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DISTRICT II

October 12, 2016

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

2015AP2598-CR	State of Wisconsin v. Corey L. Evans (L.C. #2008CF17)
2015AP2599-CR	State of Wisconsin v. Corey L. Evans (L.C. #2008CF29)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Corey L. Evans appeals a circuit court order denying his postconviction motion for a 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 Because Evans's postconviction claims are procedurally barred, we affirm.

In Sheboygan County circuit court case Nos. 2008CF17 and 2008CF29, Evans was charged with fifteen offenses, all alleging the WIS. STAT. § 939.62(1) penalty enhancer for a

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

habitual offender (repeater). Across both cases, upon his no contest pleas, Evans was convicted of seven counts of burglary, three counts of misdemeanor theft, and two counts of disorderly conduct, all as a repeater. On each of the burglary convictions, the circuit court imposed consecutive bifurcated sentences comprising two years and eight months of initial supervision, followed by two years and eight months of extended supervision. On each of the five misdemeanors, the circuit court sentenced Evans as a repeater to one year of initial confinement, followed by one year of extended supervision.² The misdemeanor sentences were ordered to run concurrent with each other but consecutive to the burglary sentences.

Evans filed a WIS. STAT. § 974.06 postconviction motion alleging that the criminal complaints in both circuit court cases were “fundamentally defective” and that his trial counsel provided ineffective assistance. The circuit court denied the motion and Evans filed notices of appeal. Following Evans’s failure to file a timely appellant’s brief or extension motion, this court dismissed the consolidated appeals.

Thereafter, Evans filed a second postconviction motion in both cases, asserting that the circuit court improperly sentenced him as a repeater and that this constituted either an erroneous exercise of discretion or a new factor justifying sentence modification. Specifically, Evans requested that the circuit court “vacate the repeater portion of his sentence and allow the portion of the substantive crime to proceed” and “[a]mend the judgment of convictions to reflect that Evans is not a repeat offender.” The circuit court denied Evans’s motion, finding that “there was

² Though Evans was charged as a habitual offender on all counts, the sentencing court only invoked the penalty enhancer on Evans’s misdemeanor sentences.

no new factor and the Court did not abuse its discretion because there was an adequate basis for the repeater enhancer in the Plea Hearing transcripts.” Evans appeals.

A defendant cannot raise claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a WIS. STAT. § 974.02 postconviction motion, on direct appeal, or in a previous § 974.06 motion, unless he or she presents a sufficient reason for failing to raise the issue earlier. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); § 974.06(4) (a defendant is required to raise all available grounds for relief in his original, supplemental or amended motion, and “[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason).

As he argued postconviction, Evans maintains that the circuit court erroneously sentenced him as a repeat offender “when there was an inadequate admission from the defendant and the circuit court failed to give a proper colloquy, and the State only presented a CCAP report for proof of prior convictions.”³ Evans appears to acknowledge that he admitted the prior convictions underlying the repeater enhancer as part of the plea-taking procedures in No. 2008CF29, but complains his admission was insufficiently specific. Insofar as Evans maintains that he was improperly sentenced as a repeater, we conclude the postconviction court properly denied his motion because his claims are procedurally barred under WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. Evans could have, but did not, challenge the procedures underlying his

³ Evans entered his pleas in connection with the two circuit court cases on separate dates. With regard to Evans’s complaints about the inadequacy of his plea colloquy in No. 2008CF17, as Evans himself acknowledges, the circuit court did not invoke the repeater enhancer and imposed a sentence less than the statutory maximum for the underlying crime of burglary. Therefore Evans’s claims, even if true, would not entitle him to relief in that case.

enhanced misdemeanor sentences earlier, as part of his prior § 974.06 postconviction motion, and he has not alleged a sufficient reason for this failure.⁴

Evans also argues that the repeater portion of his sentence is void under WIS. STAT. § 973.13,⁵ and that pursuant to *State v. Flowers*, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), his claims are not subject to *Escalona-Naranjo*'s procedural bar. In *Flowers*, recognizing that legally excessive sentences are void under § 973.13, we created a narrow exception to the procedural bar in situations where the State neither proved nor gained the admission of the defendant about the existence of a prior conviction necessary to sustain a repeater allegation. *Flowers*, 221 Wis. 2d at 29-30. In *State v. Mikulance*, 2006 WI App 69, ¶18, 291 Wis. 2d 494, 713 N.W.2d 160, we clarified that a claim under § 973.13 “applies only when the State fails to prove the prior conviction necessary to establish the habitual criminal status (by proof or by admission) or when the penalty given is longer than permitted by law for a repeater.” We determined that where Mikulance argued that the plea-taking court insufficiently failed to advise him of the maximum penalties for his underlying offenses and of the penalty enhancement attributable to his conviction as a habitual offender, he could not raise his claim under § 973.13,

⁴ To the extent Evans insinuates he raised a new factor claim which can be brought at any time, we disagree. A new factor is “a fact or set of facts 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 ... it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citations omitted). That Evans was charged and convicted as a repeater was known to the parties and the circuit court at the time of sentencing. His claims allege error in the plea-taking and sentencing procedures and are more properly construed as a WIS. STAT. § 974.06 postconviction motion.

⁵ WISCONSIN STAT. § 973.13 provides: “In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”

and the narrow exception to the procedural bar in *Flowers* was inapplicable. *Mikulance*, 291 Wis. 2d 494, ¶¶17-20. As in *Mikulance*, Evans cannot use *Flowers* to circumvent *Escalona-Naranjo*'s procedural bar where he did not argue that his sentence exceeded that permitted by the repeater enhancement statute, or that there was no basis presented to the circuit court for determining that Evans was a repeater. Arguing that the circuit court's plea-taking procedures were inadequate to establish Evans's understanding of his repeater status does not bring Evans's claims within the narrow exception set forth in *Flowers* and *Mikulance*.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals