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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP1244-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD D. TAYLOR,

Defendant-Appellant.

APPEAL OF AN ORDER DENYING A MOTION FOR SENTENCE MODIFICATION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH R. WALL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

Did the circuit court appropriately exercise its discretion when it denied Taylor's motion for sentence modification after concluding that it was unripe and that his presumptive mandatory release status did not warrant sentence modification?

The circuit court denied the motion on the grounds stated above.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe oral argument or publication are warranted. Whether a defendant has shown a new factor justifying sentence modification involves only the application of well-settled law to the facts of the case.

STATEMENT OF THE FACTS

On September 30, 1999, Gerald D. Taylor pled no contest to two counts of first-degree sexual assault of a child, in violation of Wis. Stat. § 948.02(1)(1999–2000), for assaulting his step-daughter's eleven-year-old friend when she was staying overnight, and threatening to kill her if she

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[1] Defendant-Appellant Taylor has stated the circuit court's two reasons for denying the motion as separate issues, and addresses one under the legal doctrine of "ripeness" rather than the two prongs of the new factor test. The State will separately address both reasons the court gave for denying the motion, but believes they are more appropriately framed as the single issue of whether the circuit court appropriately denied his motion for sentence modification.

told anyone.[2] (R. 118:17.) At the time, Wisconsin's indeterminate sentencing scheme was still in place. First-degree sexual assault of a child was a Class B felony, and therefore each count carried a maximum penalty of "imprisonment not to exceed 60 years." Wis. Stat. §§ 948.02(1), 939.50(3)(b).

Sentencing

The court[3] began its sentencing decision by explaining the factors it was required to consider: the gravity of the offense, Taylor's character, and the need for protection of the community. (R. 118:81–82.)

The court stated that "the magnitude of what you did, it is shocking." (R. 118:86.) "To have been there the way [the victim] was and to hear what you said and to observe what you did, being forced to submit was an act of terrorism for that child." (R. 118:87.)

The court noted that Taylor had pursued higher education, had always tried to further his career and support his family, and that he had been a good parent. (R.118:90–91.) It also found that Taylor was "truly remorseful" and had taken responsibility for the crime. (R. 118:92.) The court observed, though, that there was something aberrant and inexplicable in Taylor's character that "allowed you to terrorize this child in what you said and what you did physically and psychologically. We need to find an answer for that. We don't have one on the surface." (R. 118:94.)

Regarding the interests of the community, the court said that "[s]econd of all, [society] want[s] your rehabilitation, but they also want protection." (R. 118:99.) "[T]he third

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[2] All following statutory citations are to the 1999–2000 versions unless otherwise indicated.

[3] The Honorable John DiMotto presided over the sentencing hearing. (R. 118:1.)

component of society's interest is punishment. You do need to be punished for what you've done." (R. 118:99.) The court said that "punishment is near the forefront of the sentences I'm going to impose." (R. 118:100.)

The court then noted that Truth-In-Sentencing was going to take effect on December 31st of that year, which would mean that "when a judge says 'five years,' that means the person will serve every day of the five years before they get extended supervision." (R. 118:103.) "However, judges when they impose sentence now, they take into account how parole works." (R. 118:103.) It explained,

> I know everyone in the criminal justice system knows whatever sentence I impose, you will have to serve one-quarter of that sentence and then you will be eligible for parole, and you could serve up to two-thirds of the time imposed. That's when you would reach your mandatory release date.
>
> So in essence, a sentence is somewhere between one-quarter and two-thirds of the judge's proclamation. . . .
>
> Several things could happen to you in your present indeterminate sentence. Maybe you could be released on your mandatory release date, which might be two-thirds of your sentence. I say "maybe" because given the nature of these offenses, when you do finally reach your parole date, the department could seek to have you committed as a sexually violent offender, as a sexual predator . . . .

(R. 118:103–04.)

The court observed that, therefore, the sentence it was going to impose "will have a minimum component to it when you reach discretionary parole, and it will have a mandatory release date," but given the potential for Taylor to be committed under Chapter 980 "[t]he sentence I will impose could ultimately be a life sentence." (R. 118:104.)

The court said, "I believe there is a need for you to do at leas[t] a minimum number, a finite amount of time, after which the department can determine when you are truly parole eligible, if you're ever parole eligible." (R. 118:104–05.) It told Taylor that the purpose of its sentence was "to hold you accountable for your crimes of sexual violence, intimidation, exploitation, and terror," and it therefore was imposing on Count 1 "an indeterminate term not to exceed thirty years," and on Count 2 that Taylor also "be incarcerated for an indeterminate term not to exceed thirty years." (R. 118:105.) It further ordered that the sentence on Count 2 would run consecutively to Count 1. (R. 118:105–06.)

The court then explained,

> I have imposed this sentence because I believe there needs to be some truth in sentencing even today. I imposed this sentence because I believe given the lack of answers that we have that the minimum amount of time you must serve in prison is fifteen years, that's the minimum, and the sixty-year sentence I'm impressed [sic] will ensure that.
>
> . . . .
>
> So you're going to end up serving a minimum of fifteen years, and you could serve up to a maximum time of forty years. So in essence this is a fifteen to forty-year sentence.

(R. 118:106.)

The court said it rejected both the State and the defense's recommendations because either recommendation would not be sufficient time for punishment and protection of the public, but that it also did not impose the maximum possible sentence because it did not find Taylor to be one of the worst offenders possible. (R. 118:07.)

Postconviction Proceedings[4]

On February 28, 2019, Taylor filed the motion for sentence modification at issue in this appeal. (R. 104.) He claimed that "the court and the parties did not know that his offense was defined as a 'serious felony' subject to a presumptive mandatory release [PMR] date" rather than an actual mandatory release date, and that this was a new factor warranting reduction of his sentence by 20 years. (R. 104:1–2.)

The circuit court[5] denied the motion. (R. 112.) The court noted that Judge DiMotto made several comments about Taylor's parole eligibility and had informed Taylor that he could be held past his mandatory release date as a sexual predator. (R. 112:2.) Accordingly, "even though Judge DiMotto may not have been familiar with the new parole policy of holding serious offenders past their mandatory release date, he knew the defendant might not be released at all if he was designated to be a sexual predator." (R. 112:2.) Given Judge DiMotto's comments at sentencing, the court was "not persuaded" that had Judge DiMotto "known about the new parole policy which would have had the possibility of keeping the defendant in prison past his mandatory release date . . . [he] would have lessened his sentences." (R. 112:2–3.)

The court further stated, "[e]ven so, the motion is wholly premature" because Taylor had not yet served any time beyond his presumptive mandatory release date. (R. 112:3.) It recognized that "[h]aving PMR status does not preclude the parole commission from releasing a person on a

[4] Taylor pursued postconviction relief previously via a direct appeal in 2000 and a Wis. Stat. § 974.06 motion in 2003. (R. 75; 84.) Those motions are not at issue in this appeal.

[5] The Honorable Joseph R. Wall, presiding.

discretionary parole . . . . " prior to, or on, his or her mandatory release date. (R. 112:3.) "It is unknown at this juncture whether [Taylor] will be paroled before or at his M.R. date or held beyond. Under the circumstances, the court declines to modify the sentence in this case." (R. 112:3.)

Taylor appeals.

STANDARD OF REVIEW

Whether the proffered fact or facts constitutes a new factor presents a question of law reviewed de novo. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828. If a new factor exists as a matter of law, the trial court must then determine, in the exercise of its discretion, whether the new factor warrants sentence modification. Because sentencing discretion enjoys a strong presumption of reasonableness, a courts determination under this second step of the new factor test must be accepted on review unless the defendant shows an "unreasonable" or "unjustifi[able]" basis for the court's decision. *State v. Setagord*, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997).

ARGUMENT

The circuit court appropriately exercised its discretion in denying Taylor's motion for sentence modification.

A. General principles of sentence modification

After the time for a direct appeal has passed, a defendant's ability to attack a conviction or sentence is limited. A claim that a new factor warranting sentence modification exists invokes the inherent, though limited, authority of the circuit court to modify a sentence, and can be made at any time. *See State v. Noll*, 2002 WI App 273, ¶¶ 11–12, 258 Wis. 2d 573, 653 N.W.2d 895.

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 . . . it was unknowingly overlooked by all of the parties." *Harbor,* 333 Wis. 2d 53, ¶ 40 (citation omitted).

To obtain sentence modification based on a proffered "new factor," a convicted defendant must show by clear and convincing evidence (1) that a new factor exists, and (2) that the new factor warrants sentence modification. *Harbor*, 333 Wis. 2d 53, ¶¶ 36–38.

As with other conjunctive tests, a trial court may end its inquiry without addressing both requirements, if it concludes that one or the other requirement has not been met. *See Harbor*, 333 Wis. 2d 53, ¶ 38.

B. Taylor's having a presumptive mandatory release date is not a new factor because ensuring Taylor is released early was not highly relevant to Taylor's sentence.

The circuit court correctly determined that Taylor's having a presumptive mandatory release date rather than an actual mandatory release date is not a new factor. (R. 112:2.) This is so because ensuring Taylor is released before serving all of his sentence was not at all relevant to the circuit court's imposition of Taylor's sentence.

The court's primary focus was on the horrific nature of Taylor's offenses, and what that meant for both punishment and protection of the community. (R. 118:88, 98–102.) It emphasized that not only had Taylor committed "crimes of sexual violence towards a twelve-year-old child," but he had threatened to kill her. (R. 118:86.) The court described Taylor's acts and the victim's "being forced to submit" as "an act of terrorism for that child." (R. 118:87.) Moreover, Taylor was the victim's neighbor and before the offense his home was

somewhere the victim and her mother thought she would be safe. (R. 118:16, 87.) The court noted that because of Taylor, the victim "now is isolated. She has difficulty relating well to her peers. She is anxious. She suffers from sleep problems. . . . She's been described as withdrawn, unhappy . . . no longer the strong person she was . . . ." before Taylor assaulted her. (R. 118:89.)

The court recognized that Taylor's personal history reflected someone who wanted to better himself, and that he had been a good father to his own children. (R. 118:91–92.) It also recognized that Taylor was "truly remorseful" and took responsibility for what he did. (R. 118:92.) There did not appear to be any explanation, however, for how Taylor could commit such terrible crimes. (R. 118:93–95.) The court stated that society had an interest in Taylor's rehabilitation, but it also had a "need to be protected from you now over the short [haul] and more permanently over the long [haul]." (R. 118:99.)

The court said, "the third component of society's interest is punishment. . . . The punishment must fit the crime and the person who committed the crime . . . ." (R. 118:99.) "What was scary here . . . is that you had no history of this behavior before [the assault]." (R. 118:99–100.) The court told Taylor that "punishment is near the forefront of the sentences I'm going to impose. I need you to know that." (R. 118:100.)

The sentencing court did make several comments about Taylor's parole eligibility, but the transcript shows that those comments were directed toward explaining why the court believed it needed to sentence Taylor to at least a particular minimum term of years. (R. 118:102–05.) The court informed Taylor that beginning at the end of that year, truth in sentencing would take effect, and explained what that meant. (R. 118:102–03.) It then explained the pre-TIS parole system, stating, "everyone in the criminal justice system knows whatever sentence I impose, you will have to serve one-

quarter of that sentence and then you will be eligible for parole, and you could serve up to two-thirds of the time imposed. That's when you would reach your mandatory release date." (R. 118:103.)

The court then told Taylor that, despite this mandatory release parole system, he might not ever be released. (R. 118:103–04.) The court observed that "[s]everal things could happen" with Taylor's indeterminate sentence. (R. 118:103.) First, "[m]aybe you could be released on your mandatory release date, which might be two-thirds of your sentence." (R. 118:103–04.) The court said "'maybe' because given the nature of these offenses, when you finally do reach your parole date," the State could seek to have him committed as a sexually violent offender under Chapter 980, "where you can be placed in a prison-like hospital where you can remain potentially for the rest of your life." (R. 118:104.)

The court observed that, therefore, "the sentence I impose here will have a minimum component to it when you reach discretionary parole, and it will have a mandatory release date . . . but neither the discretionary nor the mandatory really mean anything if you are determined to be a sexual predator." (R. 118:104.) The court noted that because of Chapter 980, "[t]he sentence I will impose could ultimately be a life sentence . . . ." (R. 118:104.)

The court said that the purpose of its sentence was "to hold [Taylor] accountable for [his] crimes of sexual violence, intimidation, exploitation, and terror." (R. 118:105.) It said it "believe[d] there is a need for [Taylor] to do at leas[t] a minimum number, a finite amount of time, after which the department can determine when you're are truly parole eligible, if you're ever parole eligible." (R. 118:105.)

Indeed, contrary to what Taylor believes, the court's comments at sentencing make clear that it was not concerned with whether Taylor would ever be released from prison.

(Taylor's Br. 13; R. 118:105.) To the extent the court gave parole any consideration, it was only to ensure that it imposed a long enough sentence that Taylor would have to spend a significant amount of time behind bars before reaching any parole date. (R. 118:105.) Otherwise, the court made clear that it was unconcerned with when and whether Taylor would ever be appropriate for release into the community, and left that to the Department of Corrections. (R. 118:104–05.)

Moreover, Taylor fails to recognize that even inmates who received a "mandatory" release date under former Wis. Stat. § 302.11 could be required to serve the entirety of their sentence in prison. *See* Wis. Stat. § 302.11(2), (4). Taylor's claim that neither the court nor any of the parties understood "that Mr. Taylor could serve more than 40 years in prison," (Taylor's Br. 16–17), simply cannot be true—mandatory release on parole on a particular date was always conditioned on good behavior in prison with no rule infractions. Wis. Stat. § 302.11(2). It is not possible that neither the court nor any of the parties understood that Taylor's two consecutive thirty-year sentences could result in him spending sixty years in prison. That was always the nature of the parole statutes. And as explained, the court expressly recognized that Taylor may never be released into the community. (R. 118:104.)

Accordingly, the fact that Taylor has a presumptive mandatory release date rather than an actual mandatory release date cannot possibly be highly relevant to the sentence imposed. Taylor points to nothing even suggesting that the court would have imposed a lesser sentence had it known that his parole date was presumptive rather than mandatory. (Taylor's Br. 14.) He simply notes that the sentencing court explained how the parole system worked under the pre-TIS statutes. (Taylor's Br. 13–15.) But he omits any mention of the court's observations that the statutory parole dates could be meaningless given the possibility that Taylor could be committed under Chapter 980, and its focus

on wanting to punish Taylor for his criminal acts. (Taylor's Br. 13–16.) Taylor's mandatory release date was simply not relevant to the sentence imposed.

In short, the court's comments about the parole system show that it was concerned only with making sure Taylor spent a minimum amount of time in prison, not with ensuring he was released at the two-thirds mark. This Court should affirm the circuit court.

C. The circuit court adequately explained that Taylor's presumptive mandatory release date did not warrant sentence modification because Taylor may still be released on or before that date.

Wisconsin courts do not issue advisory opinions, nor adjudicate claims involving "hypothetical or future facts." *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). Whether a controversy is ripe for judicial review is a legal determination appellate courts independently review. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 39, 309 Wis. 2d 365, 749 N.W.2d 211. Here, however, as explained above, the question remains only whether the trial court erroneously exercised its discretion in determining that Taylor's having a presumptive mandatory release date did not warrant modification of his sentence. *See Harbor*, 333 Wis. 2d 53, ¶ 37; *supra* n.1.

And even if Taylor's having a presumptive mandatory release date is a new factor as a matter of law, the record shows that the circuit court properly exercised its discretion in determining that that factor does not warrant sentence modification. *Harbor*, 333 Wis. 2d 53, ¶ 36.

The circuit court determined that Taylor's claim that his sentence should be modified because he is subject to presumptive mandatory release, rather than automatic mandatory release, is premature because it is based on a

chain of events that has not occurred and may never occur. (R. 112:2–3.) Taylor has not yet served any time beyond his presumptive mandatory release date, which is not until June 24, 2039, and may never do so. (R. 112:3.) As the circuit court correctly observed, "[h]aving PMR status does not preclude the parole commission from releasing a person on a discretionary parole prior to his or her mandatory release date." (R. 112:3.) Accordingly, "[i]t is unknown at this juncture whether he will be paroled before or at his M.R. date or held beyond. Under the circumstances, the court declines to modify the sentence in this case." (R. 112:3.) And, as explained above, the original sentencing court was not concerned with when Taylor would be released other than ensuring that he served a minimum amount of time in prison. (R. 118:104–05.)

The circuit court used a rational process to determine that Taylor's having a presumptive mandatory release date rather than an actual mandatory release date did not warrant sentence modification because the sentencing court was unconcerned with the precise date he may be released on parole, and Taylor may still be released on or before his PMR. (R. 112:2–3.) The record supports the circuit court's rationale, and Taylor has not shown that the circuit court used an "unreasonable" or "unjustifi[able]" basis for its decision. *Setagord*, 211 Wis. 2d at 418. He is due no relief.

CONCLUSION

This Court should affirm the circuit court's decision denying Taylor's motion for sentence modification.

Dated this 13th day of December 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,305 words.

Dated this 13th day of December 2019.

____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of December 2019.

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