COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP1801-CR
2007AP1802-CR

Cir. Ct. Nos. 1997CF120
1997CF1075

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK D. RANNICK,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Kenosha County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Patrick Rannick appeals from an order denying his motion to modify his sentence on the ground that his ineligibility for mandatory parole is a new factor supporting a reduction in his sentence. We conclude that the

circuit court properly exercised its discretion in determining that Rannick's parole ineligibility did not support a sentence reduction. We affirm the order.

¶2 In August 1997, upon his guilty plea to second-degree sexual assault, Rannick was sentenced to fifteen years in prison.[1] At the very conclusion of the sentencing hearing the sentencing court stated, "You obviously already know that under Wisconsin law the operation of law allows you to become parole eligible after one-fourth of any sentence imposed by the Court, and you must be released after completing two-thirds of the sentence imposed. So that some time in that period you will be released."

¶3 Rannick is subject to WIS. STAT. § 302.11(1g) (2005-06),[2] which makes the two-thirds mandatory release date a presumptive mandatory release date. That Rannick would not be entitled to mandatory release was unknown to the sentencing court and attorneys. In February 2007, Rannick moved for sentence modification on the ground that he was not, as anticipated by the sentencing court, entitled to release after serving only two-thirds of his sentence.[3] The circuit court concluded that Rannick's entitlement to only presumptive mandatory release did not strike at the very purpose of the sentence and denied the motion for sentence modification.

[1] Rannick was also convicted of felony bail jumping and sentenced to five years' probation.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Rannick was denied presumptive mandatory release and remains incarcerated.

¶4 Sentence modification because of a new factor requires the defendant to first demonstrate by clear and convincing evidence that there is a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Once a defendant has demonstrated the existence of a new factor, the circuit court determines whether the new factor justifies modification of the sentence. ***Id.*** at 8. The defendant must persuade the trial court that the original sentence is unjust before the court can correct the sentence. ***Id.*** at 14. This decision is assigned to the circuit court's discretion and we review the decision under the erroneous exercise of discretion standard. ***Id.*** at 8.

¶5 Whether a new factor exists is a question of law reviewed de novo. ***State v. Delaney***, 2006 WI App 37, ¶7, 289 Wis. 2d 714, 712 N.W.2d 368. "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." ***Id.***, ¶8. Here it is undisputed that the sentencing court and parties overlooked the application of WIS. STAT. § 302.11(1g). A change affecting the prospect of parole is a new factor only if the prospect of parole played a demonstrated role in the sentence. *See* ***Delaney***, 289 Wis. 2d 714, ¶21.

¶6 The sentencing court's reference to parole eligibility at the very conclusion of the sentencing hearing is all that Rannick relies on to demonstrate that parole eligibility was a highly relevant fact to the imposition of sentence. We are not convinced that parole eligibility played a role in the sentence. The comment came at the very conclusion of sentencing. It came after an examination of relevant sentencing considerations, the announcement of the length of the sentence, the setting of conditions of parole and probation, the advisement that Rannick needed

to participate in treatment, the imposition of the DNA surcharge, the advisement that Rannick not possess a firearm, and the determination of sentence credit. It was literally the last thing the sentencing court said to Rannick and there was no attempt to explain how that factor impacted the sentence. It was, as the circuit court later noted, an explanation of the law of mandatory parole.[4] That Rannick would be released after serving two-thirds of his sentence was not a factor in the determination of the length of the sentence. No new factor is demonstrated.

¶7 Even assuming, as the circuit court did, that a new factor exists, we affirm. In concluding that the new factor did not justify sentence reduction, the circuit court reviewed the factors it had considered in imposing the original sentence. The court was satisfied that the original sentence was appropriate even considering that only presumptive mandatory release applied. Indeed, its conclusion that presumptive mandatory release did not strike at the very purpose of the sentence was a determination that the new factor alone was insufficient to justify sentence reduction. The record demonstrates a proper exercise of discretion in denying Rannick's motion. *See* ***State v. Smet***, 186 Wis. 2d 24, 34-36, 519 N.W.2d 697 (Ct. App. 1994) (determination that new factor did not justify sentence modification is a proper exercise of discretion when the court indicates that the same factors that influenced the original sentence remained the factors upon which it denied a modification); ***State v. Verstoppen***, 185 Wis. 2d 728, 741-42, 519 N.W.2d 653 (Ct. App. 1994) (conclusion that the new factor by itself was insufficient to justify a sentence modification was a proper exercise of discretion).

[4] The circuit court explained, "it was my habit when persons, not just Mr. Rannick, but others were sentenced to prison, to basically tell defendants the effect of law as it then exists, and that's really the purpose of the statement [at the conclusion of sentencing] that counsel refers to."

By the Court.—Order affirmed.

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