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June 28, 2016

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

2015AP1542-CR

State of Wisconsin v. Parrish Christopher Payne
(L.C. # 1995CF953628)

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

Parrish Christopher Payne, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification. 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 order.

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

On April 8, 1996, Payne was sentenced to fifty years' imprisonment following jury verdicts convicting him on one count of kidnapping and two counts of first-degree sexual assault. Payne had a direct appeal; this court affirmed the judgment of conviction. Payne brought *pro se* postconviction motions in June 2003 and December 2009. Both were denied; Payne also lost on appeal both times. In July 2015, Payne filed the underlying motion, seeking sentence modification based on two "new" factors: a 1994 letter reflecting a change to parole policy and sentencing disparity with his co-defendant. The circuit court concluded that neither of these was a new factor and denied the motion.

A new factor is a fact or set of facts that is "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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also State v. Harbor*, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See Harbor*, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. *Id.*, ¶37.

The 1994 letter to which Payne refers is then-Governor Tommy Thompson's letter to the Secretary of the Department of Corrections, directing the Secretary to pursue all available avenues to block the mandatory release to parole of certain violent prisoners. However, this court has already determined that the governor's letter is not a new factor unless the sentencing court expressly relied on parole eligibility as a factor in determining the sentence length. *See State v. Delaney*, 2006 WI App 37, ¶¶9-12, 289 Wis. 2d 714, 712 N.W.2d 368, *abrogated on*

other grounds by Harbor, 333 Wis. 2d 53, ¶¶47, 52. Payne does not show that the sentencing court expressly considered his parole eligibility, so we conclude the circuit court properly determined the letter is not a new factor.

Payne's co-defendant, Timothy Tuitt, was sentenced first and received twenty-six years' imprisonment for the same convictions as Payne. Payne complains about the disparity between Tuitt's sentence and his. The circuit court determined that the disparity is not a new factor because Payne's sentencing court was clearly aware of Tuitt's sentence. While Payne admits that his sentencing court was aware of Tuitt's sentence length, he nevertheless asserts that the court improperly exercised its sentencing discretion. He emphasizes that the actual new factor to which he refers is a comment from Tuitt's court that the offenses in this matter were part of a single course of conduct, warranting concurrent sentences; Payne's sentences are consecutive.

First, to the extent Payne is challenging the sentencing court's exercise of discretion, the circuit court properly determined the challenge is time-barred. A defendant may seek sentence modification in one of two ways, one of which is through WIS. STAT. § 973.19. *See State v. Noll*, 2002 WI App 273, ¶9, 258 Wis. 2d 573, 653 N.W.2d 895. Section 973.19, in turn, provides a defendant with two options. If the defendant plans to seek sentence modification only because of a too-harsh sentence, he may do so within ninety days of sentencing. *See WIS. STAT. § 973.19(1)(a)*. Otherwise, the defendant may pursue relief in accord with WIS. STAT. RULE

809.30, the rule for direct appeals following criminal convictions. *See* WIS. STAT. § 973.19(1)(b). Both deadlines under § 973.19(1) are long expired.²

Second, it is true that a motion for sentence modification invoking the circuit court’s inherent authority may be brought at any time. *See Noll*, 258 Wis. 2d 573, ¶¶11-12. But that requires Payne to demonstrate a new factor. *See id.* The comments made by the court at Tuitt’s sentencing were in existence at the time of Payne’s sentencing, and Payne does not establish that the comments were “unknowingly overlooked.” *See Rosado*, 70 Wis. 2d at 288. We thus agree with the circuit court that Payne has not shown a new factor relative to Tuitt’s sentence.

Finally, this sentencing-disparity argument is procedurally barred. In his 2009 motion and resulting appeal, Payne raised an argument about the sentencing disparity based on Tuitt’s sentencing court’s comments. Then, Payne argued that his sentence was cruel and unusual in light of Tuitt’s; presently, he claims an equal protection violation. However, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”³ *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

² To the extent Payne claims he is still entitled to pursue WIS. STAT. § 973.19 relief, he is simply mistaken.

³ The matter is also procedurally barred by WIS. STAT. § 974.06 and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Payne correctly notes that a sentence modification motion, “insofar as it alleges a new factor or challenges the court’s exercise of sentencing discretion ... is not subject to § 974.06.” *See State v. Grindemann*, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* WIS. STAT. § 974.06(1) (limiting § 974.06 motion to jurisdictional and constitutional claims). However, to the extent that Payne argues the sentencing disparity violates equal protection, he is making a constitutional claim. *See Ocanas v. State*, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975).

IT IS ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals