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DISTRICT I

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

2014AP466-CR State of Wisconsin v. Charles Blunt (L.C. #1999CF640)

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

Charles Blunt, *pro se*, appeals from a trial court order denying his motion for resentencing or sentence modification. Upon our review of the briefs, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the order.

In April 1999, Blunt pled guilty to two felonies. He was sentenced to thirty-five years for one count of first-degree reckless homicide, while armed, as a habitual criminal. The sentencing court imposed a consecutive five-year sentence for one count of being a felon in possession of a

firearm, as a habitual criminal.[1] Postconviction/appellate counsel filed a no-merit report and we affirmed. *See* ***State v. Blunt***, No. 2000AP1582-CRNM, unpublished slip op. and order (WI App June 15, 2001).

Blunt subsequently filed numerous *pro se* motions and petitions in the trial court and this court. As relevant to this appeal, Blunt filed a motion for sentence modification in September 2010, asserting that he was entitled to sentence modification because the parties had "unknowingly overlooked" the "new factor" of the presumptive mandatory release (PMR) law and the trial court had failed to consider the application of the PMR law on Blunt's sentence. *See* WIS. STAT. § 302.11(1g) (1999-2000).[2] Blunt recognized that the PMR law had been in effect since 1994—five years before he was sentenced—but he cited circuit court decisions involving other defendants from Dane County and Brown County where judges determined that they had overlooked the PMR law and agreed to modify the defendants' sentences.

The trial court denied Blunt's 2010 motion in a written order on several grounds, stating:

> PMR law has been on the books since 1994, and thus, is not a new factor. A court does not make reference to PMR law at sentencing because the law is implemented by the Department of Corrections, not the court. In addition, there is no indication that the sentencing court expressly relied on parole eligibility as a factor in determining sentence in this case, and therefore, the defendant's inability to obtain parole does not constitute a new factor for purposes of sentence modification….

[1] The Honorable Mel Flanagan accepted Blunt's guilty pleas and sentenced him.

[2] "The presumptive mandatory release scheme provide[d] that for a prisoner sentenced for a serious felony between April 21, 1994, and December 31, 1999, the mandatory release date is presumptive." ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶8, 246 Wis. 2d 814, 632 N.W.2d 878.

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

> In sum, the defendant's motion does not set forth the existence of a new factor. Moreover, he has filed several motions and appeals and could have raised this issue previously.

Blunt did not appeal the trial court's order.[3]

Next, Blunt filed a WIS. STAT. § 974.06 motion in April 2011 challenging the basis for the habitual criminality penalty enhancer. The trial court denied the motion and Blunt did not appeal. Blunt raised that same issue again in September 2011, when he filed a motion "for resentencing and sentence modification." (Bolding and uppercasing omitted.) The trial court denied the motion on procedural and substantive grounds. Blunt did not appeal.

In February 2014, Blunt filed the motion at issue in this appeal. He sought "resentencing or modification of sentence" on grounds that "it is more probable than not that, at the time of original sentencing, all of the parties 'unknowingly overlooked'" WIS. STAT. § 302.11(1g) (1999-2000), the PMR law. (Uppercasing omitted.) Blunt's request for resentencing was filed pursuant to WIS. STAT. § 974.06, and he argued that "resentencing is required due to the sentencing court's reliance on inaccurate information regarding mandatory release law." (Uppercasing omitted.) His alternate request for sentence modification was based on the existence of a new factor: the PMR law. In support, he provided transcripts from four circuit court cases—including the same Dane County and Brown County cases he referenced in his 2010 motion—where judges determined that they had overlooked the PMR law at sentencing.

Blunt argued that the WIS. STAT. § 974.06 portion of his motion was not procedurally barred even though he had filed numerous prior motions, because there was a sufficient reason

[3] The Honorable Dennis R. Cimpl denied Blunt's filings from 2010-2011. The Honorable Stephanie G. Rothstein denied the motion at issue in this appeal.

why he did not raise his claim sooner. Specifically, he argued that the Wisconsin Supreme Court's decision in ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491, "changed the law regarding what types of erroneous information could form the basis for this type of due process claim." Blunt argued that the sentencing modification portion of his motion was not barred because sentence modification motions are "not subject to the restrictions of" ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and § 974.06.

The trial court denied Blunt's motion on procedural grounds. Referring to the September 2010 order issued by a prior judge, it stated:

> The defendant previously filed a motion to modify sentence on the basis that the sentencing court was unaware of the presumptive mandatory release law. The motion was assigned to [another judge], who denied it…. The defendant did not appeal [the judge's] decision. The defendant may not bring successive motions raising the same issues in another motion. The court explained in that decision that a court does not make reference to PMR law at sentencing because the law is implemented by the Department of Corrections and not the court. More importantly, because the sentencing court did not rely on parole policy, PMR law in this case is not a new factor.

This appeal follows.

We agree with the trial court that Blunt's motion is procedurally barred and, on that basis, we affirm.[4] As Blunt's motion freely admitted, he has filed multiple motions already, including the September 2010 motion related to the PMR law. That 2010 motion was premised on the same assertion that Blunt is now making in support of his WIS. STAT. § 974.06 motion and his

[4] We do not consider the State's alternative arguments that: (1) "Blunt failed to prove a 'new factor' by clear and convincing evidence"; and (2) "Blunt's claim is premature" because he is eleven years away from his PMR date. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

motion for sentence modification: that the sentencing court "relied upon inaccurate information regarding his mandatory release after serving 2/3 of the sentences imposed." The trial court rejected this assertion in September 2010, when it recognized that the PMR law had been in effect since 1994 and found that there was "no indication that the sentencing court expressly relied on parole eligibility as a factor in determining sentence in this case." Blunt, who chose not to appeal the trial court's decision, cannot relitigate his assertion that the sentencing court relied on Blunt's parole eligibility date when it imposed sentence. *See* ***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.").

Blunt asserts that he should not be procedurally barred because ***Travis*** introduced a new legal standard and "Blunt cannot be expected to understand legal theory that has not yet been developed by the higher courts." ***Travis*** considered "whether a circuit court's imposition of a sentence using inaccurate information that the defendant was subject to a mandatory minimum five-year period of confinement is structural error or subject to the application of harmless error analysis." ***Id.***, 347 Wis. 2d 142, ¶9. As best we can interpret Blunt's argument, he contends that ***Travis*** affected when certain claims can be raised, and he asserts that he could not have raised his argument in his prior WIS. STAT. § 974.06 motion. We are not convinced that ***Travis*** established new law that would affect Blunt's claim.

More importantly, as we have discussed, Blunt fails to recognize that his request for resentencing pursuant to WIS. STAT. § 974.06 and his request for sentence modification both rely on an assertion that he has *already litigated*: that the sentencing court relied "on inaccurate information regarding mandatory release law." As we have explained, the trial court rejected

that assertion in 2010 and Blunt did not appeal. He cannot relitigate that issue again. *See* ***Witkowski***, 163 Wis. 2d at 990.

IT IS ORDERED that the trial court's order denying Blunt's motion for resentencing or sentence modification is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals