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DISTRICT I

February 21, 2018

To:

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

2017AP980

State of Wisconsin ex rel. Cleveland Lee, Sr. v. Jon Litscher
(L.C. # 2016CV8841)

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).

Cleveland Lee, Sr., *pro se*, appeals from a February 21, 2017 circuit court order denying his petition for *habeas corpus* relief and from an April 21, 2017 circuit court order denying his motion for reconsideration.¹ Based upon our review of the briefs and record, we conclude at

¹ We do not address the merits of the petition, but we note that it alleged an *ex post facto* violation concerning the extended supervision component of Lee's sentences and also suggested there was a problem with the structure of his sentences.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2015-16).² For reasons discussed below, we dismiss the appeal for lack of jurisdiction.

By order dated July 18, 2017, this court concluded that Lee’s appeal of the February 21, 2017 order was untimely and that this court therefore lacks jurisdiction to review that order. In addition, we questioned whether we have jurisdiction over the circuit court’s second order because “[i]t is unclear from the record before us whether the motion for reconsideration which was denied in the April 21, 2017 order presented issues which could have been raised in an appeal from the February 21, 2017 order.” We explained:

An appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See Silvertown Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). The concern is that a motion for reconsideration not be used to extend the time to appeal from a judgment or order when that time has expired. *Id.*

We directed the parties to “address, as the first issue in their appellate briefs, whether this court has jurisdiction to review the reconsideration order.”

In order for this court to have jurisdiction over an appeal from the denial of a motion for reconsideration, “a party must present issues other than those determined by the original final order or judgment.” *Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 45, 310 N.W.2d 615 (1981). Stated another way, an “order is not appealable where ... the only issues raised by the motion were disposed of by the original judgment or order.” *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). Whether a party’s motion for reconsideration raised a new issue “presents a question of law that this court reviews *de novo*.” *State v. Edwards*, 2003 WI 68, ¶7,

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

262 Wis. 2d 448, 665 N.W.2d 136 (italics added). To determine whether new issues exist, we must compare the issues raised in the motion for reconsideration with those disposed of in the original order. See *Harris v. Reivitz*, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987).

In his opening brief, Lee disagrees with this court's conclusion that we lack jurisdiction over the February 21, 2017 order, asserting that under WIS. STAT. § 805.17(3), the time for Lee to initiate his appeal commenced after the motion for reconsideration was denied. As we explained in our July 18, 2017 order, the filing of a motion for reconsideration in this case did not affect the deadline to appeal from the first order because § 805.17(3) does not apply to reconsideration motions unless they are brought after there has been a trial to the court or another evidentiary hearing. See *Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.*, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993).

Lee also alleges that he brought his motion for reconsideration to correct a “manifest error” in the circuit court's decision concerning the retroactivity of WIS. STAT. § 973.01(4m), the early release law at issue in Lee's petition for *habeas corpus*. Lee notes that the circuit court ordered the Respondent to provide additional briefing on that issue.

In its response brief, the Respondent argues that Lee's motion for reconsideration did not present new issues. The Respondent notes that the circuit court's February 21, 2017 decision “determined that the repeal of [WIS. STAT.] § 973.01(4m) did not violate Lee's rights under the Ex Post Fact[o] Clause of the Constitution because the law was not retroactive as to him.” The Respondent argues that Lee's motion for reconsideration “merely took issue with the circuit court's application” of *State ex rel. Singh v. Kemper*, 2016 WI 67, 14, 371 Wis. 2d 127, 883

N.W.2d 86, a case that was addressed in the parties' briefs and in the circuit court's February 21, 2017 decision.

In his reply brief, Lee attempts to refute the Respondent's argument. He contends that the fact that the circuit court directed the Respondent to respond to one of the arguments in the motion for reconsideration demonstrates that Lee raised a new issue in his motion. We are not persuaded. Lee's motion for reconsideration challenged one of the reasons cited in the circuit court's decision rejecting Lee's *ex post facto* challenge. The motion for reconsideration also challenged the circuit court's analysis of Lee's sentence structure argument. The issues raised in Lee's motion for reconsideration were not new. Rather, Lee took issue with aspects of the circuit court's analysis of the primary issues he raised in his petition. Because Lee's motion for reconsideration did not raise new issues, we lack jurisdiction to review the order denying the motion for reconsideration. *See Ver Hagen*, 55 Wis. 2d at 25.

Upon the foregoing, therefore,

IT IS ORDERED that this court lacks jurisdiction to review the April 21, 2017 order and, therefore, the appeal is summarily dismissed. *See* WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals