

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 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. 2009AP552-CR

Cir. Ct. No. 1990CF2011R

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAREN E. LEHMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Price County:
ANN KNOX-BAUER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Karen Lehman appeals an order denying her motion to change her parole eligibility date. The trial court denied the motion because Lehman failed to establish a new factor. Lehman contends the court has

authority to restructure her sentence to change her parole eligibility date without establishing any new factor. We reject that argument and affirm the order.

¶2 In 1993, Lehman was convicted of first-degree intentional homicide. She was sentenced to life in prison with parole eligibility in twenty-five years. While incarcerated, she engaged in numerous programs and has earned sixty post-high school education credits. However, under prison rules, she is not eligible to continue her education because she is not eligible for parole.

¶3 Lehman filed a motion to restructure her sentence by modifying her parole eligibility date to enable her to continue with her education. She argued she was not seeking modification of the sentence, but only sought restructuring of the sentence to take into consideration her conduct, efforts, and progress toward rehabilitation, education, treatment and other correctional programs. The State opposed the motion, contending parole eligibility is a part of a defendant's sentence, and a motion seeking to change the parole eligibility date must allege a new factor. The court denied the motion, concluding that Lehman must establish a new factor in order to justify a change of her parole eligibility date.

¶4 Lehman's entire argument is based on the premise that a change of parole eligibility is not a modification of the sentence, and therefore the new factor rule does not apply. We disagree. When parole eligibility is determined by the court at sentencing, it is a part of the sentence and is subject to the new factor rule. At sentencing, when the court determines the parole eligibility date, its decision is based on the nature of the crime, the public's need for protection, and the defendant's rehabilitative needs. *State v. Borrell*, 167 Wis. 2d 749, 768-69, 482 N.W.2d 883 (1992), *overruled on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. These are the same factors the court uses to

determine the length of the sentence. *State v. Seeley*, 212 Wis. 2d 75, 87, 567 N.W.2d 897 (Ct. App. 1997). When parole eligibility is determined by the sentencing court, it is an “essential and integral part of the court’s sentencing decision.” *Borrell*, 167 Wis. 2d at 767. Therefore, Lehman cannot avoid the restrictions on sentence modification by merely describing the modification as a “restructuring” of her sentence. This is a distinction without a substantive difference, and amounts to merely semantics.

¶5 Because a motion to change court-ordered parole eligibility is a modification of the sentence, the motion must establish a new factor or an improper exercise of the sentencing court’s discretion. As a matter of law, rehabilitative efforts cannot be new factors entitling a defendant to sentence modification. *State v. Krueger*, 119 Wis. 2d 327, 333-35, 351 N.W.2d 738 (Ct. App. 1984). Lehman does not allege that the sentencing court improperly exercised its discretion. Therefore, there is no basis for amending the parole eligibility date.

By the Court.—Order affirmed.

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

