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DISTRICT I

May 7, 2014

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

2013AP1130-CR State of Wisconsin v. Darryl Tucker (L.C. #2001CF6394)

Before Curley, P.J., Fine and Brennan, JJ.

Darryl Tucker, *pro se*, appeals an order denying his claims 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 (2011-12).[1] We affirm.

Tucker pled guilty in 2002 to two counts of second-degree sexual assault of a child. Count one arose before and count two arose after December 31, 1999, the effective date of the Wisconsin determinate sentencing system known as Truth-In-Sentencing. Tucker's sentence for

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

count one is therefore structured differently from his sentence for count two. The trial court imposed a twelve-year indeterminate sentence for count one. For count two, the trial court imposed a determinate thirteen-year term of imprisonment bifurcated as ten years of initial confinement and three years of extended supervision. The trial court ordered Tucker to serve his two sentences consecutively.

Tucker appealed. His appellate counsel filed a no-merit report, Tucker submitted a response, and we affirmed. *See* ***State v. Tucker***, No. 2002AP3130-CRNM, unpublished op. and order (WI App June 9, 2003) (***Tucker I***). In December 2007, Tucker filed a postconviction motion for sentence modification, alleging the existence of a new factor. He supported the motion with seventy-one pages of discussion and exhibits. The trial court denied the motion and Tucker's request for reconsideration. He pursued an appeal, but voluntarily dismissed it while briefing was underway. *See* ***State v. Tucker***, No. 2008AP381-CR, unpublished order (WI App Aug. 14, 2008) (***Tucker II***).

In 2011, Tucker filed a petition for a writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He alleged that his appellate counsel was ineffective in various ways. Before addressing the petition, we reviewed Tucker's litigation history, noting the prior proceedings that we have outlined here as well as his unsuccessful collateral attacks launched in the Wisconsin Supreme Court and the federal district court:

> In 2004, acting *pro se*, Tucker filed a writ of *habeas corpus* with the Wisconsin Supreme Court, alleging at least twenty-two claims of error. The petition was denied. *See* ***State ex rel. Tucker v. Wisconsin Court of Appeals***, No. 2004 AP1907-W, unpublished order (WI July 21, 2004).
>
> In 2005, Tucker filed a *pro se* petition for a writ of *habeas corpus* in federal court. The district court denied the petition. *See* ***Tucker***

> ***v. Jess***, No. 05-C-3, 2006 WL 752896 (E.D. Wis. March 20, 2006), motion for reconsideration denied, 2006 WL 995143 (E.D. Wis. April 13, 2005).

See ***State ex rel. Tucker v. Tegels***, No. 2011AP1527-W, unpublished slip op. at 4 (WI App Mar. 1, 2012) (***Tucker III***). After describing Tucker's postconviction litigation, we considered the contentions in his petition for a writ of *habeas corpus*, and we denied the petition.[2] *See* ***id.*** at 13.

On April 22, 2013, Tucker filed his most recent motion for sentence modification. The trial court rejected his claims, as do we. Tucker contends now that his determinate sentence is "abusive" and that the sentencing court erroneously exercised its discretion. He also contends that a new factor exists, namely, the sentencing court's alleged failure to fashion his determinate sentence according to the "mandatory release conversion process" that he argues went into effect on February 1, 2003, as part of the second phase of Truth-in-Sentencing. These claims are barred.

Turning first to the contention that Tucker received an "abusive" sentence, we remind Tucker that our decision in ***Tucker I*** included a review of his sentences. *See* ***id.***, 2002AP3130-CRNM, unpublished op. and order at 3. We concluded that the sentencing court considered appropriate factors and that the sentences it imposed were not unduly harsh or abusive. ***Id.*** Accordingly, we will not entertain a claim that Tucker received an "abusive" sentence or that the sentencing court erroneously exercised its discretion. "A matter once litigated may not be

[2] We noted that Tucker's petition for a writ of *habeas corpus* and his response to the State's reply were "voluminous." *See* ***State ex rel. Tucker v. Tegels***, No. 2011AP1527-W, unpublished slip op. at 2 n.1 (WI App Mar. 1, 2012) (***Tucker III***).

relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowksi***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Tucker's claim that a "new factor" warrants sentence modification also fails. 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."' ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A motion for sentence modification alleging a new factor is not governed by a statutory deadline. *See* ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. Nonetheless, a prisoner who could have presented an alleged new factor in a previous postconviction motion is procedurally barred from presenting the claim in a later postconviction motion. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338. Here, Tucker's various allegations surrounding his claim of a new factor are based on his view of the differences in sentencing law and policy before and after February 1, 2003. He could have presented these allegations and arguments in his prior *pro se* litigation, including the postconviction motion for sentence modification that he filed in 2007. Accordingly, his current claim for sentence modification based on an alleged new factor is barred.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals