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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

February 6, 2018

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Katherine Desmond Lloyd
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Sean Fitzgerald Rowell 255649
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2017AP1259-CR State of Wisconsin v. Sean Fitzgerald Rowell
(L.C. # 1992CF923243)

Before Brennan, P.J., Kessler 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).

Sean Fitzgerald Rowell, *pro se,* appeals a circuit court order denying his postconviction motion for sentence modification. He also appeals the order denying reconsideration. He contends that he should be relieved of the obligation to pay restitution and related surcharges because, he says, the sentencing court failed to follow the statutory procedure for determining restitution. Alternatively, he asserts that we should vacate his restitution obligation in the interest of justice. Upon our review of the briefs and record, we conclude at conference that this

matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

Rowell and an armed companion robbed a bank on June 27, 1992. Police arrested them the next day. The State charged Rowell with one count of armed robbery as a party to the crime. He pled guilty as charged. The matter proceeded to sentencing on March 2, 1993, and the circuit court imposed a fifty-six-month prison sentence with credit for 154 days in presentence custody.

During the sentencing hearing, the State explained that police had recovered all but $3479 of the stolen money and that the bank requested restitution in that amount. Rowell did not object to the request. At the close of the hearing, the circuit court ordered him to pay "any restitution, to be determined by his parole officer," and applicable court costs.

On March 22, 1993, Rowell's parole officer submitted a proposed restitution order along with a supporting memorandum and work sheet. The submission reflected that the bank was seeking $3479 as restitution and that the agent viewed the request as proper. The circuit court signed and entered the order that day.[2]

In May 2017, Rowell filed the motion underlying this appeal. He alleged that the sentencing court did not follow the statutory procedure for imposing a restitution obligation. He

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

[2] In June 1994, Rowell's parole agent filed another memorandum, again requesting that the circuit court set restitution in the amount of $3479 to compensate the bank for the amount of its loss in the armed robbery. The circuit court signed the proposed order, which states that the amount due is $3749. The State advises that, in its view, the amount reflected in the June 1994 order is a typographical error. Rowell has not challenged his restitution obligation on the basis of the discrepancy in the orders, and we discuss the matter no further.

claimed that this alleged procedural defect entitled him to sentence modification both under WIS. STAT. § 973.19(1)(b), and pursuant to a circuit court's inherent authority to grant sentencing relief based on a new factor. The circuit court determined that the motion was untimely under § 973.19. As to the common-law claim that an alleged procedural defect constituted a new factor, the court found that Rowell did not object to the restitution request at sentencing and that the sentencing court acted properly when it subsequently ordered the requested amount of $3479.[3] Rowell moved to reconsider, asserting that the circuit court should have construed the sentence modification motion as a timely request for postconviction relief under WIS. STAT. § 974.06. The circuit court denied reconsideration on the ground that relief was unavailable under § 974.06. Rowell appeals.

Pursuant to WIS. STAT. § 973.19(1)(b), a convicted person who has requested transcripts of circuit court proceedings may seek sentence modification within the deadlines for pursuing postconviction and appellate relief set forth in WIS. STAT. RULE 809.30. The deadlines provided in the 1993 rules of appellate procedure required a convicted person to file a postconviction motion or notice of appeal within sixty days after service of transcripts. *See* RULE 809.30(2)(h) (1993-94).[4] The docket in this case reflects that the final transcript of circuit court proceedings was served on Rowell's postconviction counsel on July 28, 1993. Rowell thereafter filed a postconviction motion that the circuit court denied on September 28, 1993. He did not file a notice of appeal within twenty days of that decision as required by RULE 809.30(2)(j), and his

[3] The Honorable Jeffrey A. Wagner presided over both the original sentencing and the postconviction motions underlying this appeal.

[4] All subsequent references to WIS. STAT. RULE 809.30 are to the 1993-94 version.

deadlines under RULE 809.30 therefore expired. *See* ***State v. Lagundoye***, 2004 WI 4, ¶20 n.13, 268 Wis. 2d 77, 674 N.W.2d 526. Accordingly, the circuit court correctly determined that he could not pursue his May 2017 motion under § 973.19(1)(b).

Further, Rowell could not pursue relief under WIS. STAT. § 974.06. The circuit court found, and Rowell does not deny, that he has fully served his fifty-six-month prison sentence in this matter. The rule is long settled in this state that a person cannot litigate claims under § 974.06 unless the person is in custody under the sentence he or she desires to attack. *See* ***State v. Bell***, 122 Wis. 2d 427, 430-31, 362 N.W.2d 443 (Ct. App. 1984). Accordingly, the circuit court correctly determined that § 974.06 was not an available mechanism for Rowell to pursue his claims.

Rowell also sought relief under a third theory, namely, the circuit court's inherent authority to modify a sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. To prevail on this theory, a defendant must satisfy a two-prong test. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.***, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *See* ***id.***, ¶¶37-38. If a defendant fails to satisfy one prong of the new factor test, a court need not address the other. *See* ***id.***, ¶38.

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."' ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this

court decides *de novo*. *See* ***id.***, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See* ***id.***

Rowell claims that he has demonstrated a new factor. Specifically, he says the record shows that the circuit court overlooked or did not know the proper way to establish restitution, resulting in the circuit court's failure to do so in conformity with any of the procedural alternatives set forth in WIS. STAT. § 973.20(13)(c) (1993-94).[5]

"[WISCONSIN STAT. §] 973.20(13)(c) requires the [circuit] court to 'give the defendant the opportunity to stipulate to the restitution claimed by the victim.'" ***State v. Szarkowitz***, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990).[6] If the defendant does not stipulate, the statute provides ways for the circuit court to determine the amount of restitution. *See* § 973.20(13)(c)1.-4. Rowell's allegation that the circuit court made a procedural error when establishing restitution fails because, as the State correctly explains, the circuit court complied with the statute.

In ***Szarkowitz***, a convicted defendant received a restitution summary as an attachment to a presentence investigation report. *See* ***id.***, 157 Wis. 2d at 745, 748. The defendant did not object at sentencing to the amount claimed in the summary. *See* ***id.*** We held that the defendant's

[5] All subsequent references to WIS. STAT. § 973.20(13)(c) are to the 1993-94 version.

[6] The legislature did not amend WIS. STAT. § 973.20(13)(c) between the date we decided ***State v. Szarkowitz***, 157 Wis. 2d 740, 460 N.W.2d 819 (Ct. App. 1990), and the date that Rowell was sentenced in this matter.

failure to voice an objection constituted a constructive stipulation to the amount claimed. *See* ***id.*** at 749. The circumstances in Rowell's case are analogous to those discussed in ***Szarkowitz***. In both cases, a convicted defendant received notice as to the amount of restitution claimed before the circuit court imposed sentence. In both cases, the defendant did not object. Although in this case Rowell received notice of the claimed restitution during the sentencing hearing rather than in an attachment to the presentence investigation report, this is a distinction without a difference. The State revealed in open court the amount of restitution that the victim wanted. Rowell could have objected. He did not, and therefore he constructively stipulated to the amount sought. *See* ***id.*** Accordingly, he fails to show any defect in the restitution procedure, let alone a new factor within the meaning of ***Harbor***.

Significantly, Rowell has not filed a reply brief in this court, and thus he has not responded to the State's contention that ***Szarkowitz*** defeats his new-factor claim. We take his lack of response as a concession that ***Szarkowitz*** is controlling authority in regard to this issue. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to respond in a reply brief may be deemed a concession).

Moreover, were we to reject Rowell's concession or conclude that the sentencing court made a procedural error when ordering restitution—and we do neither—we would nonetheless deny Rowell's claim that he has identified a new factor within the meaning of ***Harbor***. A new factor must be something that is '"highly relevant"' to the sentence imposed. *See* ***id.***, 333 Wis. 2d 53, ¶40 (citation omitted). Rowell fails to demonstrate that the procedural steps involved in determining restitution were highly relevant to his sentence. Therefore, he fails as a matter of law to show that any alleged procedural error is a new factor that might earn him relief.

Finally, Rowell seeks reversal under WIS. STAT. § 752.35. He asserts that he is entitled to relief from his restitution obligation "to correct this miscarriage of justice." This court has discretionary power to reverse under § 752.35, if we conclude that justice has miscarried. *See* ***State v. Jones***, 2010 WI App 133, ¶43, 329 Wis. 2d 498, 791 N.W.2d 390. Our power is reserved, however, for '"exceptional cases."' *See* ***id.*** (citation omitted). This is not such a case. As we have explained, Rowell failed to demonstrate any error in the procedure used to establish his restitution obligation, and he failed to demonstrate that the procedure selected, even if erroneous, was highly relevant to his sentence. Further, Rowell does not dispute that he caused his victim monetary loss. We reject the suggestion that justice would be served by releasing him from his restitution obligation and instead saddling his victim with the financial burden of his crime.

Therefore,

IT IS ORDERED that the orders are summarily affirmed.

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

Diane M. Fremgen
Acting Clerk of Court of Appeals