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**DISTRICT III/IV**

November 12, 2013

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

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2011AP2255

State of Wisconsin v. Timothy T. Lee (L.C. # 2009CF1256)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Timothy Lee, pro se, appeals an order denying both a motion for sentence modification based on alleged new factors and a WIS. STAT. § 974.06 (2011-12)<sup>1</sup> motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We affirm. See WIS. STAT. RULE 809.21.

In February 2010, a jury found Lee guilty of delivering between one and five grams of cocaine; possession of THC; escape; and misdemeanor possession of drug paraphernalia. The

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

jury acquitted Lee on a charge of possession with intent to deliver cocaine. Lee was convicted upon the jury's verdicts and the court imposed concurrent sentences resulting in an eight-year term, consisting of five years of initial confinement and three years of extended supervision.

On November 3, 2010, Lee, pro se, filed an unsigned notice of appeal. In a November 10, 2010 order, this court noted Lee's failure to sign the notice of appeal, indicating that the failure to sign a notice of appeal is a fundamental defect that could result in dismissal of the appeal. That order acknowledged, however, that the failure to sign a notice of appeal would not deprive this court of jurisdiction if the omission was corrected. The order also questioned what prompted Lee's decision to discharge his appointed attorney and proceed pro se on appeal.

In a November 19, 2010 order, we indicated that according to counsel, Lee opted to proceed pro se after being informed of his options pursuant to *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-07, 516 N.W.2d 362 (1994). That order again noted Lee's failure to sign the notice of appeal, reiterating that failure to sign a notice of appeal was a fundamental defect that could result in dismissal of the appeal. We gave Lee fourteen days to file a signed notice of appeal, warning that the appeal would be subject to dismissal if he failed to comply. When Lee failed to correct the omission, we dismissed the appeal.

Lee subsequently filed the motions underlying this appeal—a motion for sentence modification based on alleged new factors and a WIS. STAT. § 974.06 motion for postconviction

relief.<sup>2</sup> The circuit court denied the motions without a hearing, concluding that Lee offered “no new factors to the Court which merit consideration” and failed to offer “a legitimate basis for consideration of relief under § 974.06.” This appeal follows.

In his WIS. STAT. § 974.06 motion, Lee sought relief on several grounds, including allegations that the prosecutor engaged in misconduct at trial; he was denied the effective assistance of trial counsel; the circuit court erred by denying his pretrial motion to suppress evidence; and he did not make a knowing, voluntary and intelligent waiver of his right to counsel at trial. Citing *State v. Braun*, 185 Wis. 2d 152, 165, 516 N.W.2d 740 (1994), the State argues that Lee’s WIS. STAT. § 974.06 motion is procedurally barred under § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree.

A WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. See *State v. Lo*, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756;

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<sup>2</sup> In its brief, the State indicates that Lee filed two motions for sentence modification and the court construed one as a WIS. STAT. § 974.06 motion. Although it does not alter our analysis, the record shows that Lee filed a “notice of motion and motion to modify sentence” along with a document entitled “motion for sentence modification” that appears to be a memorandum in support of his sentence modification motion. In addition to alleging that several new factors warranted sentence modification, Lee’s motion raised issues that were repeated in a separate filing that Lee described as a petition for a writ of habeas corpus pursuant to WIS. STAT. § 974.06.

We note that although the document was captioned as a petition for a writ of habeas corpus, the text of the document described it as a motion and the circuit court construed it as a § 974.06 postconviction motion. In a motion for reconsideration of the circuit court’s order, Lee reiterated that he filed a petition for a writ of habeas corpus. The circuit court denied reconsideration and, on appeal, Lee does not claim that the filing should have been addressed as a petition for a writ of habeas corpus. He refers to the subject document as a motion seeking postconviction relief or a WIS. STAT. § 974.06 motion. Consequently, Lee appears to have abandoned any claim that the circuit court improperly construed his filing. See *State v. Johnson*, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) (issues not briefed or argued on appeal are deemed abandoned).

*Escalona–Naranjo*, 185 Wis. 2d at 185. In *Braun*, the defendant filed a WIS. STAT. § 974.02 postconviction motion and subsequently escaped from prison. *Braun*, 185 Wis. 2d at 156-57. The circuit court dismissed the motion because Braun absconded. *Id.* at 156. Although the circuit court never reached the merits of Braun’s motion, the dismissal served as a final adjudication of the motion, precluding further postconviction motions under § 974.06(4). *Id.* at 158-59. The *Braun* court emphasized that “[r]ather than appear and prosecute her appellate rights, [Braun] chose to escape and thereby forfeited her right to be heard on the merits of her claims.” *Id.* at 165.

Here, Lee opted to pursue a direct appeal pro se after being warned of the difficulties and disadvantages of self-representation. During the course of representing himself, Lee failed to prosecute his direct appeal when he disregarded this court’s admonitions that the appeal was subject to dismissal if the defect on his notice of appeal was not corrected. To the extent Lee intimates that the appeal was a nullity without his signature, Lee is mistaken. The notice of appeal was filed in the circuit court, transmitted to this court and assigned appeal No. 2010AP2839-CR. The appeal, therefore, existed despite the curable defect in the notice of appeal. As in *Braun*, the dismissal of Lee’s direct appeal serves as a final adjudication, precluding his WIS. STAT. § 974.06 motion under § 974.06(4), *Lo* and *Escalona-Naranjo*.

Turning to the motion for sentence modification, Lee claimed sentence modification was warranted based on new factors. 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: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37.

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 (quoted source omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *Id.*, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *Id.*, ¶38.

Here, Lee alleged as new factors that he: suffers from post-traumatic stress disorder (PTSD); had a harsh childhood at the hands of his abusive father; witnessed the September 11 attacks first-hand while in New York City; suffered the death of his daughter and brothers; and has maintained positive adjustment in prison. The presentence investigation report, however, described Lee’s harsh childhood, including reference to his abusive father. The PSI also disclosed that Lee took medication for PTSD and that his daughter died as an infant. At sentencing, Lee told the court he was in New York City at the time of the September 11 attacks. Because the circuit court knew these facts at the time of sentencing, they cannot be new factors. *See id.*, ¶40. Further, Lee’s motion fails to establish how the death of Lee’s brothers since his incarceration is “highly relevant to the imposition of sentence.” *Id.* (quoted source omitted). Finally, Lee’s “rehabilitation is not a ‘new factor’ for purposes of sentence modification.” *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Because Lee failed to establish a new factor justifying sentence modification, the circuit court properly denied his motion.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the appellant's pending motion to remand the record is denied as unnecessary.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*