COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2285-CR **Cir. Ct. No. 1993CF678**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE DEAN JARDINE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jamie Jardine, pro se, appeals orders denying his postconviction motions. The circuit court denied Jardine's motions for: (1) sentence modification; (2) reconsideration of the court's order denying his

sentence modification motion; (3) vacation of the order denying his motion for reconsideration; and (4) judicial recusal. We affirm.

BACKGROUND

¶2 In 1994, a jury found Jardine guilty of one count of attempted first-degree intentional homicide, contrary to WIS. STAT. §§ 939.32(1)(a) and 940.01(a) (1991-92),[1] and four counts of first-degree sexual assault, contrary to WIS. STAT. § 940.225(1)(b). At sentencing, the circuit court imposed an aggregate sixty-year sentence.

¶3 In 2015, Jardine filed a motion for sentence modification.[2] He argued that a change in parole policy violates the ex post facto clause and

[1] All references to the Wisconsin Statutes are to the 1991-92 version unless otherwise noted.

[2] Jardine has an extensive litigation history in both the circuit court and this court. After sentencing, Jardine filed a postconviction motion and pursued a direct appeal of his conviction with the assistance of appointed counsel. The circuit court denied his postconviction motion and we affirmed. *See* ***State v. Jardine***, No. 1995AP1856-CR, unpublished slip op. (WI App May 29, 1996).

In 1996, Jardine filed a postconviction motion pursuant to WIS. STAT. § 974.06 (1993-94), for a new trial based on newly discovered evidence. The circuit court did not address Jardine's motion. In 2000, Jardine moved for sentence modification or, alternatively, to vacate his sentence. We affirmed the circuit court's order denying Jardine's motion for sentence modification. *See* ***State v. Jardine***, No. 2001AP713-CR, unpublished slip op., ¶1 (WI App Sept. 5, 2001). However, because we construed Jardine's 2000 motion to also "revive" his 1996 motion for a new trial based on newly discovered evidence—which the circuit court never addressed—we reversed the circuit court's order denying Jardine's motion to vacate his sentence and remanded for further proceedings. *See* ***id.*** Jardine subsequently withdrew his 1996 postconviction motion for a new trial based on newly discovered evidence.

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constituted a new factor warranting sentence modification, the circuit court violated his due process rights by sentencing him based upon inaccurate information, and the court's failure to appoint postconviction counsel violated his Sixth Amendment right. The circuit court summarily denied Jardine's motion. Jardine filed a motion for reconsideration, which the court also denied. The court also denied Jardine's subsequent motion for judicial recusal and to vacate the court's order denying Jardine's motion for reconsideration. Jardine now appeals.

DISCUSSION

I. Sentence modification

¶4 Jardine first argues that a purported change in parole policy is a new factor warranting sentence modification.[3] 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). Whether a fact or set of facts constitutes a new factor warranting sentencing modification is a

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In 2005, Jardine filed a postconviction motion for a new trial based on newly discovered evidence or, alternatively, for sentence modification. The circuit court denied his postconviction motion and we affirmed. *See* ***State v. Jardine***, No. 2008AP1533-CR, unpublished slip op., ¶1 (WI App June 30, 2009). In 2012, Jardine filed another postconviction motion for sentence modification, which the circuit court denied in an oral ruling. We dismissed Jardine's subsequent appeal for lack of jurisdiction, as the record did not include a written order. *See* ***Ramsthal Advert. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979).

[3] Jardine repeatedly uses the phrase "abuse of discretion" in his brief. We have used the phrase "erroneous exercise of discretion" in place of "abuse of discretion" since 1992. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

question of law. ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38.

¶5 "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). Here, the circuit court sentenced Jardine to an aggregate sixty-year sentence under Wisconsin's prior indeterminate sentencing scheme. Based on the jury's verdict, the court described Jardine as "a very dangerous individual" and concluded "a long prison term is appropriate." The court did not expressly rely on parole when it sentenced Jardine. Therefore, any purported change in parole policy is not a new factor warranting sentence modification.[4] *See* ***id.*** at 15 (holding that a change in parole policy "is not a relevant factor unless the [sentencing] court expressly relies on parole eligibility" when sentencing the defendant).

¶6 Jardine next argues his due process rights were violated because he was sentenced upon inaccurate information. In support of his argument, he asserts that at the sentencing hearing: (1) the State impermissibly referenced new statutory penalties that were inapplicable to him; and (2) the circuit court failed to

[4] Jardine appears to raise two related arguments. First, Jardine argues that because his attorney mentioned parole policy at the sentencing hearing, the circuit court necessarily considered parole in sentencing him. This argument is without merit. *Cf.* ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) ("[T]he sentencing court never expressly considered parole eligibility. It would be improper to impute the thoughts of the prosecutor to the sentencing judge."). Second, after describing our supreme court's decision in ***Franklin*** as "misguided," Jardine appears to suggest we overrule or modify ***Franklin***. Contrary to Jardine's apparent suggestion, we have no authority to do so. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

explicitly state that his parole eligibility status is governed by 1985 Wis. Act 528. Even though the State referenced statutory penalties inapplicable to Jardine, the court did not expressly rely on that information in sentencing Jardine. Therefore, Jardine's due process argument fails. *See* ***State v. Tiepelman***, 2006 WI 66, ¶¶2, 12-17, 291 Wis. 2d 179, 717 N.W.2d 1 (a defendant asserting a due process violation based on a sentencing court's alleged reliance on inaccurate information must first demonstrate the sentencing court expressly relied on that information in sentencing the defendant).

