COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2364-CR **Cir. Ct. No. 2010CF5021**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE ALBERT SAFFOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Clarence Albert Saffold appeals from a judgment of conviction for armed robbery with use of force and armed robbery with threat

of force, contrary to WIS. STAT. § 943.32(2) (2009-10).[1] He also appeals from an order that partially denied his postconviction motion to modify his sentence.[2] Saffold argues that the legislative repeal of positive adjustment time, which previously allowed inmates convicted of certain offenses to earn potential reductions in their terms of initial confinement for defined positive behavior, is a new factor justifying sentence modification in his case. We affirm.

BACKGROUND

¶2 Pursuant to a plea bargain, Saffold pled no contest to armed robbery with use of force and guilty to armed robbery with threat of force. On February 4, 2011, the circuit court sentenced Saffold to seven years of initial confinement and three years of extended supervision on both robberies. It ordered that the two sentences be served concurrently, but consecutive to any other sentence, which included a reconfinement sentence that would not end until 2012.

¶3 Represented by postconviction counsel, Saffold filed a motion to modify his sentence on September 6, 2011. He argued that he was entitled to sentence modification because "recent legislation withdrawing his opportunity to earn positive adjustment time constitutes a new factor justifying the modification of his sentence." The circuit court rejected Saffold's argument, for reasons discussed below. This appeal follows.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The circuit court granted Saffold's request to vacate the DNA surcharge.

DISCUSSION

¶4 Saffold argues the legislative repeal of positive adjustment time is a new factor justifying sentence modification in his case. We recently considered the same issue brought by a similarly situated defendant in ***State v. Carroll***, 2012 WI App 83, __ Wis. 2d __, __ N.W.2d. __ (petition for review filed July 18, 2012).[3]

¶5 In ***Carroll***, we explained that "[i]n June 2009, the legislature passed 2009 Wis. Act 28, which, in part, allowed offenders convicted of certain crimes to earn positive adjustment time during the terms of their initial confinement." *See* ***Carroll***, 2012 WI App 83, ¶3 (footnote omitted). Subsequently, "[i]n August 2011, the legislature enacted 2011 Wis. Act 38, repealing many of the earlier release provisions created under 2009 Wis. Act 28, including positive adjustment time under WIS. STAT. § 302.113(2)(b)." ***Carroll***, 2012 WI App 83, ¶4. "Offenders eligible for positive adjustment time who had begun serving their sentences between the enactment of 2009 Wis. Act 28 and the August 3, 2011 effective date of 2011 Wis. Act 38, remained eligible for a potential reduction of confinement time based on positive adjustment time already earned." ***Carroll***, 2012 WI App 83, ¶4.

¶6 In Carroll's case, his sentence was not scheduled to begin until after he finished serving another sentence in 2015—long after the August 3, 2011 effective date of 2011 Wis. Act 38—so he was not eligible to earn positive

[3] Saffold's appellate counsel is the same attorney who represented Carroll on appeal and the briefs present many of the same arguments.

adjustment time.[4] *See* ***Carroll***, 2012 WI App 83, ¶4. Carroll unsuccessfully moved for sentence modification after the repeal of the early release provisions of WIS. STAT. § 302.113(2)(b), alleging "that the repeal was a new factor warranting sentence modification under ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828, and ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)." *See* ***Carroll***, 2012 WI App 83, ¶5.

¶7 ***Harbor*** recognized that "[w]ithin certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences." ***Id.***, 333 Wis. 2d 53, ¶35. It held that a court "may base a sentence modification upon the defendant's showing of a 'new factor.'" ***Id.*** (citation omitted).

¶8 ***Carroll*** summarized the legal standards that apply when a defendant seeks sentence modification based on a new factor:

> A new factor is a fact or set of facts both highly relevant to the imposition of sentence, and not known to the sentencing judge at the time of original sentencing. ***Rosado***, 70 Wis. 2d at 288. Whether a fact or set of facts constitutes a new factor is a question of law that we review independently. ***Harbor***, 333 Wis. 2d 53, ¶33. The determination of whether a new factor justifies sentence modification is committed to the circuit court's discretion. ***Id.*** We review the circuit court's decision for an erroneous exercise of discretion. ***Id.***
>
> The defendant has the burden of demonstrating "both the existence of a new factor and that the new factor justifies modification of the sentence." ***Id.***, ¶38. If a court

[4] Saffold was likewise unable to earn positive adjustment time after sentencing, because he had to serve his reconfinement sentence until 2012, well after the repeal of the positive adjustment time provisions.

> determines that the facts do not constitute a new factor as a matter of law, "'it need go no further in its analysis."' ***Id.*** (citation omitted).

Carroll, 2012 WI App 83, ¶¶7-8.

¶9 Applying those standards, ***Carroll*** first concluded that "[b]ecause 2011 Wis. Act 38 did not become effective until more than a year after Carroll's sentencing hearing, it is obvious that the sentencing judge could not have known about the repeal at the time of sentencing. Thus we consider only whether the existence of positive adjustment time was highly relevant to the imposition of sentence." ***Carroll***, 2012 WI App 83, ¶9 (two sets of quotation marks and citation omitted).

¶10 Next, ***Carroll*** concluded that in Carroll's case, where "the sentencing court did not mention, much less discuss, positive adjustment time … the possibility of positive adjustment time was not a factor highly relevant to the sentence imposed." ***Id.***, ¶11. ***Carroll*** continued: "Consequently, repeal of a program that was not considered at sentencing does not establish a new factor justifying sentence modification under ***Harbor***." ***Carroll***, 2012 WI App 83, ¶11.

¶11 Applying ***Carroll***'s analysis here, we likewise conclude that Saffold has not established a new factor that would justify sentence modification. First, like Carroll, Saffold was sentenced before the enactment of 2011 Wis. Act 38, so "it is obvious that the sentencing judge could not have known about the repeal at the time of sentencing," and we will "consider only whether the existence of positive adjustment time was highly relevant to the imposition of sentence." *See* ***Carroll***, 2012 WI App 83, ¶9 (two sets of quotation marks and citation omitted).

¶12 To determine whether the possibility of positive adjustment time was highly relevant to Saffold's sentence, we look to the circuit court's remarks at sentencing, which the circuit court itself reviewed when it denied Saffold's motion for sentence modification. In its written order denying the motion, the circuit court began by discussing its sentencing decision:

> At the sentencing hearing I was required to determine … whether the defendant was eligible for certain programs that might enable him to reduce the length of his prison sentence. In particular, I was required to consider eligibility for the challenge incarceration and earned release programs and whether a risk reduction sentence was appropriate. I declined each of those options. As I explained at the sentencing hearing, "I've determined in your case what I think is the minimum amount of time that you should serve in prison so that you are adequately punished for something that was so clearly wrong, and so that the community is protected from somebody who is willing to go to great lengths to support a drug habit. I don't want those programs to shorten the length of time that you spend in prison."

(Quotation marks added and indenting omitted.) The circuit court's order then addressed the brief comments it made at sentencing concerning the possible accrual of positive adjustment time:

> At the time Mr. Saffold was sentenced, there was another early release option. Certain inmates were allowed to earn "positive adjustment time" which might qualify them for early release. Early release was no guarantee, but depending on his conduct in prison, his risk of reoffending, the nature of his offense, and the recommendation of the Earned Release Review Commission, Mr. Saffold might have been released from prison after serving only 85% of the length of his initial confinement term of seven years, a little more than a year early.
>
> I was aware of this possibility at the time of Mr. Saffold's sentencing, but took no position on whether he deserved early release, and I said so at the sentencing hearing: "Now, there are other ways for prisoners to earn early release. It's premature for me to judge whether or not you should qualify for those, so I'm not going to comment

> on those. And to the extent that your participation in those programs or any credit that you would get from them is up to the court, that will be up to somebody else sitting in my seat down the road."

(Second set of quotation marks added and indenting omitted.)

¶13 The circuit court in its order stated that it did not believe that the repeal of positive adjustment time was highly relevant to the sentence it imposed because at sentencing it did not "say anything to suggest that the possibility of early release was at all relevant to [the circuit court's] sentence calculation." Further, the circuit court said that what was highly relevant to the sentence "was the price that Mr. Saffold should pay for his wrongdoing, which I judged to be seven years of initial confinement … [and which] was the minimum amount of time he should do in order to be adequately punished."

¶14 We agree with the circuit court's analysis of its original sentencing decision and its conclusion that the possibility of Saffold earning positive adjustment time was not a factor that was highly relevant to the sentence the circuit court imposed. ***Carroll***'s conclusion is equally as fitting here:

> We conclude, based on the facts of the case before us, that the existence of positive adjustment time at the time of sentencing was not a factor highly relevant to the sentence imposed, thus the repeal of positive adjustment time is not a new factor warranting sentence modification. The motion for sentence modification was properly denied.

Id., 2012 WI App 83, ¶13.

¶15 Finally, like the defendant in ***Carroll***, Saffold argues that the repeal of positive adjustment time provisions "effectively lengthens the initial confinement portion of his sentence." We rejected the same argument in ***Carroll***, explaining:

> That conclusion assumes that the legislature would not change the positive adjustment time statute before 2020 (when he begins serving his sentence at the end of his initial confinement), that he would eventually earn a significant amount of such time by violating no prison regulations, and that the court would ultimately allow that time to reduce his incarceration time. *See* WIS. STAT. § 302.113(2)(c)2. (sentencing court may accept or reject the Department of Corrections award of positive adjustment time or may order inmate to serve entire incarceration portion of the sentence). Because Carroll had earned no adjustment time when the statute was repealed, his argument is premised on nothing more than multiple assumptions. Such a speculative syllogism does not persuade us that he has been harmed in any way by the repeal of a statute under which he had no vested rights.

Carroll, 2012 WI App 83, ¶12. The same reasoning applies to Saffold's argument and we reject it.

By the Court.—Judgment and order affirmed.

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