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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 11, 2023

To:

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Circuit Court Judge
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Mark S. Tishberg
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP1136-CR

State of Wisconsin v. Danny F. Anton (L.C. #2008CF852)

Before Neubauer, Grogan and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Danny F. Anton appeals from orders denying his motion for sentence modification and motion to dismiss. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹

We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2011, Anton was convicted following a jury trial of one count of first-degree sexual assault of a child and three counts of second-degree sexual assault of a child. The circuit court imposed consecutive sentences totaling forty-eight years of imprisonment.

This court affirmed Anton's convictions on direct appeal. *State v. Anton*, No. 2012AP1165-CR, unpublished slip op. (WI App Apr. 23, 2013). In doing so, we rejected arguments that Anton's trial counsel was ineffective and that the circuit court erroneously exercised its discretion at sentencing.

In 2014, Anton filed a pro se motion for relief pursuant to WIS. STAT. § 974.06. Citing *State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), Anton alleged that the complaint was defective because it did not provide him with sufficient notice regarding the dates of the offenses. He also raised claims of newly discovered evidence and ineffective assistance of counsel. The circuit court denied the motion. Anton did not appeal.

In 2019, Anton, now proceeding with counsel, filed a motion for sentence modification based upon a new factor, which was his cooperation with law enforcement in another prosecution after he was sentenced. While that motion was pending, Anton filed a motion to dismiss pursuant to WIS. STAT. § 974.06. Again, relying on *Fawcett*, Anton complained that the State's charging documents lacked specificity so that he could not properly defend himself. After a hearing on both motions, the circuit court issued orders denying them. This appeal follows.

On appeal, Anton contends that the circuit court erred in denying his motions. We begin our discussion with his motion for sentence modification.

A circuit court may modify a defendant’s sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶37-38.

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.” *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See id.*, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See id.*, ¶¶37, 66.

Here, we are not persuaded that the circuit court erroneously exercised its discretion in denying Anton’s motion for sentence modification. In its remarks, the court acknowledged the case of *State v. Doe*, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101, which recognized that “substantial and important assistance to law enforcement after sentencing” can qualify as a new factor. However, the court was not convinced that sentence modification was warranted based on the limited information that Anton provided. The Record supports the court’s decision. Anton’s motion did not meaningfully address the five *Doe* factors² used for determining whether

² The five *Doe* factors, which Anton did not even list in his motion, are:

(continued)

any postsentencing assistance constitutes a new factor. Likewise, the letter that Anton included in support of his motion was not specific enough to justify the requested relief.³ Thus Anton provides no basis for us to disturb the circuit court’s decision.

We turn next to Anton’s motion to dismiss. As noted, that motion was brought pursuant to WIS. STAT. § 974.06 and raised a claim that Anton previously litigated in an earlier § 974.06 motion.

“We need finality in our litigation.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. Furthermore, a defendant may not relitigate a

(1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant’s assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant’s assistance.

State v. Doe, 2005 WI App 68, ¶9, 280 Wis. 2d 731, 697 N.W.2d 101.

³ The letter was from a Jefferson County Assistant District Attorney and consists of two sentences acknowledging Anton’s “valuable information” and “willing[ness] to assist” in the prosecution of Logan Vollriede. As noted by the State, the letter does not say how substantial the information was, whether it was vital to Vollriede’s conviction, whether the prosecutor had other evidence that was valuable to securing the conviction, or other information about the facts of the case.

matter previously litigated, “no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Applying these principles, we conclude that Anton’s motion to dismiss is procedurally barred. Claims that were litigated in the earlier WIS. STAT. § 974.06 motion cannot be relitigated. *Id.* To the extent that Anton’s motion implicates new claims, it does not allege a sufficient reason for failing to raise them earlier—either on direct appeal or in the prior § 974.06 motion. *See Escalona-Naranjo*, 185 Wis. 2d at 185. Accordingly, we are satisfied that the circuit court properly denied the motion.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals