

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2055-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BROOK E. GRZELAK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD G. GREENWOOD, Reserve Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brook Grzelak appeals an order granting his motion for sentencing modification. Although the circuit court determined that a “new factor” warranted reducing his sentence, Grzelak claims the court failed to

reduce his sentence sufficiently. We affirm the order because the court did not erroneously exercise its sentencing discretion.

¶2 Grzelak was convicted of five counts of burglary in November 1994. Judge Vivi L. Dilweg sentenced Grzelak in December 1996¹ to ten-year concurrent sentences on each count.

¶3 In December 1998, Grzelak moved the circuit court for sentence modification on the grounds that a parole policy change constituted a new factor that frustrated his sentence's purpose. He claimed that the Department of Corrections effectively increased the time he would be incarcerated by eliminating an intensive sanctions program.

¶4 Sentence modification involves a two-step process in Wisconsin. First, the defendant must demonstrate that a "new factor" exists. *See State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If a defendant demonstrates the existence of a new factor, the circuit court must undertake the second step in the modification process: determine whether the new factor justifies modification of the sentence. *See Hegwood*, 113 Wis. 2d at 546.

¹ Grzelak absconded in January 1995 before his original sentencing date.

¶5 Reserve Judge Richard G. Greenwood presided over Grzelak's motion to modify his sentence. Judge Greenwood concluded that Judge Dilweg's sentencing comments indicated reliance on parole policy. "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). Judge Dilweg stated:

Will you serve ten years? Absolutely you will not serve ten years. I can tell you you'll probably serve about two and a half, and I know that when I'm sentencing you. If by the way, they should change the law in the midst of this and try to apply it to you, come back to this court, and I'll reduce the sentence because I'm assuming you're going to spend about two and a half

....

Because I know they're talking about changing the law as to how they read judges' sentences, and I don't know how they're going to do it.

....

I am saying in my sentence so that the State gets it that it is my anticipation that he wouldn't serve more than the minimum.

Judge Greenwood concluded that a change in parole policy that resulted in a delay of Grzelak's release constituted a "new factor" and warranted modifying Grzelak's sentence.

¶6 The State now takes issue with Grzelak's proof of a "new factor." However, as the State concedes, it did not file a cross-appeal in this case.² A cross-appeal must be filed if a respondent seeks a change of the circuit court's decision. *See* WIS. STAT. RULE 809.10(2)(b); *State v. Alles*, 106 Wis. 2d 368,

² The State also failed to respond to Grzelak's motion to modify his sentence in the circuit court.

392-95, 316 N.W.2d 378 (1982). Therefore, we do not consider whether the parole policy constituted a “new factor.” Our review turns to Grzelak’s claim that the court erroneously exercised its discretion in modifying his sentence.

¶7 Judge Greenwood modified Grzelak’s sentence from concurrent ten-year terms to concurrent eight-year terms. Grzelak contends that this reduction was insufficient to meet Judge Dilweg’s intentions that he be paroled after serving approximately two and a half years.

¶8 Sentencing decisions are vested in the circuit court’s discretion, and a defendant who challenges a sentence has the burden of showing that the sentence was unreasonable. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender and the need for the public’s protection. *See Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). “The weight to be given each factor is within the discretion of the trial court.” *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶9 Judge Greenwood specifically incorporated Judge Dilweg’s analysis of the relevant sentencing factors. Judge Dilweg noted that Grzelak’s criminal record was “kind of abysmal” and exhibited violent behavior in the past. Moreover, although Grzelak’s burglaries were not vicious, they were aggravated due to their number. Therefore, both courts concluded, Grzelak had exhibited a pattern of lawless behavior, from which the public needed protection.

¶10 Judge Greenwood properly exercised his discretion in reducing Grzelak’s sentence to effectuate the public-protection purpose behind Judge Dilweg’s sentence. Judge Greenwood was under no duty to interpret Judge Dilweg’s comments as an obligation to sentence Grzelak to any particular term.

Moreover, the authority to consider parole eligibility is granted solely to the parole commission and commission chairperson. *See* WIS. STAT. §§ 304.01 and 304.06. Circuit court judges are in no position to establish mandatory parole dates because many factors enter into parole considerations, including institutional behavior. *See* WIS. ADMIN. CODE § PAC 1.02.

¶11 We will not reverse a sentencing court's decision based on appropriate factors unless it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Eight years under these circumstances is not overly excessive, unusual or disproportionate.

By the Court.—Order affirmed.

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

