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DISTRICT IV

October 15, 2013

To:

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

2011AP2810-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2008CF1284)
2011AP2811-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2008CF1804)
2011AP2812-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2008CF2023)
2011AP2813-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2009CF13)
2011AP2814-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2009CF270)
2011AP2815-CR	State of Wisconsin v. Jeffrey M. Davis, Jr. (L.C. # 2009CF287)

Before Lundsten, Higginbotham and Sherman, JJ.

Jeffrey Davis appeals an order denying his motion to modify sentence. 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 (2011-12).[1] We affirm.

The circuit court denied Davis's motion as untimely. In his reply brief, Davis appears to concede that the motion would be untimely under WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, but he argues that those deadlines do not apply because his motion was one invoking the inherent authority of the court, and such a motion may be made at any time. The parties agree that *some* such motions may be made at any time, but only on the grounds that a new factor exists, that the sentence is illegal, or that the sentence is unduly harsh or unconscionable. *See* ***State v. Harbor***, 2011 WI 28, ¶35 & n.8, 333 Wis. 2d 53, 797 N.W.2d 828. Here, Davis appears to argue in his reply brief that his argument is directed at the unconscionable sentence ground. We disagree.

Davis argues that the court's failure to state sufficient reasons and address certain factors on the record at sentencing was unconscionable. However, "unconscionable" in this context refers to the terms of the sentence itself, not the articulation of the reasons for the sentence imposed. Absence of discretion, or erroneous exercise of discretion, is not the same thing as unconscionability. Therefore, Davis's motion is not one that invokes the inherent authority of the court, and was thus untimely under the provisions cited above.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Davis also argues that his attorney at sentencing was ineffective. This is not a motion to modify his sentence for any of the reasons on which a defendant may invoke the inherent authority of the court. Instead, this is a postconviction claim of constitutional error under WIS. STAT. § 974.06. Motions under that section may be made "at any time." WIS. STAT. § 974.06(2).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The court in this case denied the motion without an evidentiary hearing, and therefore the question before us is whether the motion alleged facts which, if true, would entitle the defendant to relief, in which case a hearing would be required. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Davis's motion claimed that his attorney at sentencing was ineffective because counsel did not ask the court to consider various factors that might have led to a lesser sentence. The motion does not come to grips with the fact that the court imposed the sentence that was jointly recommended by the parties as part of a plea agreement. The State correctly points out that Davis's attorney was required by the plea agreement to recommend the sentence Davis agreed to. Davis has not alleged facts that, if true, would show counsel's compliance with the plea agreement was deficient performance.

On appeal, Davis also asserts that his attorney did not inform him that the plea agreement would restrict counsel's ability to argue for a lesser sentence. However, his postconviction motion itself does not contain such a claim. We usually do not address issues that are raised for

the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to do that in this case.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals