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DISTRICT IV

August 20, 2014

To:

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

2013AP597 State of Wisconsin v. Gerald L. Lynch, Jr. (L.C. # 2003CF539)

Before Lundsten, Sherman and Kloppenburg, JJ.

Gerald Lynch, pro se, appeals a circuit court order denying Lynch's WIS. STAT. § 974.06 (2011-12)[1] motion seeking to withdraw his no-contest plea to homicide by intoxicated use of a vehicle.[2] Based upon our review of the briefs and record, we conclude at conference that this

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

[2] Lynch was represented by counsel when he filed the WIS. STAT. § 974.06 motion, but is pro se on appeal.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In 2003, Lynch was convicted on his no-contest pleas to one count of homicide by intoxicated use of a vehicle and two counts of eluding an officer, causing bodily harm. We affirmed on direct appeal, rejecting Lynch's claims that: (1) the statutes making Lynch ineligible for the earned release program were unconstitutional; and (2) the circuit court relied on improper and inaccurate information at sentencing by citing a television interview of Lynch. Lynch then filed a pro se WIS. STAT. § 974.06 motion, arguing that his appellate counsel was ineffective by failing to properly argue the unconstitutionality of the statutes that rendered Lynch ineligible for the earned release program. The circuit court denied the motion, and we affirmed on appeal.

Lynch then filed another WIS. STAT. § 974.06 motion, seeking to withdraw his plea to homicide by intoxicated use of a vehicle. Lynch argued that his plea was not knowing, intelligent and voluntary because he was not informed of his ineligibility for the earned release program when he entered his plea. Lynch argued that program eligibility was a direct consequence of his plea and that his plea was not valid because he did not understand his program ineligibility at that time. The circuit court denied the motion as procedurally barred, and Lynch did not timely appeal.[3]

Lynch argues again in his current postconviction motion that his plea was not knowing, intelligent and voluntary because the circuit court did not advise him that his plea would

[3] While this is not a complete list of Lynch's state and federal filings, it is sufficient for purposes of this opinion.

automatically disallow his participation in the earned release program, and that he did not understand that information when he entered his plea. Lynch contends that the circuit court was obligated to advise him that he would be ineligible for the earned release program because his ineligibility for the program was a direct consequence of his plea. *See* ***State v. Byrge***, 2000 WI 101, ¶¶59-60, 68, 237 Wis. 2d 197, 614 N.W.2d 477 (defendant must understand the direct consequences of a plea for the plea to be knowing, intelligent and voluntary).

Lynch acknowledges that he must overcome the general procedural bar to successive postconviction motions because he has already pursued a direct appeal and prior § 974.06 motions. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Lynch asserts, however, that he has a sufficient reason for failing to previously argue that his plea was not knowingly, voluntarily and intelligently entered, because Lynch did not previously know of that claim. *See* ***id.*** (defendant may overcome general procedural bar by establishing a sufficient reason for failing to previously raise claim). He argues that whether ineligibility for the earned release program is a direct consequence of a plea is an issue of first impression that has not been addressed by the courts, and thus Lynch could not have been expected to raise it previously. In support, Lynch cites ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997) (sufficient reason established by subsequent new rule of substantive law), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765. ***Howard***, however, is inapposite.

In ***Howard***, 211 Wis. 2d at 287–288, the supreme court held that Howard established a sufficient reason for failing to raise a claim during his first appeal when the supreme court later interpreted a relevant statute in a way that created a "new rule of substantive law." Here, however, Lynch has not identified a new rule of substantive law developed after his earlier

litigation. While Lynch argues that his rights were violated because his ineligibility for the earned release program is a direct consequence of his plea, he admits that there is no authority for that proposition. Indeed, case law suggests the opposite. *See* ***State v. Plank***, 2005 WI App 109, ¶¶12-17, 282 Wis. 2d 522, 699 N.W.2d 235 (holding that circuit courts are not required to inform defendants that they will serve every day of their sentence under truth-in-sentencing).

In sum, Lynch fails to offer a persuasive explanation for why he could not previously raise the claim he raises now. Moreover, as explained above, Lynch has actually raised the same claim previously, and that as well bars that claim. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (an issue litigated in postconviction proceedings "may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue").

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals