COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2737-CR **Cir. Ct. No. 1998CF970**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAREYTON PIERSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Tareyton Pierson, *pro se*, appeals a circuit court order denying his motion for sentence modification.[1] He also appeals the order denying reconsideration. He claims that his continued confinement beyond his presumptive mandatory release date is a new factor warranting relief from his sentence. We disagree and affirm the orders of the circuit court.

¶2 Pierson pled guilty to one count of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (1997-98).[2] The criminal complaint alleged that, in October 1997, Pierson approached a thirteen-year-old girl who was waiting for a bus, pulled her into his car, and took her to the basement of a house where he forcibly had sexual intercourse with her. In August 1998, the sentencing court imposed a seventeen-year indeterminate sentence.[3] At the conclusion of the sentencing hearing, Pierson asked why he had received such a sentence, and the sentencing court responded:

> [y]ou actually will not have to serve seventeen years. There's a presumptive mandatory release date at two-thirds, and there's parole eligibility at a quarter. Whether or not you are released either at a quarter or at the presumptive mandatory release date will depend a lot on how you do in prison.

[1] Pierson's given name is spelled "Taeryton" in circuit court records. We spell the name as Pierson does in his submissions to this court, and as we did when we resolved his direct appeal. *See* ***State v. Pierson***, No. 1999AP1275-CRNM, unpublished op. and order (WI App Oct. 4, 1999).

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

[3] The Honorable Elsa C. Lamelas imposed sentence in this matter. The Honorable David L. Borowski presided over the postconviction proceedings and entered the orders denying sentence modification and reconsideration.

¶3 Generally, a prisoner sentenced for a crime committed before December 31, 1999, is entitled to mandatory release after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony, including second-degree sexual assault of a child, between April 21, 1994, and December 31, 1999. The parole commission is authorized to deny such prisoners presumptive mandatory release for any of the reasons listed in § 302.11(1g)(b), including protection of the public. *See* ***id.***

¶4 Pierson was denied release when he reached his presumptive mandatory release date. In 2012, he filed a motion for sentence modification on the ground that his continued confinement is a new factor. The circuit court determined that he did not demonstrate a new factor and that, even assuming he did demonstrate a new factor, his sentence should not be modified.

¶5 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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). If a defendant proves by clear and convincing evidence that a new factor exists, the circuit court may modify the defendant's sentence. *See* ***id.***, ¶¶35-36.

¶6 Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis and may deny sentence modification on that basis. ***Id.***, ¶38. Further, "[t]he existence of a

new factor does not automatically entitle the defendant to sentence modification." ***Id.***, ¶37. Rather, if the defendant shows that a new factor exists, the circuit court has discretion to determine whether the new factor warrants sentence modification. ***Id.*** Moreover, if the circuit court concludes that "the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor." ***Id.***, ¶38.

¶7 In support of the claim that a new factor exists here, Pierson points to the sentencing court's response to his question about the reason for his seventeen-year sentence. He misconstrues that response as an assurance that he would be released after serving two-thirds of his sentence. In fact, the sentencing court explained that he would not necessarily be released on his presumptive mandatory release date. The sentencing court explicitly told him that "whether or not" he was released upon reaching his presumptive mandatory release date depended substantially on how he conducted himself while incarcerated. Thus, the sentencing court clearly knew when imposing sentence that Pierson's time in prison might extend past his presumptive mandatory release date.

¶8 Pierson also seeks to support his new factor claim with citations to circuit court decisions in two cases unrelated to his own. In both of the decisions that he submitted to support his argument, a circuit court judge—a judge who did not preside over Pierson's case—found that a new factor existed because the judge was unaware of WIS. STAT. § 302.11(1g) when imposing an original sentence. The circuit court decisions Pierson relies on do not assist him. First, "a circuit court decision is neither precedent nor authority upon which this court may base its decision." ***Kuhn v. Allstate Ins. Co.***, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993), *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995). Second, the sentencing judge in Pierson's case unequivocally demonstrated familiarity with

§ 302.11(1g) by explicitly referencing presumptive mandatory release during the sentencing proceeding.

¶9 In sum, the sentencing court was aware when sentencing Pierson that his mandatory release date was only "presumptive" and that he therefore might be required to remain in prison after serving two-thirds of his sentence. His continued confinement is thus not a new factor. *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

¶10 We need not proceed further with our analysis. *See* ***id.***, ¶38. For the sake of completeness, however, we consider the circuit court's conclusion that Pierson's continued confinement does not warrant sentence modification, regardless of whether that confinement meets the definition of a new factor. Our review is limited to determining whether the circuit court erroneously exercised its discretion. *See* ***id.***, ¶33.

¶11 The record shows that Pierson has not completed sex offender treatment, and the record further reflects the parole commission's conclusion that, "as an untreated sex offender, [he] pose[s] an unreasonable risk to the public." The circuit court therefore concluded that Pierson's continued incarceration "would not justify a modification of the sentence because the safety of the community would be compromised."[4]

[4] The record includes materials reflecting the parole commission's acknowledgment that sex offender treatment "ha[d] not been made available to [Pierson] but that fact does not lessen the risk that [he] pose[s]." Pierson suggests that he should not remain incarcerated due to errors by the Department of Corrections, but that argument challenges the decision of the parole commission to deny him release and cannot be pursued in this proceeding. "An inmate may seek review of a decision by the parole commission relating to the denial of presumptive mandatory release only by the common law writ of *certiorari*." WIS. STAT. § 302.11(1g)(d) (italics added).

¶12 Pierson insists that the circuit court erred by denying sentencing modification based on safety concerns because an End of Confinement Review Board determined that he does not meet the criteria for civil commitment under WIS. STAT. ch. 980.[5] We are not persuaded. A person committed under ch. 980 suffers from "a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." *See* WIS. STAT. §§ 980.01(7), 980.05(5). A prisoner need not suffer from a mental disorder necessitating civil commitment before the prisoner may be required to complete treatment or other rehabilitative services for the safety of the public. In this case, the circuit court relied on the parole commission's assessment that releasing Pierson from prison before he completes sex offender treatment would unreasonably jeopardize public safety. The circuit court considered the facts presented and explained its reason for concluding that those facts did not warrant sentence modification. Accordingly, the circuit court properly exercised its discretion. *See* ***Harbor***, 333 Wis. 2d 53, ¶63.

¶13 Pierson believes that the circuit court violated his constitutional right to equal protection by denying his motion for sentence modification. In his view, he has wrongly been treated differently from prisoners similarly situated, because other inmates subject to WIS. STAT. § 302.11(1g) have received sentence modifications upon demonstrating that the judges who sentenced those inmates were unaware of the law governing their release from confinement. *Cf.* ***State v. Curiel***, 227 Wis. 2d 389, 413, 597 N.W.2d 697 (1999) ("Equal protection

[5] End of Confinement Review Boards assess incarcerated sex offenders and determine whether those offenders should be further considered for civil commitment under WIS. STAT. ch. 980 as sexually violent persons. *See* ***State v. Budd***, 2007 WI App 245, ¶4, 306 Wis. 2d 167, 742 N.W.2d 887.

guarantees require that persons similarly situated be accorded similar treatment."). This argument must fail. Pierson has not demonstrated that the sentencing judge presiding over his case was unaware of the presumptive mandatory release provisions that control his release date. To the contrary, the sentencing judge referred to those provisions during the sentencing hearing. Consequently, Pierson is situated differently from prisoners sentenced by judges unaware of presumptive mandatory release, and he identifies no colorable claim to be treated precisely like those prisoners for purposes of his motion for sentence modification.

By the Court.—Orders affirmed.

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