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DISTRICT I

September 20, 2017

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

2016AP810-CR State of Wisconsin v. David Eric Williams (L.C. # 1997CF974359)

Before Brennan, P.J., Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David Eric Williams, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification.[1] Based upon our review of the briefs and record, we conclude

[1] The order also denied Williams' motion for sentence credit, but he does not address that portion of the order on appeal, so the issue is deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[2] The order is summarily affirmed.

On February 13, 1998, a jury convicted Williams of two offenses: possession with intent to deliver heroin within 1000 feet of a school as a party to a crime as a second or subsequent offense, contrary to WIS. STAT. §§ 961.14(3)(k) (1997-98),[3] 961.41(1m)(d)1., 961.49(1), (2)(a), 939.05, and 961.48; and delivery of heroin within 1000 feet of a school as a second or subsequent offense, contrary to WIS. STAT. §§ 961.14(3)(k), 961.41(1)(d)1., 961.49(1), (2)(a), and 961.48. Because of the enhancers, each offense carried a maximum penalty of forty years' imprisonment. On the second count, the delivery offense, the circuit court sentenced Williams to twenty years' imprisonment, consecutive to a parole revocation sentence. On the first count, the possession offense, the circuit court sentenced Williams to fifteen years' imprisonment, imposed and stayed in favor of ten years' probation, consecutive to the other sentence.

Since 1998, Williams has litigated various postconviction motions and appeals. On March 31, 2016, he filed the motion underlying this appeal, which is approximately his tenth substantive postconviction motion.[4] His main assertion is that the circuit court was vindictive and prejudicial in imposing his sentences, penalizing him for rejecting a plea and going to trial.[5] Williams claims this prejudice is shown by lesser sentences given by the circuit court to others convicted of WIS. STAT. § 961.41 violations. The circuit court denied the motion, describing the

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] All references to statutes in WIS. STAT. chs. 961 and 939 are to the 1997-98 version.

[4] The record on appeal contains four additional motions filed after the March 31, 2016 motion.

[5] The Honorable Mel Flanagan imposed Williams' sentences.

claim of prejudice as "rank speculation" and noting that the claim was also procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994).[6] Williams then commenced this, his fifth appeal.

As Williams phrases the issue, he "will show by the Sentencing Judge own record that his sentencing Was Vindictive and PreJudice … [because] he is the only person that this Judge sentence to 240 month for 961.41[.]" (some capital letters omitted). In his brief, Williams lists thirty-five circuit court case numbers, the statutory references for the defendants' crimes of conviction, and the sentences imposed, then complains, "I'm the only one with a sentencing like mine."

First, Williams' brief utterly fails to comply with the rules of appellate procedure for briefs. *See* WIS. STAT. RULE 809.19(1)(a)-(f). In particular, he fails to cite to any appropriate legal authority for what might constitute judicial vindictiveness. We need not consider arguments unsupported by citation to legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Williams also fails to include any citations to the record to demonstrate any words or actions of the circuit court that would demonstrate vindictiveness.[7] We need not search the record for facts to support a party's arguments. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127.

Second, to the extent Williams is seeking sentence modification because he believes his sentence is excessive, the motion is time-barred. A claim that a sentence is excessive must be

[6] The Honorable Carl Ashley denied Williams' motion.

[7] "See sentencing transcript" is not a valid citation.

made either during the initial postconviction phase, *see* ***State v. Krueger***, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984), or within ninety days of sentencing, *see* WIS. STAT. § 973.19(1)(a).

Third, to the extent Williams is making other claims, like an Eighth Amendment claim of cruel and unusual punishment, the motion is procedurally barred by ***Escalona***. Constitutional and jurisdictional claims that could have been raised in a prior proceeding are barred from being raised in a subsequent proceeding absent a sufficient reason for not raising the claims earlier. *See* ***Escalona***, 185 Wis. 2d at 184-85; *see also* WIS. STAT. § 974.06(4). Williams asserts his "sufficient reason" is that this particular issue did not exist previously. However, all of the individuals whose cases Williams cites, except for one, were sentenced prior to January 1, 1999. Perhaps it would have been difficult to find the sentencing information in 1999 at the time of his original postconviction motion, but Williams does not explain why he was not able to bring this issue in motions filed more recently, such as those filed in 2006 or 2009.

Finally, the records Williams provided and the sentencing transcript simply do not bear out his claim of vindictiveness or prejudice from the sentencing court. Wisconsin recognizes the importance of individualized sentencing. *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Defendants do not receive the same punishment simply because they are convicted of the same offense, and disparity alone does not amount to an equal protection violation. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975). Here, though, Williams does not actually identify any defendant convicted of precisely the same offense as

him. Only two of the thirty-five cases he cites involved heroin offenses under WIS. STAT. § 961.41, and those two cases apparently did not include the school or repeater enhancers.[8]

At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

The sentencing transcript in this matter reveals that no improper factors were considered when the circuit court imposed sentence. Williams' offenses took place over two days, near a school, with young children in the home, including one disabled child, shortly after Williams' parole from prison on another drug offense. The convictions in this case represented Williams' ninth and tenth convictions, bringing his total felony convictions to seven; the court noted that significant past prison time was clearly not a deterrent.

While Williams complains that his sentence is four times what the State offered in the plea bargain, we note that even if Williams had taken the plea, the circuit court would not have been obliged to follow the State's recommendation. *See* ***State v. Hampton***, 2004 WI 107, ¶37,

[8] Further, sentencing decisions do not exist in a vacuum, so it is insufficient to simply compare the length of others' sentences without further information. A large number of the cases Williams cites involved convictions for cocaine-related violations of WIS. STAT. §§ 961.41(1)(cm)1. or (1m)(cm)1., for which the maximum penalty was ten years. In one of the cases Williams cites, the defendant received "only" a five-year sentence for a violation of WIS. STAT. § 961.41(1m)(h)2., but five years was the maximum penalty for that marijuana offense.

274 Wis. 2d 379, 683 N.W.2d 14. Ultimately, the sentences Williams received are well within the range authorized by law. They are, therefore, presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. Merely citing to other sentences in other cases for other offenses does not overcome that presumption, nor does such citation demonstrate the sentences imposed are vindictive or prejudiced.

The State now asks us "to warn Williams that continued efforts to pursue repetitive postconviction litigation in this case will result in the imposition of conditions restricting the circumstances under which he could file motions in the circuit court or pursue appeals in this Court" as discussed in ***State v. Casteel***, 2001 WI App 188, ¶¶19-27, 247 Wis. 2d 451, 634 N.W.2d 338.[9] The State suggests we "could counsel Williams that he, too, could be subject to such restrictions if he continues his pattern of serial filings."

Williams is hereby so warned.

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[9] Specifically, those conditions would require Williams to submit by affidavit the following: (1) a copy of the circuit court's written decision and order he seeks to appeal; (2) a statement setting forth the specific grounds upon which this court can grant relief; (3) a statement showing how the issues sought to be raised differ from issues raised and previously adjudicated; and (4) a statement of why any new claims so raised are acceptable under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-86, 517 N.W.2d 157 (1994). *See* ***State v. Casteel***, 2001 WI App 188, ¶25, 247 Wis. 2d 451, 634 N.W.2d 338.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals