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**DISTRICT IV**

August 28, 2014

To:

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

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2013AP1207-CR	State of Wisconsin v. Johnathon W. Pearson (L.C. # 1999CF3296)
2013AP1208-CR	State of Wisconsin v. Johnathon W. Pearson (L.C. # 2000CF697)

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

Johnathon Pearson, pro se, appeals the circuit court's order denying his WIS. STAT. § 974.06 motion without a hearing.<sup>1</sup> 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. We summarily affirm.

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

In 2000, Pearson was convicted on his guilty pleas to two counts of first-degree sexual assault of a child, three counts of child enticement, and three counts of sexual exploitation of a child. Pearson sought postconviction relief, arguing that the circuit court erroneously exercised its sentencing discretion by: (1) failing to give sufficient weight to expert testimony as to the likelihood that Pearson could be adequately supervised in the community; (2) failing to give sufficient weight to Pearson's need for prompt sex offender treatment; and (3) failing to impose the minimum term of imprisonment necessary. Pearson also argued that his sentence was excessive and unduly harsh. The circuit court denied the motion, explaining that the court had considered the sentencing guidelines and the testimony at the sentencing hearing in determining the minimum amount of confinement necessary. The court also explained that it considered that it had imposed indeterminate sentences, and that the Department of Corrections (DOC) would ultimately determine the total length of confinement. We affirmed on appeal.

Pearson then filed a pro se motion to modify sentence. Pearson argued again that the circuit court erroneously exercised its sentencing discretion. Pearson also argued that, in denying his prior postconviction motion, the circuit court made a legal error by relying on DOC's purported ability to release Pearson to parole. Pearson argued that his postconviction counsel was ineffective by failing to raise the parole issue in a motion for reconsideration, and that his appellate counsel was ineffective by failing to raise that issue on appeal. The circuit court denied the motion without a hearing, determining that Pearson's claims were procedurally barred and that they lacked merit.

Pearson contends that the circuit court erroneously exercised its discretion by denying his motion without explaining why Pearson was not entitled to a hearing on the motion. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court must support exercise

of discretion to deny a postconviction motion without a hearing by written opinion explaining its decision). We disagree.

The circuit court explained, in writing, that it denied Pearson's motion without a hearing because it determined that the issues Pearson raised could have been raised in Pearson's previous postconviction proceedings. See *State v. Lo*, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756 (“[A]ny claim that could have been raised on direct appeal or in a previous Wis. Stat. § 974.06 ... postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason.” (footnote omitted)); *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996) (court may, in its discretion, deny a postconviction motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief). The circuit court also explained that it had reviewed the motion and determined that Pearson's claims lacked merit. Thus, we reject Pearson's argument that the circuit court failed to explain why it denied Pearson's motion without a hearing.

Next, Pearson contends that his motion alleged sufficient facts that, if true, entitle him to relief, and thus the circuit court was required to hold a motion hearing. See *Allen*, 274 Wis. 2d 568, ¶9. Specifically, Pearson argues that the circuit court erroneously exercised its sentencing discretion by considering both Pearson's status as a child sexual abuse victim and Pearson's homosexuality as aggravating factors. The sentencing hearing transcript, however, conclusively refutes those claims. Because the record conclusively demonstrates that Pearson is not entitled to relief on those claims, Pearson's motion was properly denied without a hearing. See *Bentley*, 201 Wis. 2d at 309-11.

Pearson also argues that the sentencing court placed too much weight on protection of the community and did not give sufficient weight to expert testimony that Pearson could be safely treated in the community. However, in Pearson’s direct appeal we addressed this issue, and we will not address it again here. *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”).

Finally, Pearson claims that the circuit court made a legal error in denying his prior postconviction motion. He asserts that the court erroneously stated that DOC would be able to determine Pearson’s eligibility for parole. Pearson asserts that, contrary to the court’s statement, Pearson will not be eligible for parole in his lifetime because the length of his sentence significantly delays his eligibility for sex offender treatment. However, as the State points out, even if Pearson’s underlying factual assertion is true—that, due to DOC policies, Pearson will not be eligible for parole in his lifetime—that does not establish that the circuit court’s statement was erroneous. That is, the court’s statement that DOC will determine Pearson’s confinement time is accurate even if, according to DOC policies, Pearson will not be eligible for parole in his lifetime. Because this argument fails on the merits, we reject Pearson’s claims of ineffective assistance of counsel for failing to raise it.

Therefore,

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

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