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DISTRICT I

March 14, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2020AP2059-CR State of Wisconsin v. Thomas Allen Routt, Jr.
(L.C. # 1995CF950521)

2020AP2060-CR State of Wisconsin v. Thomas Allen Routt, Jr.
(L.C. # 1995CF954785)

Before Brash, C.J., Donald, P.J., and White, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas Allen Routt, Jr., appeals from orders of the circuit court denying his new-factor sentence modification and reconsideration motions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] The orders are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 1996, Routt was convicted of arson to a building, uttering a forgery, and bail jumping. For the arson, he was sentenced to thirty years of imprisonment, consecutive to two Waukesha County cases. For the forgery and bail jumping, Routt was sentenced to consecutive five-year terms of imprisonment, imposed and stayed for a consecutive ten-year probationary term on the forgery and a concurrent five-year probationary term on the bail jumping.

Routt was first eligible for parole in 2005; he was ultimately paroled in August 2020. In October 2020, he filed the motion for sentence modification that underlies this appeal. He asked that he "be released, without community supervision." He argued that a new factor—"changes to Wisconsin's parole laws"—warranted the modification. In support, Routt's attorney swore out an affidavit, claiming she had spoken with the sentencing judge and that the sentencing judge "in no way intended for Mr. Routt to continue to be serving his sentence in 2020."

The circuit court denied the motion without a hearing, noting that it had reviewed the sentencing transcript and found "no indication that the sentencing court expressly relied on parole policy as a factor in determining the defendant's sentence." The circuit court also noted counsel's affidavit was inadmissible hearsay and that the sentencing court, at the time of sentencing, "voiced no expectation as to when the defendant would be paroled, and therefore, any change in parole policy does not constitute a new factor." Further, the circuit court concluded that even if there were a change in parole policy that constituted a new factor, "modification is not warranted based on the fact that the defendant has already been paroled and that terminating supervision would be contrary to the sentencing goal of community protection."

Routt then filed a supplement to his motion, arguing that the circuit court erroneously rejected counsel's affidavit and requesting "an evidentiary hearing to fill in the gaps." The

circuit court construed the supplement as a motion for reconsideration and denied it, reiterating that even if there were a new factor, sentence modification was not warranted. Routt appeals.

A defendant is entitled to an evidentiary hearing on a postconviction motion only if the material facts alleged in the motion would, if true, entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***State v. Franklin***, 148 Wis. 2d 1, 9, 434 N.W.2d 609 (1989) (finding a new-factor motion analogous to a WIS. STAT. § 974.06 postconviction motion). A defendant cannot rely on conclusory allegations, expecting to supplement them at a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient material facts is a question of law, which we review *de novo*. ***Allen***, 274 Wis. 2d 568, ¶9. The circuit court retains discretion to deny a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***Id.***, ¶12 (footnote omitted).

A new factor is a fact or set of facts that is "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." *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); and ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must show a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court concludes that a new factor exists, the circuit court then determines, in an exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

We agree with the circuit court that Routt has failed to identify a new factor. While Routt claims there have been changes to parole policy, he does not identify those changes with any specificity. He claims, for instance, that the policy "shift[s] the focus for parole release away from acceptance of treatment and rehabilitation, toward lengthier and more punitive sentences," however, this is a conclusory allegation about a policy's effect rather than an objective factual allegation about how the policy has changed. "[C]onclusory allegations without factual support are insufficient." ***State v. Bentley***, 201 Wis. 2d 303, 313, 248 N.W.2d 50 (1996).

Relatedly, Routt contends that "comparatively fewer" inmates have been released to parole compared to ten years ago, as noted in "various reports," which he does not cite. These statistics alone do not establish a change in parole policy. *See* ***Franklin***, 148 Wis. 2d at 10-13.

Routt is further vague about whose policy has changed. In the body of his motion, Routt appears to argue that the policy change occurred within the Department of Corrections and the Parole Commission, but he does not identify the genesis of any such policy change, such as a change to the administrative code. The opening paragraph of the motion, though, references changes in "parole laws," which suggests legislative action, but Routt does not identify those changes in the laws to which he refers, and legislative changes do not reflect a policy change by the parole board. *See* ***Franklin***, 148 Wis. 2d at 13.

Further, "a change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the circuit court," and the circuit court may correct a sentence "'only where the sentencing judge's *express* intent is thwarted'" by new parole policies. ***Id.*** (citation omitted). While Routt notes that the sentencing court "referenced parole" in its comments, the only express references to parole made by the sentencing court were in the context of restitution.

The court commented that when Routt is "out on parole [he can] pay back the property that's owed to the victims here and to the insurance company" and "when he's on parole, [restitution] should come out of his earnings while working."

The mere utterance of the word "parole" does not mean that the sentence was fashioned around the likely future actions of the parole board. While Routt's attorney avers that the sentencing judge "assumed Mr. Routt had been released from confinement" and "believed Mr. Routt should have been released a number of years ago," these comments do not establish that the original sentence expressly considered, or was based in any way on, then-existing parole policy.[2] We are therefore unpersuaded that Routt has established a new factor.

In any event, the circuit court concluded that even if Routt had demonstrated a new factor, sentence modification was not warranted. The sentencing court had deemed Routt's "horrendous crime" of arson—in which he burned down the home of his ex-mother-in-law while that family was at another daughter's wedding—to be "one of the worst I've ever seen…. This is one of the sickest, most dangerous kind[s] of arson that I've ever encountered because it was an arson for revenge, an arson to inflict great pain upon the victims and it did." The circuit court concluded that modifying Routt's sentence to terminate supervision would be "contrary to the sentencing goal of community protection." We are not persuaded this was an erroneous exercise of discretion.

[2] Counsel's affidavit asserts, among other things, that at the time of the 1996 sentencing, "Routt was subject to Truth in Sentencing" and that the sentencing judge "informed affiant that he kept Truth in Sentencing in mind when sentencing Mr. Routt." The first truth-in-sentencing revision to Wisconsin's sentencing scheme was not enacted until 1998, *see* 1997 Wis. Act 283, and did not take effect until December 31, 1999, *see* ***State v. Yakich***, 2022 WI 8, ¶33 n.13, 400 Wis. 2d 549, 970 N.W.2d 12.

Therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals