

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP643-CR

Cir. Ct. No. 2010CF2088

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL THOMAS MISKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Daniel Thomas Miskowski, *pro se*, appeals from an order denying his motion for sentence modification.¹ Miskowski argues that he is entitled to sentence modification because the Department of Corrections no longer gives inmates with risk reduction sentences priority placement in classes that they are required to complete as part of their risk reduction sentence programs. We conclude that Miskowski has not proven the existence of a new factor. Therefore, we affirm.

BACKGROUND

¶2 Miskowski pled guilty to one count of burglary, contrary to WIS. STAT. § 943.10(1m)(a) (2009-10).² During sentencing, the trial court asked whether Miskowski was interested in a risk reduction sentence, which the trial court could impose if Miskowski agreed to participate in the program. *See* WIS. STAT. § 973.031 (2009-10).³ An inmate who successfully serves a risk reduction sentence can be released on extended supervision after serving at least seventy-five percent of his or her term of initial confinement if “the department determines that he or she has completed the programming or treatment under his or her plan and that the inmate maintained a good conduct record during his or her term of confinement.” *See* WIS. STAT. § 302.042(4) (2009-10).

¹ The Honorable Richard J. Sankovitz accepted Miskowski’s plea and imposed the sentence. The Honorable Charles F. Kahn, Jr., denied Miskowski’s subsequent motion for sentence modification.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ Effective August 3, 2011, the legislature repealed the law permitting trial courts to impose risk reduction sentences. *See* 2011 Wis. Act 38, §§ 13, 92. Miskowski was sentenced on July 13, 2010, during the period of time when such sentences were permitted.

¶3 The trial court told Miskowski about risk reduction sentences, stating:

We have a new sentencing tool we didn't have before. It is called the Risk Reduction Sentence. We can organize a sentence around getting you to change, around your mental health habits, and around your drug addiction habits, and if we are satisfied you changed, then we can reduce the length of time you spend in prison by one quarter....

We don't have complete control over it. A lot of it depends on ... your attitude. Some of it depends on whether there is space in the program.

¶4 After consulting with his attorney, Miskowski agreed to a risk reduction sentence. The trial court sentenced Miskowski to three years of initial confinement and one year of extended supervision, and it ordered Miskowski to serve a risk reduction sentence. In doing so, the trial court said that the department would evaluate Miskowski for participation in the risk reduction sentence program. The trial court also said: "If for some reason you don't qualify, no room in the program, whatever, then we simply got to keep you off the street during that additional nine months."

¶5 Miskowski began serving his sentence after completing a revocation sentence in another case. In January 2013, he filed the motion to modify sentence that is at issue on appeal. In that motion, he asserted that the risk reduction sentence plan that was created for him required him to meet certain conditions, including completing several classes and being placed in a minimum custody or community custody classification six months prior to his expected release date of July 14, 2014.

¶6 Miskowski's motion alleged that he had not been granted entry into some required classes, despite requesting to take them. According to documents

he attached to his motion, he was placed on a wait list for at least one of the classes. Miskowski's motion asserted that he was being denied priority enrollment in programs due to a change in department policy that followed the repeal of risk reduction sentences. Miskowski said that while he was still entitled to release under a risk reduction sentence because his sentence was imposed before such sentences were repealed, *see* WIS. STAT. § 302.043, the lack of priority enrollment was preventing him from completing his classes. Miskowski argued that the legislative changes to risk reduction sentences and the department's subsequent policy changes eliminating priority enrollment "constitute a 'new factor'" that entitles him to sentence modification. He asked the trial court to modify his term of initial confinement to two years and three months.

¶7 The trial court denied Miskowski's motion for sentence modification in a written order, concluding that Miskowski had not established a new factor. This appeal follows.

DISCUSSION

¶8 A defendant may be entitled to sentence modification if he or she can prove, by clear and convincing evidence, the existence of a new factor, which 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.”

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). “[I]f a court determines that the facts do not constitute a new factor as a matter of law, ‘it need go no further in its analysis’ to decide the defendant’s

motion.” See *id.*, ¶38 (citation omitted). On appeal, whether the facts proffered by the defendant constitute a new factor presents a question of law that this court reviews *de novo*. *Id.*, ¶33.

¶9 We conclude that the facts alleged by Miskowski do not constitute a new factor.⁴ First, the trial court never discussed the fact that Miskowski might receive priority enrollment in classes that he is required to take pursuant to his risk reduction sentence plan. Thus, the department’s specific changes to the priority enrollment policy were not “highly relevant to the imposition of sentence.” See *id.*, ¶40; see also *State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) (“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.”).

¶10 Moreover, while the change in department policy concerning priority enrollment could not have been known to the trial court because it had not yet occurred at the time of Miskowski’s sentencing, the trial court’s statements demonstrate that it was generally aware that Miskowski might not be able to participate in the risk reduction program for a variety of reasons, including if there was “no room in the program.” In that case, the trial court said, Miskowski would have to serve his entire term of initial confinement. The trial court’s remarks demonstrate that potential space limitations were “known to the trial judge at the time of original sentencing.” See *Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). Further, the trial court made clear what should happen if Miskowski cannot

⁴ For purposes of this decision, we will accept as true Miskowski’s allegations concerning changes in department policy.

complete the program due to space limitations: he must serve the final nine months of his initial confinement.

¶11 For these reasons, Miskowski has not demonstrated the existence of a new factor. Therefore, we affirm the trial court's order denying Miskowski's motion for sentence modification. *See id.*, ¶38.

By the Court.—Order affirmed.

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

