**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 21, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-3372-CR**

**Cir. Ct. Nos. 93CF931324**
**93CF932361**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LAMONT WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Lamont Williams appeals from an order denying his motion for sentence modification and an order denying his claim of ineffective assistance of postconviction counsel. He argues that he is entitled to a sentence modification because of an alleged change in parole policy that directed the Department of Corrections to seek to block the release of violent offenders who

had reached their mandatory release dates. He also argues that the alleged change in parole policy constitutes an *ex post facto* law and that the postconviction counsel appointed to represent him at his hearing provided ineffective assistance. This court rejects his arguments and affirms the orders.

¶2 A trial court has inherent authority under the common law to modify a sentence based on a new factor. The phrase "new factor" refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court 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. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶3 The case law since ***Rosado*** has limited the "new factor" standard to situations where the new factor frustrates the purpose of the original sentencing. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). "There must be some connection between the factor and the sentencing — something which strikes at the very purpose for the sentence selected by the trial court." ***Id.*** at 99. Whether a set of facts is a "new factor" is a question of law that this court reviews without deference to the trial court. ***Id.*** at 97. Whether a new factor warrants a modification of sentence rests within the trial court's discretion. ***Id.***

¶4 Williams's motion alleged that a letter to the Department of Corrections from then-Governor Tommy Thompson constituted a change in parole policy. The letter states, "I hereby direct the Department of Corrections to pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date." Even if this court were to assume that the letter constitutes a change in policy, this court rejects Williams's argument that

that change constitutes a new factor in his case because the trial court did not expressly rely on parole eligibility when it sentenced Williams.

¶5 In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing. ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). "It is not a relevant factor unless the court expressly relies on parole eligibility. If the court does base its sentence on the likely action of the parole board, it has the power to protect its own decree by modifying the sentence if a change in parole policy occurs." ***Id.***

¶6 Williams was convicted of four counts of armed robbery and one count of carrying a concealed weapon. The trial court sentenced Williams to incarceration for twelve years on each of three of the armed robbery counts, to run consecutively. The trial court imposed and stayed a sixteen-year sentence on the remaining count, and placed Williams on probation for fifteen years to run consecutive to his other sentences. The trial court also sentenced Williams to nine months' incarceration on the single count of carrying a concealed weapon, to run concurrent with the other sentences.

¶7 At sentencing, the trial court told Williams:

> I want the system to have a hold over you for as long as it can, Mr. Williams, and everybody in this courtroom knows or should know or will know that the sentences that I've imposed of 36 years doesn't mean you're going to spend 36 years in prison.
>
> You are a young man, Mr. Williams, and the way our system works you'll be eligible for parole in nine years. How soon you get out after that nine years is up to you and what you make of your time in the Wisconsin State Prisons. If you throw it away and become angry and all of that and try and blame the system for everything, then you'll serve more than nine years, and I also have little doubt that when you get back out you'll screw up on parole, and you'll go

> back and serve the other sentence. If you don't do that and you take advantage of it, as you claim you want to do, you'll still be a young person when you get out and still have a long life ahead of you that you can do something positive with and follow the examples set by other people in your family.

(Emphasis added.)

¶8 Williams argues that the trial court's sentence is frustrated by the change in parole policy because the trial court did not intend that Williams would serve thirty-six years straight, which he may have to do if the Department of Corrections successfully blocks his mandatory release. This court disagrees with his argument. Although the trial court mentioned parole eligibility, the trial court's statements at sentencing in no way indicate or imply the trial court's intent that Williams be released after serving only nine years of a thirty-six-year sentence of incarceration. The trial court explicitly recognized the need for the system to have a hold over Williams "for as long as it can." The trial court's additional comments reflect only its effort to encourage Williams to do his best in prison. This court concludes that the alleged policy change did not frustrate the overriding purpose of Williams's sentence, that is, for the state "to have a hold over [Williams] for as long as it can." The trial court properly denied Williams's motion because there is no "new factor" justifying modification.

¶9 Williams also argues that the alleged parole policy change violates the *ex post facto* clause of article 1, section 12 of the Wisconsin Constitution by, in effect, increasing the penalty for his conduct after he committed the offense. Courts examining alleged *ex post facto* clause violations must determine whether the application of the new law: (1) criminalizes conduct that was innocent when committed, (2) increases the penalty for conduct after its commission, or (3) removes a defense that was available at the time the act was committed. *See*

***State v. Kurzawa***, 180 Wis. 2d 502, 512-13, 509 N.W.2d 712 (1994). Williams's challenge is based on the second factor.

¶10 We conclude that the alleged policy change directing the Department of Corrections to seek to block the release of violent offenders did not increase the total penalty imposed on Williams after he committed the offenses. Williams's thirty-six-year term of incarceration was not extended. Therefore, a violation of the *ex post facto* clause did not occur.

¶11 Finally, Williams argues that the trial court erroneously denied, without a hearing, his motion alleging ineffective assistance of postconviction counsel. A defendant has the burden of showing that his counsel's performance was deficient and that he suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A reviewing court need not address the performance issue if the defendant has failed to show prejudice and vice versa. ***Strickland***, 466 U.S. at 697.

¶12 Williams asserts that the attorney who represented him at the postconviction hearing was ineffective for failing to object when the trial court denied his request to call several witnesses to testify regarding Governor Thompson's letter. He also complains that counsel did not adequately argue the sentence modification motion. It is clear from the record that witnesses were not necessary because the trial court, for purposes of this motion, accepted Williams's claim that there had been a change in parole policy. The issue of law before the trial court was whether this assumed change in parole policy was a "new factor" under the law. This court concludes that it was not.

¶13 Williams has failed to show how any action by his counsel prejudiced his motion. With no showing of prejudice by counsel's actions, Williams was not entitled to an evidentiary hearing on that issue. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (if the record conclusively demonstrates that the defendant is not entitled to relief, the court may deny without a ***Machner***[1] hearing). This court rejects Anderson's ineffective assistance claim and affirms both orders.

*By the Court*.—Orders affirmed.

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

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).