¶7 Jardine also argues that changes in parole policy subsequent to his conviction and sentencing violate the ex post facto clause. He first asserts that a 1994 letter from then Wisconsin Governor Tommy Thompson to the Department of Corrections (DOC) regarding the mandatory release of violent offenders changed parole policy. This argument is without merit. The letter Jardine refers to does not have the force of law; therefore, it does not violate the ex post facto clause. *See* ***State v. Delaney***, 2006 WI App 37, ¶24, 289 Wis. 2d 714, 712 N.W.2d 368.[5]

¶8 Jardine then asserts a 1994 letter from then DOC Secretary Michael Sullivan to Governor Thompson demonstrated a change in parole policy, which retroactively and substantially decreased his parole eligibility, in effect increasing his punishment. The letter to which Jardine refers states in relevant part: "Sex offenders will only be released on mandatory release." However, the DOC

[5] Jardine describes our decision in ***State v. Delaney***, 2006 WI App 37, 289 Wis. 2d 714, 712 N.W.2d 368, as "misguided." To the extent Jardine is implicitly suggesting we overrule or modify our decision in ***Delaney***, we again note that we are without authority to do so. *See* ***Cook***, 208 Wis. 2d at 189-90 (concluding that the court of appeals does not have the power to overrule, modify or withdraw language from another court of appeals decision).

secretary is not involved in making parole decisions and the parole commission is not subject to the control of the DOC secretary. ***Id.***, ¶17. Because Jardine was sentenced to an aggregate sixty-year sentence with the prospect of discretionary parole consideration—and this remains unchanged—Jardine has failed to establish an ex post facto clause violation. *See* ***id.***, ¶24.

¶9 Finally, Jardine argues that his Sixth Amendment right to counsel was violated when the circuit court failed to appoint postconviction counsel to assist him with his WIS. STAT. § 974.06 motion for sentence modification. His argument is without merit. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648-49, 579 N.W.2d 698 (1998) (recognizing a defendant's right to appointed counsel does not extend past defendant's first direct appeal as of right).

II. Motion for reconsideration

¶10 Jardine filed a motion for reconsideration after the circuit court denied his motion for sentence modification. To prevail on a motion for reconsideration, a party must either present newly discovered evidence or establish a manifest error of law or fact. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A manifest error of law occurs when the circuit court disregards, misapplies, or fails to recognize controlling precedent. ***Id.*** With one exception,[6] Jardine's motion for reconsideration simply rehashed his previous

[6] In moving for reconsideration, Jardine raised one completely new legal theory—which he reasserts on appeal. He argues that medically necessary sex offender treatment is being denied to him in violation of the Eighth Amendment. However, a motion for reconsideration is not the proper avenue for raising new legal theories. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (motion for reconsideration must present newly discovered evidence or demonstrate that the court's previous decision was based on manifest error of fact or law). Because Jardine

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arguments without demonstrating newly discovered evidence or manifest error. Therefore, the circuit court properly denied Jardine's motion for reconsideration. *See* ***id.***

III. Motion for judicial recusal

¶11 After the circuit court denied Jardine's motion for reconsideration, Jardine filed a motion for judicial recusal.[7] He argues the circuit court exhibited judicial bias against him because: (1) the court informed the parties that it would not render a decision on Jardine's motion for reconsideration until January 9, 2016; and (2) the court rendered a decision on Jardine's motion before that date i.e., on October 12, 2015. However, the record belies Jardine's assertion that the court informed the parties it would not render a decision on Jardine's motion for reconsideration until January 9, 2016. Rather, the court informed the parties that a decision—if one was deemed necessary by the court—would be rendered *by* January 9, 2016. Because Jardine's judicial bias argument relies upon a factual assertion unsupported by the record, we decline to address his judicial bias argument further. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (declining to address arguments premised on unsupported factual assertions).

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failed to properly raise his Eighth Amendment argument with the circuit court, we decline to address it. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476.

[7] Jardine also moved to vacate the circuit court's order denying his motion for reconsideration, arguing the court erroneously exercised its discretion in denying his motion for reconsideration. However, the circuit court properly denied his motion for reconsideration. *See supra* ¶10. Therefore, the court properly denied Jardine's motion to vacate.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).