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DISTRICT I

July 29, 2015

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

2014AP1923

State of Wisconsin v. Souvannaseng Boriboune
(L.C. #2000CF1937)

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

Souvannaseng Boriboune, *pro se*, appeals from orders of the circuit court that denied his motion for sentence modification or reinstatement of his original sentence and his motion for reconsideration. 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 (2013-14).¹ We summarily affirm the orders.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In April 2000, Boriboune was charged with one count of first-degree sexual assault with use of a dangerous weapon and one count of armed robbery with the use of force. He pled guilty to those offenses. In February 2001, Boriboune was sentenced to concurrent terms of fourteen years' initial confinement and twenty years' extended supervision for each count. However, the plea colloquy was defective, as the circuit court failed to caution Boriboune about the potential immigration consequences of a plea, and, upon his postconviction motion, Boriboune was allowed to withdraw the plea.

In January 2003, Boriboune again entered guilty pleas to the charged offenses. He was sentenced in March 2003 by a different judge than the one who had sentenced him in 2001. This time, the circuit court imposed concurrent sentences for eighteen years' initial confinement and sixteen years' extended supervision. A notice of intent to pursue postconviction relief was filed, but no appeal followed.

In February 2010, Boriboune filed a *pro se* motion seeking sentence modification. He argued that the increase in his sentence was presumptively vindictive and, thus, a constitutional due process violation.² The circuit court denied the motion. Boriboune moved for reconsideration, which was also denied. Boriboune appealed, but this court affirmed. We concluded that the sentence was not presumptively vindictive because it was a change in law, not circuit court error, that resulted in the successful plea withdrawal, and the resentencing was before a different judge. See *State v. Boriboune*, No. 2011AP347-CR, unpublished slip op., ¶7

² Boriboune's abuse-of-discretion arguments were not considered, as the motion for sentence modification was deemed untimely under either WIS. STAT. § 973.19 or WIS. STAT. RULE 809.30(2).

(WI App July 24, 2012). Further, the longer term of confinement was justified by facts of record. *See id.*, ¶8.

In August 2014, Boriboune filed another motion for sentence modification or reinstatement of the original sentence. He again raised a due process/vindictive sentence claim. He also claimed that he had been sentenced on inaccurate information—specifically, the State’s assertion at the resentencing hearing that the victim’s fear was exacerbated by contact from Boriboune’s family after his successful plea withdrawal. The circuit court denied the motion, concluding that Boriboune was raising issues that were already litigated and, to the extent that he raised new issues, those were procedurally barred. Boriboune moved for reconsideration, asserting that procedural bars are inapplicable to sentence modification motions. The motion for reconsideration was also denied, and Boriboune appeals.

The circuit court is correct that the due process/vindictive sentence issue has already been raised; it was the exact focus of the 2010 motion. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

With respect to the inaccurate information issue, the circuit court appears to have determined this issue would be procedurally barred by the rule against successful postconviction motions as set out by WIS. STAT. § 974.06(4) and as explained in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Boriboune counters that sentence modification motions are not subject to procedural bars. In some instances, Boriboune would be correct: a motion alleging a new factor or challenging the circuit court’s exercise of sentencing discretion

does not fall under § 974.06. See *State v. Grindemann*, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507.

However, a due process claim *will* fall under WIS. STAT. § 974.06, see *Grindemann*, 255 Wis. 2d 632, ¶19 n.4, and a defendant's right to be sentenced based on accurate information is a due process right, see *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Thus, Boriboune's inaccurate-information claim is an alleged constitutional error subject to the procedural bar of *Escalona* and, as he fails to offer a sufficient reason for not raising it in his 2010 motion, the circuit court did not err in denying the current motion.³

IT IS ORDERED that the orders are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

³ Boriboune has also failed to establish any inaccuracy. See *State v. Travis*, 2013 WI 38, ¶¶21-22, 347 Wis. 2d 142, 832 N.W.2d 491. He claims only that he did not know or encourage his family to contact the victim; he does not assert that the victim was not actually contacted by his relatives.