of second-degree sexual assault, and one count of false imprisonment, all as a repeater. The circuit court imposed consecutive sentences totaling thirty-three years in state prison.

¶3 In December 2014, Behnke filed a motion for sentence modification. In it, he alleged that the denial of his discretionary parole was a new factor warranting sentence modification. He also maintained that the department of corrections (DOC)'s calculation of his presumptive mandatory release date was a new factor warranting sentence modification. Finally, he asserted that the circuit court erred when it removed a sentence credit awarded in his case. The circuit court summarily denied Behnke's motion.[1] This appeal follows.

¶4 On appeal, Behnke renews the arguments presented in his postconviction motion. We begin by addressing his claims of a new factor.

¶5 A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶37-38. 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

[1] The circuit court concluded that Behnke's motion was insufficient and procedurally barred. On appeal, we may affirm on different grounds than those relied on by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. If the fact or set of facts do not constitute a new factor as a matter of law, we need go no further in our analysis. ***Id.***, ¶38.

¶6 Behnke first argues that the denial of his discretionary parole is a new factor warranting sentence modification. In support of this claim, he cites a comment made by the circuit court at the restitution hearing. There, the court recognized the possibility of parole when discussing Behnke's earning ability. The court observed:

> His present earning ability is not much, but his future earning ability could be substantial. *If he is released after parole eligibility or shortly thereafter*, he will still be at a young enough age to earn a substantial amount of money….
>
> $5,300 is not an overwhelming amount for someone who, *if he is released*, even at age 45 would have up to least 20 years of earning life left and at that point would have several years even until his parole was over to pay back this amount; so I find that he would, during the period of his incarceration and parole, have the ability to pay this amount back…. (Emphasis added.)

¶7 We are not persuaded that the denial of Behnke's discretionary parole is a new factor warranting sentence modification. Although the circuit court recognized the possibility of parole at the restitution hearing, it did not base its sentencing decision on any expectation that Behnke would be released after serving any particular length of time. Indeed, the court did not mention parole at all in its sentencing remarks. Accordingly, Behnke cannot demonstrate that his parole eligibility was highly relevant to the court's sentencing decision.

¶8 Behnke next argues that the DOC's calculation of his presumptive mandatory release date is a new factor warranting sentence modification. Behnke criticizes the DOC for basing its calculation on his total sentence and not separating the most serious felony count (second-degree sexual assault) from the other counts.

¶9 Again, we are not persuaded that Behnke has demonstrated the existence of a new factor. In calculating release dates for crimes committed before December 31, 1999, the DOC is required to compute all consecutive sentences as one continuous sentence. WIS. STAT. § 302.11(3) (2013-14).[2] Because Behnke was sentenced for a serious felony (second-degree sexual assault), his release date is presumptive and not mandatory. Sec. 302.11(1g)(am). These provisions in § 302.11 were in place at the time of Behnke's sentencing. Accordingly, there has been no change in policy for calculating release dates that would warrant relief.

¶10 Finally, Behnke argues that the circuit court erred when it removed a sentence credit awarded in his case. The action was taken following a request from the DOC to clarify Behnke's judgment of conviction. The DOC noted that the credit in the judgment appeared to be duplicative to the one that Behnke received at sentencing in two revocation cases. The court agreed and removed the credit.

¶11 The law places the burden of proving sentence credit on the defendant who seeks it. *See* ***State v. Villalobos***, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995). Whether a defendant is entitled to credit is a

[2] All references to the Wisconsin Statutes are to the 2013-14 version.

question of law that this court decides independently. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480 (2002).

¶12 Upon review of the record, we conclude that the circuit court properly removed the sentence credit awarded in this case. As noted by the DOC, the credit was already applied to the sentence in two revocation cases. Because the sentences in this case were ordered to be served consecutive to any other sentence, Behnke was not entitled to receive the same credit again. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100-01, 423 N.W.2d 533 (1988) (time is credited toward only one sentence when multiple sentences run consecutive to one another).

¶13 For these reasons, we affirm the order.[3]

By the Court.—Order affirmed.

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

[3] To the extent we have not addressed an argument raised by Behnke on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").