COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 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 Nos. 2013AP835-CR
2013AP836-CR
2013AP837-CR
2013AP838-CR

Cir. Ct. Nos. 1986CF7159A
1987CF7763
1987CF7792
1987CF8180

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD CORNELL BROWN,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Donald Cornell Brown appeals from an order of the circuit court denying his motion for sentence modification based on a new

factor. Brown contends that when he was sentenced, the sentencing court relied on an incorrect calculation of his mandatory release date. The circuit court concluded there was no new factor and denied relief. We affirm.

¶2 In 1986 and 1987, Brown committed a series of armed robberies in the Milwaukee area. He ultimately pled guilty to six counts of armed robbery as a habitual offender; four additional counts were read in at sentencing. Under the plea agreement, the State would recommend no more than fifty years' imprisonment, concurrent to a revocation sentence Brown was then serving.

¶3 Brown was sentenced in January 1989.[1] The State recommended a fifty-year term of imprisonment; defense counsel argued that a twenty-year sentence was more appropriate. In imposing its sentence of forty years' imprisonment, the sentencing court made comments indicating it had calculated Brown's mandatory release date would come at eighteen years, two months, and fifteen days.[2] *See* WIS. STAT. § 53.11(1) (1987-88) ("Except as provided [herein], each inmate is entitled to mandatory release on parole…. The mandatory release date is established at two-thirds of the sentence.").[3] In actuality, two-thirds of a forty-year sentence is twenty-six years and eight months. Brown did not directly appeal his convictions or his sentence.

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[1] Sentencing was presided over by the Honorable William D. Gardner.

[2] Elsewhere, the sentencing court indicated a calculation of eighteen years, two months, and seventeen days; the two-day difference is irrelevant to this discussion.

[3] The statute was subsequently renumbered to WIS. STAT. § 302.11 by 1989 Wis. Act 31, § 1629.

¶4 In October 2012, Brown moved for sentence modification. He asserted that the sentencing court's reliance on the incorrect mandatory release date was inaccurate information constituting a new factor. The circuit court held a hearing, after which it denied the motion.[4] It explained that it did not consider the inaccuracy to be a new factor because the sentencing court had no authority to alter application of the two-thirds rule and, in any event, the sentencing court "was totally clear that [it] felt a 40 year sentence was appropriate." Brown now appeals.

¶5 A new factor is one that is "'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). Whether a fact constitutes a new factor is a question of law. *See* ***id.***, ¶33. Whether a new factor, if found, warrants sentence modification is left to the circuit court's discretion. *See* ***id.***

¶6 Brown contends that "[t]he sentencing court explicitly and repeatedly relied upon inaccurate information regarding Brown's mandatory release date."[5] The accuracy of the information relied upon, however, is actually irrelevant to the new factor test here. Rather, the inaccuracy and the correct calculation must have been unknown to the court at the time of sentencing either

[4] The hearing was presided over by the Honorable Dennis P. Moroney, as Judge Gardner's successor.

[5] Brown has not, however, approached this case under ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, which addresses motions for resentencing because of inaccurate information. Indeed, in the reply brief, Brown expressly disavows that approach.

because they did not exist or because all parties unknowingly overlooked them. *See* ***id.***, ¶40. The record here reveals that this is not the case.

¶7 At sentencing, the State pointed out the sentencing court's error, telling it, "[J]ust so there's no problem later … the information I have concerning the parole dates would not indicate that 40-year sentence would be 18 years." The State then inquired whether the court was "sentencing to 40 years because it feels 40 years is appropriate." The sentencing court explained that it was imposing forty years and "not considering that other part as part of my sentencing scheme whatsoever…. I'm sentencing [Brown] to a 40-year sentence which I believe is appropriate, okay, and how they engage it or how you serve it or where you serve, it's all up to [the Department of Corrections]."

¶8 The State then inquired whether the sentencing court had actually been referring to an average release date rather than a mandatory release date. When the sentencing court said it had been referring to mandatory release, the State replied, "I thought that [mandatory release] was that he's available after one quarter of the time and it's two thirds of the time that he has to serve before [mandatory release]." This led the sentencing court to explain its method for calculating the mandatory release date it kept referencing, but the sentencing court ultimately explained that "as your concern is expressed, it's my concern also that that is not my sentence. My sentence is going to be 40 years."

¶9 Thus, the record indicates that both the inaccuracy and the correct information regarding mandatory release were not overlooked by the State (*i.e.*, all the parties) and were presented to the court at sentencing. "[A]ny fact that was known to the court at the time of sentencing does not constitute a new factor."

Harbor, 333 Wis. 2d 53, ¶57. Accordingly, the circuit court properly denied the request for sentencing modification. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied on by circuit court).[6]

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[6] We also agree with the circuit court's implicit determination that the mandatory release date does not appear to have been highly relevant to the sentencing court's decision. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. The sentencing court clarified at least twice that the mandatory release date was not a basis for its sentence.