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DISTRICT I

June 25, 2024

To:

Hon. Ellen R. Brostrom
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Nicholas DeSantis
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Kimeo D. Conley 679392
Racine Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1698-CR State of Wisconsin v. Kimeo D. Conley (L.C. # 2019CF45)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Kimeo D. Conley, *pro se*, appeals from an order of the circuit court that denied his September 2022 motion for sentence modification. 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] The order is summarily affirmed.

In February 2019, a jury convicted Conley on one count of trafficking a child, S.A.B., contrary to WIS. STAT. § 948.051(1) (2019-20). According to the criminal complaint, S.A.B. told

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

police that Conley sold her for money to multiple men for sex acts and that all of the money she made went to Conley.[2] The trial court imposed twenty-five years' imprisonment out of a maximum possible forty years. Conley represented himself on appeal, and we affirmed his conviction. *See* ***State v. Conley***, 2019AP1526-CR, unpublished slip op. (WI App Apr. 13, 2021). After the appeal, Conley filed multiple unsuccessful motions in the circuit court, including a "motion for reconsideration" in April 2021, a motion for release in August 2021, a motion for a new trial in September 2021, two motions related to spoliation of evidence in October 2021, a motion for a directed verdict in March 2022, and a motion to vacate the verdict in June 2022.

On September 22, 2022, Conley filed the motion underlying this appeal, a "Motion for Reduction of Sentence/Sentence Modification based on 'New Factors', Irrelevant [and] Improper information being relied on at Sentencing, Inaccurate information being relied on at Sentencing and further based on (Disparity) in Sentencing[.]" The circuit court denied the motion without a hearing,[3] concluding that Conley had not identified any actual new factors and that his claims of error were procedurally barred because he had not raised them previously. Conley appeals.

A prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); WIS. STAT. § 974.06(4).

[2] The jury acquitted Conley of similar charges relating to another victim, M.J.H.

[3] The Honorable Janet C. Protasiewicz presided at Conley's trial and imposed sentence and is referred to herein as the trial court. The Honorable Ellen R. Brostrom reviewed and denied Conley's September 2022 motion, and is referred to herein as the circuit court.

The ***Escalona*** procedural bar notwithstanding, a circuit court may still modify a sentence if the defendant shows a new factor that warrants modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a fact or set of facts that is "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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); ***Harbor***, 333 Wis. 2d 53, ¶¶40, 57.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the decision whether to grant a hearing is committed to the circuit court's discretion. ***Id.***, ¶9. When reviewing for sufficiency, we review only the allegations within the four corners of the motion itself. ***Id.***, ¶23.

Conley first claims that the trial court sentenced him based on "the 'erroneous' assertion" that he received money from S.A.B.'s prostitution. Conley asserts that pictures of S.A.B. "holding loads of money … during that time she alleged she gave the defendant money" are a new factor suggesting that S.A.B. lied in her testimony. The circuit court concluded that Conley "does not allege a new factor as defined in ***Rosado*** but rather that the court relied on false testimony and is procedurally barred[.]"

We agree with the circuit court that this claim of sentencing error is procedurally barred because Conley has offered no sufficient reason for failing to raise this claim in any of his prior

postconviction motions. While Conley argues that a new factor motion can be brought at any time, the photos Conley presented as a "new factor" are from 2019; in fact, he had submitted them as part of his first appeal.[4] Because the photos Conley claims as a new factor existed at the time of his prior postconviction motions in 2021 and the first half of 2022, claims arising from those photos is now barred by ***Escalona***. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338 (discussing that where alleged "new factor" derived from law passed in 1989, and defendant-appellant had brought seven appeals between then and 2001, the new factor claim was procedurally barred).

Conley next claims that the trial court sentenced him on "'erroneous' information" when it "stated that [he] 'trafficked' S.A.B. with numerous men on a variety of websites." In support of this claim of error, he offers a "new factor" of phone records showing that M.J.H. owned the phone used to put S.A.B.'s photos online.

We agree with the circuit court that this claim is procedurally barred because Conley does not explain his failure to raise it earlier. We also agree that Conley has not shown a new factor. The phone records, like the photos, are from 2019, and Conley has not established that precise ownership of the phone was "highly relevant to the imposition of sentence."[5] *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted).

[4] We rejected any arguments about the photos in the original appeal because Conley had not first raised the issue in the circuit court. *See* ***State v. Conley***, 2019AP1526-CR, unpublished slip op. at ¶¶33-36 (WI App Apr. 13, 2021).

[5] It was undisputed that M.J.H. had posted ads for S.A.B. on certain sites; her testimony, however, was that she had done so at Conley's direction.

Conley next alleges that this court committed an error in his original appeal. At trial, S.A.B. had testified that Conley recruited her for his "money train" of commercial sex acts, that he provided an apartment for her to stay at with a man named J.R., and that Conley paid J.R. "$20 every pop I made in order for me to keep the house." ***Conley***, No. 2019AP1526-CR, ¶39. M.J.H. also testified that Conley was paying for S.A.B. to reside at an apartment during that time. ***Id.*** In our decision, we explained that this evidence satisfied one of the elements of child trafficking—that the defendant knowingly recruited or harbored the victim. *See* ***Id.***, ¶¶38-39; *see also* WIS. STAT. § 948.051(1), WIS JI—CRIMINAL 2124. In the current postconviction motion, Conley complains that this court "had it wrong when it stated that this 'money train' was enough to prove the element of 'recruit[.]'"

We agree with the circuit court that this argument, which is an attack on the sufficiency of the evidence supporting the verdict, is procedurally barred by ***Escalona*** to the extent that Conley failed to raise this specific claim earlier. Moreover, the general issue is also barred as previously litigated, because sufficiency of the evidence was an issue in the original appeal. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding[.]"). The circuit court also correctly acknowledged that it has no jurisdiction to review errors allegedly made by this court. *See* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis. 2d 252, 261, 500 N.W.2d 339 (Ct. App. 1993) ("It is axiomatic that 'a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court[.]'") (citation omitted).

Conley next asserts that "the trial court judge saw some people had [their] 'eyes shut' that [were] part of the jury and thus [were] possibl[y] sleeping." He claims he suffered a due process violation from inattentive jurors.

We agree with the circuit court that this issue is procedurally barred. Again, Conley has not offered a reason for failing to raise the issue in earlier litigation. In any event, Conley's record citation fails to support his claim of a sleeping juror. What the record actually reflects is that the circuit court, as part of its opening instructions to the jury, said:

> I have an extra special request. While the trial is going on, please think with your eyes open. Okay. You can guess what happens if you don't, right? The lawyers pull me aside. They think you're asleep. Some people are just kind of mulling things over with their eyes shut. I don't know if people are sleeping or not. So keep your eyes open. Okay. Save us all some trouble.

Additionally, Conley has failed to identify any contemporaneous objection by him or by counsel that would have brought possible sleeping jurors to the trial court's attention, meaning any such claim has also been forfeited. *See* ***State v. Saunders***, 2011 WI App 156, ¶32, 338 Wis. 2d 160, 807 N.W.2d 679.

Conley alleges that the trial court erroneously exercised its sentencing discretion because it relied on irrelevant or improper sentencing factors and because it sentenced him based on inaccurate information. We agree with the circuit court that these complaints are procedurally barred; they should have been raised at the time of the original postconviction proceedings.

Conley additionally asks that his sentence be reduced because it is "unduly harsh" and disparate "when compared to other … similarly situated offenders." He lists six other cases and the sentences imposed. We agree with the circuit court that any challenge to the trial court's

exercise of sentencing discretion is procedurally barred. To the extent that Conley claims this information constitutes a new factor, he does not establish that the sentences of others were highly relevant to the imposition of his sentence; defendants do not receive the same punishment simply because they are convicted of the same offense.[6] Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). "[N]o two convicted felons stand before the sentencing court on identical footing .... and no two cases will present identical factors." ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted; alterations in ***Gallion***).

Finally, Conley alleges that the trial court was unaware that the vehicle involved in this case was destroyed after sentencing. We agree with the circuit court that this is not a new factor;[7] we also note that it is barred by ***Witkowski***. As the circuit court observed, this issue was previously raised in one of Conley's October 2021 spoliation motions and was denied on the merits at the time. The circuit court stated that it agreed with its predecessor's November 2021 ruling on the spoliation motion, and further explained that the trial court here "imposed the sentence that [it] did primarily to punish the defendant for his 'extraordinarily serious conduct' and to protect the community…. The destruction of the vehicle is separate from the defendant's acts. It does not mitigate the seriousness of his conduct or the need for community protection."

[6] Of the six cases to which Conley compares his sentence, only one actually involved a conviction on the same Class C felony of trafficking a child.

[7] In support, Conley had offered an "affidavit" from the City of Milwaukee's tow lot, confirming the vehicle had been destroyed. However, this "affidavit," which is simply a letter and not a sworn document is also from 2019.

In sum, Conley has failed to offer a sufficient reason to avoid application of the ***Escalona*** procedural bar; some of his issues are further barred by ***Witkowski*** as part of previous litigation; and Conley has not adequately established the existence of any new factor. Thus, the circuit court did not erroneously exercise its discretion when it denied Conley's latest postconviction motion without a hearing.

Upon the foregoing, therefore,

IT IS ORDERED that the order 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