COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2017

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. 2016AP780
2016AP781

Cir. Ct. Nos. 1999CF713
1999CF723

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EFRAIN CAMPOS,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Efrain Campos, *pro se*, appeals the denial of his WIS. STAT. § 974.06 (2015-16) motion for postconviction relief.[1] Campos argues that he should be allowed to withdraw his guilty pleas—which he entered in 1999—based on "newly discovered evidence" that rendered his pleas "not intelligently" made. (Capitalization, bolding, and one set of quotation marks omitted.) In the alternative, he argues that he is entitled to sentence modification based on that evidence. We reject his arguments and affirm.

BACKGROUND

¶2 In 1999, the State filed two criminal complaints charging eighteen-year-old Campos with a total of twenty-four felonies as a party to a crime based on his participation in the armed robberies of three businesses. According to the criminal complaints, Campos and his co-defendant entered each business and told patrons to turn over their property. At the third business, Campos's co-defendant fired a gun at two police officers who had responded to the robbery. As a result, both men were charged with two counts of attempted first-degree intentional homicide as a party to a crime in addition to twenty-two robbery-related felonies.

¶3 The State offered Campos a plea deal, which it memorialized in writing and referenced at Campos's plea hearing. In that written plea offer, the

[1] The Honorable William S. Pocan denied the postconviction motion at issue in these appeals, and we will refer to him as the "circuit court." The Honorable John E. McCormack accepted Campos's guilty pleas and sentenced him in 1999. We will refer to Judge McCormack as the "trial court."

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

prosecutor indicated that he planned "to urge the court to remove Mr. Campos from the community until he is at least 35 years old." The plea offer continued:

> That is, seek a sentence that confines him for approximately 20 years and then allows for release by the Parole Board….
>
> … I propose a combination of guilty pleas, dismissals (with and without read-in) and amendments; I further propose some consecutive sentences and some concurrent sentences. The complete proposal … is intended to hold someone accountable for each count/victim and to create exposure allowing the court to "reach" my sentencing objectives without ordering maximum sentences on any single count. (I view maximum sentences as likely to impact the Parole Board and your client's "record" adversely). My proposal is to "stack" or aggregate sentences to create an anticipated parole eligibility point between ages 35 and 40. Whether he is actually paroled then is substantially in your client's hands.

¶4 Campos accepted the plea offer and subsequently pled guilty to eleven counts of armed robbery and two counts of first-degree recklessly endangering safety, all as a party to a crime. This reduced his maximum exposure from 1050 years to 515 years.

¶5 At sentencing, the State recommended a series of consecutive and concurrent sentences totaling seventy years of imprisonment. The trial court asked the State: "Under the present parole system, what is your best estimate as to when he could be discharged from the prison not counting any subsequent probation or parole?"[2] The State confirmed that the trial court was asking for the State's estimate based on the State's sentencing recommendation and then answered:

[2] The sentencing transcript contains only uppercase letters. In this decision, we will use uppercase and lowercase letters when quoting the sentencing transcript.

> He would be required to serve one fourth of the time before he's eligible for parole. He could apply for parole after one fourth of 70 which is about 15, 16, 17 years…. If he handles [prison] responsibly, I think he's going to be released somewhere in the age group of 35 to 40 based on the State's recommendation.

¶6 Trial counsel disagreed with the State's prediction concerning when Campos would likely be released on parole. He explained:

> The difficulty in this case, Judge, is I believe expressed in the State's conception that a 70 year sentence will allow Mr. Campos to be eligible in about 18 years. I think, Judge, that puts way too much trust and faith in the parole board's evaluation of Mr. Campos; and if the court is inclined to give him 70 years, he'll be in for 35 years or 40 years at a minimum. It's been my experience that clients getting a 30 year sentence are serving way beyond that quarter eligibility. Even under the old standard, even under the current standards they are just not being paroled.

Trial counsel said that in order for Campos to be released in his mid-30s, as the State had suggested, the trial court should impose a total sentence of twenty-five years on several counts, withhold sentence on the remaining counts, and place him on probation when he is released from prison. Trial counsel explained: "[B]y current standards he will probably serve anywhere between 12 to 18 years…. He'll get out hopefully by the time he's 30 at a minimum and about 35 at the maximum and still have consecutive probation to monitor him."

¶7 After trial counsel made his sentencing argument, Campos briefly exercised his right of allocution. He told the trial court: "I would appreciate it if you take a moment of silence and ask the Lord what is the time you want to give me. If He tells you to give me the maximum time, then you go right ahead." The trial court responded that it did not intend to impose a maximum sentence.

¶8 The trial court gave the State another opportunity to comment on the defense's sentencing recommendation. The State discouraged the trial court from following trial counsel's recommendation, explaining that it would not be fair for some victims to wait twenty-five years for Campos to be sentenced for his crimes against them. The State said that the defense recommendation also "unduly depreciates the severity and number of offenses," noting that in the past it was not uncommon for defendants to be sentenced to twenty or thirty years for a single count of armed robbery. The State continued:

> It's not my intent to guarantee relief of the defendant in 18 years but to make that a possibility, a genuine possibility. 70 years is only about 15 percent of the maximum sentence available to the court. It's not excessive. It's not inappropriate. I think it's a fair amount and it would be in his hands.
>
> I don't have the same cynicism about the parole board and the same distrust of the parole board [as trial counsel has].

¶9 After discussion on other issues, the trial court pronounced sentence. In doing so, it stated: "The court does concur that the recommendation of the State is indeed reasonable, and I stress reasonable." The trial court continued:

> These w[]ere three separate holdup attempts. Three not just one. If it had been one, even with a multitude of tavern personnel, there could be some consideration, [trial counsel], for your client receiving less th[a]n the 70 years but with three separate [incidents], each one being an armed robbery and three times 45, that is 135 years.[3]

[3] We interpret the trial court's statement to be an acknowledgment that even if Campos had been charged with only a single count of armed robbery for each location, instead of separate counts for each victim, he still would have been facing 135 years of imprisonment (forty-five years for each count).

The trial court then followed the State's recommendation with respect to concurrent and consecutive sentences. As the trial court imposed the sentences, it did not make any statements with respect to whether it believed Campos would or should be released on parole at any particular time.

¶10 Campos appealed. Postconviction/appellate counsel filed a no-merit report. Campos filed a response, which he styled as a "pro se petition to withdraw guilty pleas and for a new trial … and a new sentencing hearing." (Capitalization omitted.) Campos argued that his pleas were not voluntary due to "auditory memory deficits" and that at a minimum, he should be resentenced based on those deficits. This court accepted the no-merit report and affirmed Campos's convictions. *See* ***State v. Campos***, Nos. 2000AP2013-CRNM and 2000AP2014-CRNM, unpublished slip op. and order (WI App Sept. 14, 2001).

¶11 Fifteen years later, Campos filed the postconviction motion at issue here.[4] He asserted that two letters from the United States Department of Justice to the Wisconsin Department of Corrections, dated 1998 and 1999, as well as a document entitled "Statutory Assurance" dated 1997, are evidence that when Campos pled guilty, there was a "'[s]ecret'" policy in place pursuant to which violent offenders would not be paroled. Campos sought to withdraw his guilty pleas on grounds that if he had known he would be required to serve time in prison "until at a minimum he was within [eighteen months of] … his Mandatory Release Date," he would not have accepted the plea deal. Campos argued alternatively that his sentence should be modified because the trial court adopted the State's

[4] Campos filed a single postconviction motion referencing both circuit court case numbers. The circuit court issued two identical orders denying the motion, one for each case file.

sentencing recommendation, which included the State's suggestions that there was a "'Genuine Possibility' of Discretionary Parole Release in about 20-Years" and "that the Parole Board would remain a Fair and Impartial Review Entity."

¶12 The circuit court denied Campos's motion in a written order. First, the circuit court rejected Campos's argument "that the plea agreement in this case was predicated on his ability to obtain parole after 15-17 years of incarceration." The circuit court stated:

> The defendant was facing 515 years for these offenses. Although the prosecutor advocated for smaller sentences to be imposed consecutively (rather than larger sentences imposed concurrently) to facilitate the defendant's eligibility for parole, it was nevertheless recognized by all that this only affected the defendant's ability to petition for parole, not actually be paroled. Neither the prosecutor nor the court have any authority over the Department of Corrections to ensure the parole of an individual by a date certain. Parole hinges on a variety of factors taken into account by the prison system, including the number and nature of offenses. The defendant committed an astounding number of crimes in these two cases, and he was facing an incredible amount of time in prison for his conduct. His claim that he would never have taken the plea agreement had he known he wouldn't be paroled in 15-17 years is rejected. The prosecutor never stated that parole was a certainty…. The defendant has not set forth a viable b[a]sis for plea withdrawal.

¶13 The circuit court also rejected Campos's request for sentence modification based on an alleged new factor. It observed that the Governor's policy of keeping violent offenders in prison "was introduced long before the defendant was sentenced" and it said that even if the policy was not known to the parties, "there is no indication that [the trial court] relied on any certainty that the defendant would be paroled in 15-17 years when [it] imposed sentence." Thus,

the circuit court held, "any change in parole policy does not constitute a new factor for purposes of sentence modification." Campos now appeals.

DISCUSSION

¶14 At issue is whether the circuit court erroneously exercised its discretion when it denied Campos's postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [trial] court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

¶15 We begin our analysis with Campos's claim that he should be allowed to withdraw his guilty pleas. In his postconviction motion, he asserted that the State "knowingly committed an act of 'Fraud'" by suggesting at the plea hearing and at sentencing that Campos might be paroled, despite the existence of what Campos asserts was a secret program pursuant to which individuals were being kept in prison and not paroled. On appeal, he presents a slightly different argument, focusing on whether the documents he submitted to the circuit court constitute "newly discovered evidence" that justifies plea withdrawal in this case.

