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DISTRICT IV

January 25, 2018

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

2016AP2416 State of Wisconsin v. Joseph C. Elam (L.C. # 2008CF387)
2016AP2417-CR State of Wisconsin v. Joseph C. Elam (L.C. # 2004CF273)

Before Lundsten, P.J., Sherman, and Blanchard, 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).

In these consolidated appeals, Joseph Elam, pro se, appeals the circuit court's denial of his request for a positive time adjustment in a 2004 case and his motion for sentencing modification in a 2008 case. 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 (2015-16).[1] We reject Elam's arguments and affirm.

The 2004 case arose out of a fight that escalated into a car chase, with Elam repeatedly ramming the victim's car at speeds of 70-80 miles per hour. Elam entered a deferred prosecution agreement in which he pleaded no contest to two counts of first-degree reckless endangerment. Elam violated the agreement, and the court sentenced Elam to five years of initial confinement and five years of extended supervision on each count, to be served consecutively. Meanwhile, the 2008 case was based on an incident in which Elam took his employer's truck to a bar while on Huber release, became intoxicated, and had a rollover accident on a county highway. A jury found Elam guilty of operating while intoxicated as a fifth or sixth offense and operating while revoked as a second offense. In the 2008 case, Elam was sentenced to a total of eight years, including five years' initial confinement and three years' extended supervision, to be served consecutively to the sentences in the 2004 case.

We first address Elam's petition for positive time adjustment in the 2004 case, which Elam filed on April 25, 2016. Elam filed his petition under a statute that permits courts to adjust a sentence based on the number of positive adjustment days the inmate earned between October 1, 2009, and August 3, 2011. *See* WIS. STAT. § 973.198(1). The circuit court denied Elam's request for adjustment because by the time Elam requested the adjustment, he had already fully served the relevant sentence. The circuit court has broad discretion about whether to grant a petition for positive adjustment time. ***State ex rel. Singh v. Kemper***, 2014 WI App 43,

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

¶¶23-24, 353 Wis. 2d 520, 846 N.W.2d 820, *rev'd in part on other grounds*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86. A circuit court's discretionary decision will not be reversed unless the court erroneously exercised its discretion, and appellate courts look for reasons to uphold the court's exercise of discretion. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

Elam argues that he satisfied all of the requirements for the adjustment and that he should therefore be entitled to an adjustment that would reduce his subsequent consecutive sentences.[2] Elam points to case law from the habeas corpus context that allows a prisoner who is serving consecutive sentences to collaterally attack any of the sentences. *See, e.g.*, ***Garlotte v. Fordice***, 515 U.S. 39, 45-46 (1995). However, those decisions were interpreting the meaning of the federal statutory phrase "in custody." ***Id.*** at 43-44 ("The federal habeas statute authorizes United States district courts to entertain petitions for habeas relief from state-court judgments only when the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'"). In contrast, Wisconsin's statutory procedure for positive adjustment states that "the court may reduce the term of confinement in prison by the amount of time remaining in the term of confinement in the prison portion of *the sentence*." WIS. STAT. § 973.198(5) (emphasis added). This language supports the circuit court's conclusion that an adjustment could reduce only the sentence that Elam was serving when the positive adjustment credits were earned, and was therefore no longer available after Elam had completed that particular sentence.

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[2] The State disputes the amount of positive adjustment time that Elam could claim to have earned under the applicable provisions. We need not resolve this dispute because we conclude that the circuit court did not err in denying Elam's request.

Accordingly, Elam has not persuaded us that the court erroneously exercised its discretion by denying Elam's petition.[3]

We now turn to Elam's appeal of the denial of his motion for modification of his sentence in the 2008 case. This is Elam's third postconviction motion seeking sentence modification. As explained below, each of these motions focuses on the circuit court's comments about Elam's eligibility for state early release programs. Specifically, at sentencing, the circuit court expressed concern that Elam might be released on ERP before serving a sentence that was long enough to address his dangerousness and his rehabilitative needs. The court concluded that Elam was "too dangerous" for ERP but stated that it would revisit this ruling after Elam had served at least five years.

In Elam's first motion for sentence modification, which was filed by an attorney, Elam argued that the circuit court misunderstood his eligibility for ERP. Elam requested that the court designate him as eligible and reduce the term of confinement for his sentence in the 2008 case. After a hearing, the circuit court amended the judgment of conviction to reflect that Elam was eligible for ERP. However, the court did not reduce Elam's confinement. Elam did not appeal this decision.

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[3] In his reply brief, Elam explains that the status of positive adjustment time was uncertain until our supreme court's decision in ***State ex rel. Singh v. Kemper***, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86. Elam filed his petition after the court issued its decision, but by then it was too late to get the benefit on his first sentence. Elam argues that the courts ought to create an equitable remedy for inmates in his position. However, we do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

Elam's second motion for sentence modification, which he submitted pro se, was nearly identical to the first motion. However, Elam requested that the sentence in the 2008 case run concurrently with the sentence in the 2004 case. The circuit court denied this motion. The court explained that Elam had not identified a "new factor" but was instead making the identical arguments he had made in the first motion. Elam filed a motion for reconsideration, which the court also denied. The court explained that it understood how ERP worked when it imposed its sentence, and reiterated its concern that Elam remain incarcerated for his full confinement period in order to protect the community. Elam filed a notice of intent to appeal, but his appeal was dismissed because Elam did not pay the filing fee or submit the paperwork to request a waiver.

Elam's third motion for sentence modification, which is the subject of this appeal, was also premised on the contention that the circuit court did not understand his eligibility for ERP when it sentenced him. This time, however, Elam framed his motion as a due process claim. Specifically, Elam argued that he has a due process right to be sentenced based on accurate information about his eligibility for ERP. The circuit court denied this motion as procedurally barred, concluding that there was no reason Elam could not have made these arguments in his first motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The application of the procedural bar is a question of law that we review de novo. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Elam argues that his current postconviction motion is the first time he is seeking resentencing based on his due process right to be sentenced based on accurate information. We question whether Elam is raising a new claim, or merely rephrasing a claim advanced in his previous motions. Indeed, both of Elam's prior motions for resentencing argued that he had been

sentenced based on inaccurate information about his eligibility for ERP, and that the correct information was a "new fact" that justified a modification. A defendant cannot avoid procedural bar by rephrasing or re-theorizing previously litigated challenges. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990-92, 473 N.W.2d 512 (Ct. App. 1991).

But even if Elam were advancing a constitutional claim that he had not previously litigated, Elam must still overcome the procedural bar of ***Escalona-Naranjo***. Specifically, Elam must show a "sufficient reason" why he did not bring this constitutional claim in his first motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. In his reply brief, Elam argues that his "subjective ignorance" of the legal basis for his claim is a sufficient reason not to apply the procedural bar in this instance. *See* ***State v. Howard***, 211 Wis. 2d 269, 287-88, 564 N.W.2d 753 (1997), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765. ***Howard*** is of no use to Elam. In ***Howard***, our supreme court determined that the procedural bar did not apply because the defendant's argument relied on a later court decision that established "a new rule of substantive law." 211 Wis. 2d at 287. The court explained that under the circumstances, it would be "impractical to expect a defendant to argue an unknown statutory interpretation." ***Id.***

In contrast, nothing in Elam's brief suggests that his current motion relies on a new rule of substantive law. To the contrary, Elam cites a 2006 decision, ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1, for the proposition that he has a due process right to be sentenced based on accurate information. Under the circumstances, we conclude that Elam has not demonstrated a sufficient reason for omitting this claim from his previously litigated motions. We therefore affirm the circuit court's decision to deny Elam's motion as procedurally barred by ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Upon the foregoing reasons,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Acting Clerk of Court of Appeals