STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2019AP001244-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD D. TAYLOR,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR SENTENCE MODIFICATION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT ON JUNE 20, 2019, HON. JOSEPH R. WALL PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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A. Contrary to the State's assertions, the sentencing court expressly relied on Gerald Taylor's mandatory release date to fashion its sentence, and the court expected that Mr. Taylor would be released on parole no later than after serving two-thirds of his sentence.

The State argues that Gerald Taylor's presumptive mandatory release (PMR) status is not a

new factor because it is not highly relevant to his sentence. The State contends that, at sentencing, Judge John J. DiMotto was not concerned with when and whether Mr. Taylor ever would be released from prison. State's Response at 10. These claims, however, are not supported by established new factor law or Judge DiMotto's statements at sentencing.

The Supreme Court of Wisconsin has recognized that changes in parole policy and parole law can be new factors that justify sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989); *Kutchera v. State*, 69 Wis. 2d 534, 553, 230 N.W.2d 705 (1975). A change in parole policy may be a new factor if parole policy was "a relevant factor in the original sentencing." *Franklin*, 148 Wis. 2d 1 at 15. Parole policy may be a relevant factor in the original sentencing if it was "expressly considered by the court in sentencing." *Id.* While Mr. Taylor's PMR status resulted from a change in the parole law (the passage of 1993 Wisconsin Act 194), rather than parole policy, the new factor analysis for determining whether a parole change was relevant to sentencing still applies. Additionally, the Wisconsin Supreme Court has recognized a change in the law regarding parole eligibility as a new factor when parole eligibility is expressly considered at sentencing. *See* Opening Brief at 15–16 (discussing *Kutchera*).

As the State itself acknowledges, Judge DiMotto expressly considered parole eligibility several times at sentencing. State's Response at 8. The judge explained that Mr. Taylor would be eligible for parole after serving one-quarter of his sentence and "could serve up to two-thirds of the time imposed. That's when you would reach your mandatory release date." 118:101.[1]

[1] Mr. Taylor inadvertently referred to Index Record No. 117 when citing to the sentencing transcript in his Opening Brief.

The judge then reiterated that "in essence, a sentence is somewhere between one-quarter and two-thirds of the judge's proclamation." *Id.* The court used these two dates—initial parole eligibility after serving one-quarter of the sentence and mandatory release (MR) on parole after serving two-thirds of the sentence—to come up with Mr. Taylor's sentence of 60 years.[2]

The State's argument boils down to an assertion that Mr. Taylor's MR date—*which sets the maximum term that Mr. Taylor could spend in prison*—is not relevant to his sentence. But his initial parole eligibility date and MR date define the precise range of his sentence. Indeed, they *are* the sentence. As Judge DiMotto explained: "[I]n essence, this is a fifteen to forty-year sentence." 118:104. Mr. Taylor's PMR status means that he does not reach his actual MR date until he has served his entire sentence, rather than two-thirds of his sentence, as Judge DiMotto believed. Therefore, Mr. Taylor's PMR status, which extends his actual MR date from 40 to 60 years, is "highly relevant" to his sentence. *See State v. Borrell*, 167 Wis. 2d 749, 767, 482 N.W.2d 883 (1992) (recognizing that the parole eligibility determination is an "essential and integral part of the court's sentencing decision").

The State also argues that Judge DiMotto was not concerned with whether Mr. Taylor ever would be

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The sentencing transcript is listed as Record No. 118 in the Index.

[2] Mr. Taylor faced a maximum sentence of 80 years on the two counts. The maximum on each count, a Class B felony, was 40 years, not 60 years as the State claims. Wis. Stat. §§ 948.02(1), 939.50(3)(b) (1997–1998); *see* State's Response at 2. The maximum sentence for a Class B felony was increased from 40 years to 60 years, but this change did not take effect until December 31, 1999, six months after the offense occurred in this case. *See* 1997 Wisconsin Act 283.

released from prison but instead was focused on punishing Mr. Taylor. State's Response at 9, 10–11. While Judge DiMotto explained that he was focused on punishing Mr. Taylor for his offenses, 118:98, he also was concerned with Mr. Taylor's rehabilitation, *id.*, as the State recognizes. State's Response at 8. However, the State fails to acknowledge that Judge DiMotto expected that Mr. Taylor would be released from prison and hoped that Mr. Taylor would address his rehabilitation needs promptly so that he could be reunited with his family:

> Plan one of those goals should be *when you get out*, you can reconnect with your family on the outside.... [Y]ou need to set as a goal addressing your criminal behavior quickly and in a way for you to be returned to them and the community as a person whom we can feel we are safe.

118:96 (emphasis added).

Because Mr. Taylor's PMR status allows him to be held in prison for 20 years longer than Judge DiMotto ever intended, and because sentence length and time remaining to serve are factors the Department of Corrections (DOC) considers when assigning incarcerated persons to treatment programs with limited space, *see* Wis. Admin. Code DOC § 302.13(2), Mr. Taylor's PMR status frustrates one of the purposes of Judge DiMotto's sentence—that Mr. Taylor get treatment quickly. *See State v. Harbor*, 2011 WI 28, ¶ 49, 333 Wis. 2d 53, 797 N.W.2d 828 (recognizing that "any fact that frustrates the purpose of the original sentence would generally be a new fact that is highly relevant to the imposition of sentence") (internal quotation marks omitted).

Judge DiMotto did not say when he expected Mr. Taylor to be released from prison. But Judge DiMotto

was clear that, unless Mr. Taylor were found to be a sexually violent person under Wis. Stat. Ch. 980, Mr. Taylor must be mandatorily released to parole no later than after serving two-thirds of his sentence. Judge DiMotto explained, "[T]he sentence I impose here will have a minimum component to it when you reach discretionary parole, and it will have a mandatory release date, *mandatory parole date*." 118:102 (emphasis added). Judge DiMotto intended that, unless Mr. Taylor were found to be a sexually violent person, he must be released on parole after serving at least 15, but no more than 40, years.

B. Far from supporting the State's position, Judge DiMotto's comments about Chapter 980 refer to a civil commitment—not an extended prison sentence—for a person found to be sexually violent.

The State misconstrues Judge DiMotto's statements about the possibility that Mr. Taylor could be committed as a sexually violent person under Wis. Stat. Ch. 980. The State argues that Judge DiMotto was not concerned with whether Mr. Taylor would ever be released from prison. State's Response at 9–10. Judge DiMotto did note that Mr. Taylor might be held past his expected MR date of 40 years if he were found to be a sexually violent person. 118:101, 102. However, unlike Mr. Taylor's PMR status, which permits the DOC to hold him in prison for up to 60 years, Chapter 980 allows the Department of Health Services to civilly commit a person in a secure mental health facility upon the person's completing their prison sentence. Wis. Stat. § 980.065(1m). Judge DiMotto understood that if Mr. Taylor were found to be a sexually violent person, he would not continue to be held in prison. 118:102. Additionally, Judge DiMotto made clear that he believed Mr. Taylor could be held

past 40 years *only if* he were found to be a sexually violent person under Chapter 980. Such a finding would require that the State prove beyond a reasonable doubt, in a trial to a jury or the circuit court, that Mr. Taylor "has a mental disorder," and that he "is dangerous to others because [his] mental disorder creates a substantial probability that he ... will engage in acts of sexual violence." Wis. Stat. § 980.02(2)(b), (c).

Judge DiMotto's statements about Chapter 980 do not support the State's argument that the judge believed Mr. Taylor could serve more than 40 years on the sentence imposed. Rather, these statements underscore that Judge DiMotto did not know, and did not intend, that Mr. Taylor could be held *in prison as part of the sentence he imposed* past his intended mandatory release at 40 years, as his PMR status allows him to be. Judge DiMotto was noting that Mr. Taylor, like anyone convicted of a sexually violent offense, could be held past his MR date on a Chapter 980 civil commitment if he were found to be a sexually violent person. The actual sentence Judge DiMotto imposed had no impact on the chance that Mr. Taylor could be committed under Chapter 980.

In addition to relying on Chapter 980, the State argues that even those incarcerated persons not subject to presumptive mandatory release could serve past their MR dates if they violated prison rules or were placed in segregation. State's Response at 10 (citing Wis. Stat. § 302.11(2)). Under Wis. Stat. § 302.11(2), a person's MR date may be extended by up to 40 days for each violation of prison rules or by 50 percent for each day in segregation. Therefore, for an additional 20 years (7,300 days) of confinement to be tacked onto Mr. Taylor's sentence under Wis. Stat. § 302.11(2)—as his PMR status does—Mr. Taylor would have to commit more than 180 rule infractions or serve

his entire 40-year prison sentence in segregation. After serving more than 20 years in prison, Mr. Taylor has received only four conduct reports, only one of which was a major infraction. *See* Opening Brief at 10–11. Like Chapter 980, and unlike his PMR status, this statutory mechanism could extend the length of Mr. Taylor's sentence by two decades only if he were found to have committed significant additional wrongdoing.

C. The State overlooks that, by extending his MR date to 60 years, Mr. Taylor's PMR status creates unintended hardships for him now and violates the mandate of *Gallion*.

The State argues that the circuit court properly denied the motion for sentence modification because Mr. Taylor may be released on parole before he reaches his PMR date, and therefore the motion is based on hypothetical facts that may never occur. State's Response at 11–12. While it is not known whether Mr. Taylor will be released before his current PMR date in 2039, his sentence allows the DOC to hold him until 2059, contrary to Judge DiMotto's expressly stated intent. That is not a "hypothetical or future fact[ ]." *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). Because Mr. Taylor's motion is fit for judicial consideration and he would experience significant hardship if the Court withholds consideration of the motion's merits, this Court should consider the merits of the motion now. *See State v. Thiel*, 2012 WI App 48, ¶ 7, 340 Wis. 2d 654, 813 N.W.2d 709 (recognizing that "[t]he two fundamental considerations in a ripeness analysis are the fitness of the issues for judicial consideration and the hardship to the parties of withholding court consideration") (internal quotation marks omitted).

Mr. Taylor's PMR status increases the length of time he can be held in prison on his current sentence by 20 years. The DOC uses the length of the sentence and time remaining to serve to make classification decisions and to assign incarcerated persons to highly sought after treatment programs with limited capacity. *See* Opening Brief at 9–11. In addition, the Parole Commission considers these same factors (as well as treatment program participation) when deciding whether to grant parole. *Id.* Therefore, Mr. Taylor's PMR status is creating unintended hardships for him. Moreover, because Judge DiMotto intended for Mr. Taylor to be released after serving no more than 40 years in prison, Mr. Taylor's actual PMR date should be calculated by taking two-thirds of that 40-year intended maximum sentence, or 26 years and 8 months. Therefore, Mr. Taylor's sentence should be modified to 40 years now so that the DOC and the Parole Commission can base their decisions on the PMR and MR dates that Judge DiMotto intended. *See id.* at 8–9.

Finally, both the circuit court and the State have ignored the Wisconsin Supreme Court's clear requirement that "the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." *State v. Gallion*, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197 (internal quotation marks omitted). Judge DiMotto recognized this requirement when he sentenced Mr. Taylor, noting that the sentence must be "the minimum amount of time necessary to obtain the goals of rehabilitation, protection, and punishment." 118:97. The judge determined that the minimum amount of time Mr. Taylor needed to serve was at least 15 years in prison (he now has served

more than 20 years), but that he should not serve more than 40 years in prison.

This case presents a unique set of facts. Judge DiMotto stated his intent to sentence Mr. Taylor to 15 to 40 years in prison, but Mr. Taylor's PMR status makes his prison sentence 15 to 60 years. *Gallion* surely cannot allow a person's potential prison term to be extended by 50 percent—up to 20 years—simply because the sentencing judge and all the parties were unaware of changes to parole law made more than five years earlier. By ignoring both Judge DiMotto's stated expectation that Mr. Taylor would serve no more than 40 years in prison and the mandate of *Gallion*, the circuit court "applie[d] the wrong legal standard" and made "a decision not reasonably supported by the facts of record." *State v. Avery*, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). This decision was "unreasonable" and "unjustified." *State v. Setagord*, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997).

The sentence modification Mr. Taylor seeks, based on his PMR status, does not require this Court to speculate how the original sentencing court would view this new factor. Mr. Taylor asks only that his sentence be modified to ensure Judge DiMotto's pronouncement that he "could serve up to a maximum time of forty years" is fulfilled. 118:104.

CONCLUSION

This Court should reverse the circuit court's denial of Mr. Taylor's motion for sentence modification and remand to the circuit court with instructions to modify Mr. Taylor's sentence to 40 years.

Respectfully submitted this 29th day of January 2020.

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CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,436 words.

Gregory W. Wiercioch

ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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