¶16 In response, the State argues that this court should not consider the merits of Campos's newly discovered evidence argument because he did not present it to the circuit court. The State also asserts that Campos's motion seeking

plea withdrawal is procedurally barred because he failed to raise his concerns in response to the no-merit report years ago.

¶17 We agree with the circuit court that Campos is not entitled to plea withdrawal. First, we reject Campos's belated attempt to present a newly discovered evidence argument on appeal. Although Campos used that phrase once in his postconviction motion, he did not present adequate argument concerning the four components of such a claim. *See* ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (newly discovered evidence claim requires showing that: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'") (citation omitted). We decline to consider those issues for the first time on appeal.

¶18 Second, Campos's allegations that he would not have pled guilty had he known about the three pages of government documents he submitted with his motion are conclusory and contrary to the trial court record. Those documents discuss the State of Wisconsin's participation in the federal government's Violent Offender Incarceration/Truth-in-Sentencing Grant Program. It is not clear how Campos's case would be affected by the grant program.[5] Campos's motion implies that the documents suggest he would be forced to serve most of his

[5] For instance, it is not clear whether program requirements that violent offenders serve eighty-five percent of their sentences would apply to those defendants who committed crimes prior to the effective date of new truth-in-sentencing laws. We need not determine how the grant program affected Campos's case because the record does not support Campos's assertion that if he had known he might have to serve a large portion of his sentence before being paroled, he would not have accepted the plea bargain.

sentence until his mandatory release date. Campos further asserts that if he had known that, he would not have pled guilty. The record belies his assertion.

¶19 Campos's own trial counsel told the trial court at sentencing that he was not as optimistic as the State about Campos's chances of being paroled early in his sentence. Trial counsel estimated that if Campos were sentenced to twenty-five years in prison, he would serve twelve to eighteen years before being paroled. Despite hearing trial counsel's prediction, Campos did not raise any concerns with the trial court during or after sentencing. Indeed, Campos urged the trial court to impose the maximum sentence if the trial court felt it would be appropriate. Even when Campos responded to the no-merit report, he did not indicate that the State's parole estimates were an important factor in his decision to plead guilty. In short, the record does not support Campos's assertion that if he had known that parole policies might result in him serving most of his sentence before being paroled, he would not have pled guilty and would have insisted on going to trial on twenty-four charges with a potential exposure of 1050 years of imprisonment.

¶20 Next, we turn to Campos's alternative request for sentencing modification. A sentence may be modified if a defendant can demonstrate that a "new factor" justifies the modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). 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."

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A defendant must demonstrate the existence of a new factor by clear

and convincing evidence. ***Id.***, ¶36. Whether a fact constitutes a new factor presents a question of law, ***id.***, which this court reviews *de novo*, ***State v. Tucker***, 2005 WI 46, ¶10, 279 Wis. 2d 697, 694 N.W.2d 926.

¶21 Campos asserts that the government documents he submitted with his motion constitute a new factor because they outline a parole policy that was not known to the trial court or the parties.[6] We are not persuaded. As we have noted, it is not clear from the documents how the parole policy could affect Campos's case. But even if we assume that the documents suggest there was some parole policy that may affect the timing of Campos's parole, that policy would not constitute a "new factor" justifying sentence modification unless the trial court expressly relied on it. *See* ***Franklin***, 148 Wis. 2d at 15 ("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. It is not a relevant factor unless the court expressly relies on parole eligibility.").

¶22 In this case, the trial court heard competing opinions about when Campos was likely to be paroled, but ultimately it did not attempt to resolve those opinions, and it did not state that Campos's likely parole date was relevant to the sentence it was imposing. Instead, the trial court explained that it was adopting the State's sentencing recommendation because it believed it would not be appropriate to impose a sentence of less than seventy years for three separate serious incidents. Nothing in the trial court's pronouncement of sentence suggests

[6] We note that this contradicts Campos's suggestion in his postconviction motion that the State was aware of the parole policy and "committed an act of 'Fraud'" at the plea hearing and sentencing.

it based the seventy-year sentence on the belief that Campos would be released prior to his presumptive mandatory release date. Accordingly, the policy discussed in the government documents Campos submitted with his postconviction motion does not constitute a new factor.

¶23 Campos disagrees, and he urges this court to follow the reasoning of an unpublished opinion and order this court issued in 2002. We decline to discuss that case because "[a]n unpublished opinion may not be cited in any court of this state as precedent or authority," except in circumstances that do not apply here. *See* WIS. STAT. RULE 809.23(3)(a). We emphasize, however, that we have carefully considered the sentencing transcript in this case and we are satisfied that when the trial court imposed sentence, it did not rely on Campos's likelihood of release on parole at any particular time.

¶24 For the foregoing reasons, we affirm the circuit court's orders denying Campos's postconviction motion without a hearing.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).