COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP265-CR **Cir. Ct. No. 1999CF120**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. WINIUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. McGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Winius, pro se, appeals an order denying his motion for sentence modification. Winius argues he is entitled to sentence modification based on new factors, and the circuit court erred by denying his motion without a hearing. Winius also contends the circuit court erred by failing

to grant his request for appointment of counsel. We reject Winius's arguments and affirm the order.

¶2 In 1999, Winius pled no contest to one count of second-degree sexual assault of a child, as a repeater. Consistent with the parties' joint recommendation, the court sentenced Winius to twenty-eight years' imprisonment, out of a maximum possible thirty-year sentence.[1] The circuit court denied Winius's postconviction motions for plea withdrawal and resentencing. On appeal, this court summarily affirmed the judgment and orders. ***State v. Winius***, No. 2000AP773-CR, unpublished slip op. (WI App Oct. 31, 2000).

¶3 In April 2002, Winius filed a motion alleging that new factors justified sentence modification. Winius claimed that although the court stressed Winius's need for treatment, he had been unable to enroll in treatment because of the length of time before his mandatory release. Citing an April 1994 letter from former Governor Tommy Thompson to the Secretary of Corrections,[2] Winius also argued that "current parole practices and frequent changes in legislation" undermined the sentencing court's expectation that Winius would be eligible for discretionary parole based on good behavior and program participation. To that end, Winius noted the following statement by the sentencing court: "You know as

[1] Because Winius committed the offense in February 1999, the sentencing revisions of truth-in-sentencing were not applicable. *See* 1997 Wis. Act 283, § 419, creating WIS. STAT. § 973.01, (truth-in-sentencing applies to felonies committed on or after December 31, 1999).

[2] In the letter, Thompson acknowledged a recent statutory change replacing mandatory release on parole with "presumptive mandatory release" for serious felonies. Thompson further directed 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," and also noted that the policy of his Administration was "to keep violent offenders in prison as long as possible under the law."

well as I do, Mr. Winius, that the actual length of time you spend incarcerated would be entirely up to you." The court denied Winius's motion after a hearing, concluding that Winius had presented no new factors to justify a modification of the existing sentence. Winius did not appeal that order.

¶4 In December 2010, Winius filed the underlying motion for sentence modification. The circuit court denied the motion without a hearing, and Winius appeals. Although the motion was denied on its merits, we affirm on other grounds. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (appellate court may affirm on different grounds than those relied on by circuit court).

¶5 As in his 2002 motion for sentence modification, Winius's 2010 motion again claims the policy change that "went from paroling offenders to holding them as long as legally possible" constitutes a new factor justifying sentence modification. The 2010 motion is voluminous, including citation to the Thompson letter, as well as statistics to illustrate "the decrease in paroles." Regardless, the crux of both the 2002 and 2010 motions remains the same—that the policy change undermined the sentencing court's expectation that Winius would be eligible for discretionary parole based on good behavior and program participation. A matter once litigated, however, "may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 Although Winius contends he was entitled to a hearing on his motion, the circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise

conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Because the record establishes that Winius was not entitled to relief, the circuit court properly denied the motion without a hearing. Finally, to the extent Winius claims the circuit court erred by failing to appoint counsel, "the right to appointed counsel extends to the first appeal of right, and no further." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648, 579 N.W.2d 698 (1998).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).