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DISTRICT IV

February 22, 2013

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

2011AP1877-CR

State of Wisconsin v. Joseph A. Hempel (L.C. # 2009CF1061)

Before Sherman, Blanchard and Kloppenburg, JJ.

Joseph Hempel appeals pro se from an order denying his motion for sentence modification alleging a new factor. Hempel argues that the circuit court misunderstood or was not aware that his sentence would be implemented by the Department of Corrections (DOC) so as to not afford him participation in the early release program (ERP) during the sentence and that this warrants modifying the sentence to make it concurrent to a prior sentence. 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(1) (2011-12).¹ We affirm the order denying sentence modification.

In 2010 Hempel was convicted of burglary and sentenced to three years' initial confinement and four years' extended supervision. The sentence was imposed consecutive to other sentences Hempel was then serving. At the time of sentencing, Hempel was serving two prior consecutive sentences requiring his confinement for five and one-half years.² The court also found that Hempel was eligible for the ERP.

Hempel learned from prison authorities that he would not be eligible for the ERP until he was three years from his release date on all his consecutive sentences added together, including a consecutive term of confinement imposed on a conviction subsequent to sentencing in this case.³ Understanding that he would have to serve the entire three years of initial confinement imposed in this case before being considered for ERP participation, Hempel moved to modify his sentence by making it concurrent to the prior sentences. He argued that the DOC's implementation of the sentence was a new factor because the circuit court did not know or understand how ERP works and that service of the confinement period for this sentence is

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

² The prior sentences were on convictions in Dodge County and Walworth County. The Walworth County sentence consisted of four years' initial confinement and five years' extended supervision, and Hempel was eligible for the ERP on that sentence.

³ After sentencing in the instant case, Hempel was convicted in Waukesha County and sentenced to five years' initial confinement and five years' extended supervision and made eligible for the ERP on that sentence.

contrary to the circuit court's intent that he be afforded ERP before reaching this sentence. He seized upon the court's explanation at the conclusion of sentencing:

I'm finding you eligible for the earned release program. The way this works now in the new law, if they determine—what they determine your needs are, if you complete them early, they let you out early. You don't have to wait till 75 percent. If you complete them before you get to this sentence, they're going to release you at the end of this sentence—at the end of the other sentence. It's how hard you work before you get to the end of the sentence.

The circuit court denied Hempel's motion for sentence modification, concluding that its sentence was a punitive sentence and it was not the court's intent to let Hempel out of the sentence whenever he could get earned release. On appeal Hempel maintains his argument that the DOC's implementation of the consecutive sentence is a new factor and supports modification to a concurrent sentence to be consistent with the circuit court's explanation of ERP.

A motion for sentence modification based on a new factor presents a two-step inquiry: whether the fact or set of facts put forth is, as a matter of law, a new factor and, if a new factor exists, whether it justifies modification of the sentence. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. The circuit court exercises its discretion in determining if a new factor justifies sentence modification. *Id.*, ¶37. “[I]f the court determines that in the exercise of its discretion, 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 as a matter of law.” *Id.*, ¶38.

We need not decide whether the DOC's implementation of the sentence is a new factor. Even if it is, the circuit court, in the exercise of its discretion, determined that sentence modification was not justified. The circuit court explained that the imposition of the sentence

consecutively was for the purpose of punishment. At sentencing the circuit court explained that the Rock County offense was a separate offense and was to be treated separately. Modifying the sentence to make it concurrent would be contrary to the circuit court's stated purpose of treating the offense separately and imposing punishment. It was properly within the court's discretion to deny the motion for sentence modification.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals