COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2075-CR **Cir. Ct. No. 1997CF975165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PARNELL T. GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Parnell T. Graham, *pro se*, appeals an order denying his motion for sentence modification. He contends that the presumptive mandatory release statute, which permits the Department of Corrections to confine him after he has served two-thirds of his sentences, constitutes a new factor. We

conclude that Graham has not shown a basis for relief, and we affirm the order of the circuit court.

¶2 In November 1997, the State filed a complaint against Graham alleging that: (1) on June 17, 1997, he committed first-degree sexual assault and armed robbery of Maticia F.; (2) on September 28, 1997, he committed first-degree sexual assault and armed robbery of Vanessa T.; (3) on June 17, 1997, he committed a burglary; and (4) on September 22, 1997, he committed an attempted burglary. *See* WIS. STAT. §§ 940.225(1) (1997-98); 943.32(2) (1997-98); § 943.10(1)(a) (1997-98); 939.32 (1997-98).[1] Graham pled guilty as charged. In April 1998, the circuit court imposed a forty-year prison sentence for each sexual assault and each armed robbery conviction and ordered Graham to serve the four, forty-year sentences consecutively. Additionally, the circuit court imposed a concurrent ten-year sentence for the burglary conviction and a concurrent five-year sentence for the attempted burglary conviction.

¶3 Graham pursued a direct appeal, alleging that his trial counsel was ineffective and that his sentences are unduly harsh and excessive. We summarily affirmed.[2] *See* ***State v. Graham***, No. 2000AP0643-CR, unpublished op. and order (WI App Aug. 28, 2001).

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Our decision summarily affirming Graham's convictions included an order directing the circuit court to conform the written judgment of conviction to the oral pronouncement of a five-year concurrent sentence for attempted burglary. *See* ***State v. Graham***, No. 2000AP0643-CR, unpublished op. and order at 2 n.1 (WI App Aug. 28, 2001).

¶4 In 2013, Graham filed the postconviction motion underlying this appeal. He alleged that a new factor warrants sentence modification and that the circuit court erroneously exercised its discretion by imposing consecutive sentences for crimes involving the same victim. The circuit court rejected his claims. He appeals, pursuing his allegation that a new factor warrants relief.[3]

¶5 A circuit court may modify a sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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 was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). The defendant has the burden of proving by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Whether a fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a circuit court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶6 Graham's claim that a new factor exists is premised on WIS. STAT. § 302.11(1g), which provides for presumptive mandatory release of certain inmates. As a general rule, a prisoner sentenced for a crime committed before December 31, 1999, is entitled to mandatory release after serving two-thirds of his

[3] The appellate brief that Graham filed in this court includes a description of his claim that the sentencing court erred by imposing consecutive sentences for crimes involving the same victim. The brief, however, does not include any argument in support of that claim. We deem the claim abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (claim not briefed or argued is deemed abandoned).

or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g)(am), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony between April 21, 1994, and December 31, 1999. The parole commission may, for the reasons set forth in § 302.11(1g)(b)1.-2., deny presumptive mandatory release to an inmate who is serving a sentence for a serious felony. First-degree sexual assault and armed robbery are serious felonies within the meaning of the statute. *See* § 302.11(1g)(a)2. Graham claims that the circuit court was unaware of the law of presumptive mandatory release at the time of his sentencing for first-degree sexual assault and armed robbery and that this constitutes a new factor in his case. The claim fails.

¶7 WISCONSIN STAT. § 302.11(1g) went into effect in April 1994. *See* 1993 Wis. Act 194, § 2; WIS. STAT. § 991.11. Nothing said during Graham's sentencing in April 1998 suggests that the circuit court lacked knowledge of § 302.11(1g), which by that time was well-established Wisconsin law. Moreover, when resolving Graham's postconviction motion, the circuit court found that it was aware of the law of presumptive mandatory release at the time of his sentencing.[4] We defer to a circuit court's factual findings unless they are clearly erroneous. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. Graham asserts that the circuit court's finding here is clearly erroneous—indeed, he deems it "suspect"—because, in several proceedings unrelated to the instant matter, a few circuit court judges have admitted not knowing about the law of presumptive mandatory release. We will not impute some judges' lack of

[4] The Honorable Timothy G. Dugan imposed sentence in this case and presided over the postconviction motion underlying this appeal.

knowledge to other members of the judiciary. To the contrary, we presume that judges know the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. We see nothing remarkable or suspicious about a finding that, at sentencing in this matter, the circuit court was aware of a law that had been in effect for four years.

¶8 A new factor is a fact or set of facts that was "'not known to the trial judge at the time of original sentencing.'" ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Because the record conclusively shows that the circuit court was aware of the law of presumptive mandatory release at the time of sentencing in this case, Graham cannot prevail in his claim that the law of presumptive mandatory release constitutes a new factor.

By the Court.—Order affirmed.

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