COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1855-CR **Cir. Ct. No. 2005CF553**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC LAMAR JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eric Lamar Johnson, *pro se*, appeals an order denying his motion for sentence modification. He argues: (1) that the circuit court misused its discretion when it sentenced him because it did not consider his rehabilitative needs; (2) that the circuit court should modify his sentence now, nine

years after his conviction, because his rehabilitative needs are a "new factor"; and (3) that the circuit court erred in denying his postconviction motion without a hearing. We affirm.

¶2 Johnson was convicted of second-degree intentional homicide while armed and possession of a firearm by a felon in 2005. The circuit court sentenced Johnson to seventeen years of imprisonment for the homicide conviction, with twelve years of initial confinement and five years of extended supervision, and two years of imprisonment for being a felon in possession of a firearm, with one year of initial confinement and one year of extended supervision, to be served consecutively. On direct appeal, Johnson argued that the circuit court erred in refusing to allow him to introduce evidence about the victim's disposition to use handguns in a reckless manner. We affirmed. In 2013, Johnson brought this postconviction motion for sentence modification. The circuit court denied the motion.

¶3 Johnson first argues that the circuit court misused its discretion when it sentenced him because it did not consider his rehabilitative needs. A claim that the circuit court misused its sentencing discretion must be raised within ninety days of sentencing under WIS. STAT. § 973.19, or within the time-frame for a direct appeal under WIS. STAT. § 809.30. Johnson did not raise his argument that the circuit court misused its sentencing discretion within these time limits. To the contrary, Johnson pursued a direct appeal under § 809.30 within the proper time limits, but did *not* raise this argument. We will not consider Johnson's argument at this point because it is time-barred.

¶4 Johnson contends the circuit court has inherent authority to modify his sentence regardless of whether the time limits for direct appeal have expired,

citing ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 646, 648 N.W.2d 507, 514. Johnson reads ***Grindemann*** too broadly. That case explains that the circuit court has the inherent power to modify a sentence, but only in limited circumstances; it may not reduce a sentence based solely on second thoughts or further reflection. ***Ibid.*** For example, the circuit court may reduce a sentence if it concludes that the original sentence was "'unduly harsh or unconscionable,'" or if the movant shows the existence of a new factor that warrants sentence modification. ***Id.***, 2002 WI App 106, ¶29, 255 Wis. 2d at 650, 648 N.W.2d at 514–515 (citation omitted). We reject Johnson's contention that the circuit court has inherent authority to modify his sentence in any circumstance regardless of time limits.

¶5 Johnson next argues that the circuit court should modify his sentence because his rehabilitative needs are a "new factor." 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. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 74, 797 N.W.2d 828, 838 (citation and quotation marks omitted). Unfortunately for Johnson, it is well established that a person's rehabilitation while in prison or jail is not a "new factor" for purposes of sentence modification. ***State v. Kluck***, 210 Wis. 2d 1, 7–8, 563 N.W.2d 468, 470–471 (1997). Therefore, we reject this argument.

¶6 Finally, Johnson argues that the circuit court should not have denied his postconviction motion without a hearing. The circuit court must hold an evidentiary hearing if a postconviction motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***,

2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. The issues Johnson has raised in his motion are unavailing as a matter of law. Stated differently, Johnson cannot prevail on his claims regardless of whether he proves the facts he alleges in his motion. Therefore, the circuit court properly denied the motion without a hearing.

By the Court.—Order affirmed.

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