

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2010

David R. Schanker
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 No. 2009AP1074-CR

Cir. Ct. No. 1997CF974134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME PAUL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jerome Paul, *pro se*, appeals the circuit court's order denying his motion to modify his forty-year indeterminate sentence for first-degree reckless homicide. He argues that there is a new factor justifying sentence modification. We affirm.

¶2 “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.” *State v. Delaney*, 2006 WI App 37, ¶8, 289 Wis. 2d 714, 712 N.W.2d 368. “The effect of the ‘new factor’ must frustrate the purpose of the original sentencing.” *Id.* (citing *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989)). “Whether a fact or set of facts constitutes a new factor is a question of law this court decides without deference to the circuit court’s determination.” *Delaney*, 2006 WI App 37, ¶7.

¶3 Paul’s argument centers on his mandatory release date. He points to the circuit court’s comment at the sentencing hearing, made after it had already imposed the sentence, that Paul would be “mandatorily released after he has served two-thirds of the sentence.” Paul contends that his sentence should be modified because this statement was incorrect. He is not absolutely entitled to mandatory release after serving two-thirds of his indeterminate prison sentence—rather, he is only *presumed* to be entitled to release. Paul’s argument is unavailing. The circuit court mentioned Paul’s mandatory release date only in passing, in response to a question by Paul’s attorney, *after* the court had already imposed the sentence. The circuit court did not base its sentence on the mandatory release date and, in fact, would not have mentioned it at all but for the question by Paul’s attorney. Therefore, the fact that the mandatory release date is presumptive rather than absolute cannot be said to “frustrate[] the purpose of the original

sentencing.” See *Michels*, 150 Wis. 2d at 97. We reject Paul’s argument that his sentence should be modified based on the presence of a new factor.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

