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DISTRICT II

May 22, 2024

To:

Hon. Andrew J. Christenson
Circuit Court Judge
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Mark H. Price #173621
Prairie Du Chien Correctional Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2022AP1883-CR

State of Wisconsin v. Mark H. Price (L.C. #1990CF226)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Mark H. Price, pro se, appeals the circuit court's order denying his motion to modify his sentence. He argues that there are three new factors warranting sentence modification. After reviewing the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2020-21).¹ We affirm.²

¹ All references to the Wisconsin Statutes are to the 2020-21 version unless otherwise noted.

² Price's notice of appeal indicates that he is appealing both the order denying his motion to modify his sentence and the order denying his motion for the appointment of counsel. Price has not, however, made any argument with regard to the circuit court's decision regarding the appointment of counsel.

In 1991, Price was convicted of multiple felonies, including first-degree intentional homicide, as a party to a crime, for his role in the death of Michael Fitzgibbon. Price was sentenced to life imprisonment for the homicide, with parole eligibility in thirty years, and to shorter consecutive and concurrent sentences for the other crimes. In 1994, we affirmed those convictions. In 2014, Price moved for a new trial under WIS. STAT. § 974.06 based on prosecutorial misconduct. The circuit court denied his motion. On appeal, we affirmed. In 2022, Price filed the current motion for sentence modification, arguing that there are three new factors that warrant sentence modification. The circuit court denied the motion without a hearing. This appeal follows.

Price argues that his sentence should be modified based on three new factors: (1) the enhancement and analysis after trial of a photograph of Fitzgibbon's body that shows he suffered no trauma prior to being shot and killed, which contradicts trial testimony that Price repeatedly punched Fitzgibbon prior to his murder; (2) that the district attorney, detective, and coroner all had legal problems subsequent to trial; and (3) an affidavit from a successor district attorney that states that he believed that Price was mistreated in a different case.

We first note that Price raised the first two claims during his 2014 appeal as claims of prosecutorial misconduct. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding 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). These claims are therefore procedurally barred. As for the third claim, Price could have raised it in his 2014 postconviction motion, but he chose not to. Moreover, Price has not alleged a sufficient reason for his failure to do so. As such, it, too, is procedurally barred. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168,

185, 517 N.W.2d 157 (1994) (All grounds for relief available to a person under this section must be raised “in his or her original, supplemental or amended motion.” (citation omitted)).

Even if Price’s claims were not procedurally barred, Price is not entitled to relief. A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the [circuit court] 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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The information Price presents is not highly relevant to the sentences imposed on him for his conduct that led to Fitzgibbon’s death. The circuit court’s sentencing decision was largely based on Price’s role as the instigator of the aggression against Fitzgibbon and Price’s actions that made him culpable as a party to a crime for the criminal actions against Fitzgibbon. Price’s conduct in committing these crimes is not ameliorated by the untoward actions of the district attorney and others. Therefore, we reject Price’s argument that he is entitled to resentencing based on new factors.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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