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DISTRICT II

May 28, 2014

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

2013AP2134

State of Wisconsin v. Cory A. Hewitt (L.C. # 2010CF269)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Cory A. Hewitt appeals pro se from an order denying his postconviction motion to vacate, set aside, or correct his sentence. Based on 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 order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Hewitt was convicted following a no contest plea to operating while intoxicated as a sixth offense. The circuit court sentenced him to two years and six months of initial confinement followed by three years of extended supervision.

Hewitt filed a postconviction motion to vacate, set aside, or correct his sentence. In it, he claimed that he was denied the right to be sentenced based on accurate information, that he never read or received a copy of the presentence investigation (PSI) report, that his attorney did not contradict the State's case, that he was denied his right to allocution, that the court erroneously minimized his health problems, and that the PSI report included erroneous information. The circuit court denied the motion. Hewitt did not appeal that decision.

Approximately one year later, Hewitt filed a second postconviction motion to vacate, set aside, or correct his sentence. In it, he raised many of the same issues that he presented in his first postconviction motion. He also claimed that his attorney was ineffective for failing to obtain and produce medical records to support a plea of not guilty by reason of mental disease or defect. Additionally, Hewitt sought sentence modification on the ground that his diagnosis of hyperthyroidism constituted a new factor. The circuit court denied the motion, refusing to reconsider the issues previously litigated and rejecting the claims of ineffective assistance of counsel and a new factor. This appeal follows.

On appeal, Hewitt contends that the circuit court erred in denying his latest motion to vacate, set aside, or correct his sentence. We disagree.

With respect to the issues previously litigated by Hewitt, the circuit court properly refused to reconsider them. As this court explained in *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 no matter how artfully the defendant may rephrase the issue.”

With respect to Hewitt’s claim of ineffective assistance of counsel, the circuit court properly rejected it. Although not cited by Hewitt, his second postconviction motion was brought, in part, pursuant to WIS. STAT. § 974.06. Any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Because Hewitt does not provide a sufficient reason for why he did not raise his ineffective assistance of counsel claim earlier, the claim is procedurally barred.

Finally, with respect to Hewitt’s claim of a new factor, the circuit court properly rejected it. 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 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact constitutes a new factor is a question of law that this court decides independently. See *id.*, ¶33. Here, Hewitt does not explain how his diagnosis of hyperthyroidism is a fact highly relevant to his sentence, which was based primarily on protection of the public and deterrence to others in the community. As a result, he failed to demonstrate that a new factor existed.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals