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DISTRICT I

July 2, 2018

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

2017AP2309-CR State of Wisconsin v. Earl Jones, Jr. (L.C. # 1997CF973526)

Before Kessler, P.J., Brennan and Brash, 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).

Earl Jones, Jr., appeals the circuit court's order denying his motion for resentencing. Jones argues that he is entitled to resentencing based on a "new factor." After 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 affirm.

Jones was convicted of felony murder and armed robbery as a party to a crime in 1997. Since his conviction, he has brought nine motions seeking postconviction relief. In the current motion, Jones argues that a new factor exists that entitles him to resentencing.

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 (citation omitted). Jones contends that there is a new factor because his convictions violate the Double Jeopardy Clause of the United States Constitution.

Jones's argument fails. Jones has not shown the existence of a new factor. His argument is not based on a *fact*; it is based on a legal claim. Jones's legal claim is procedurally barred because he previously raised the argument, or a similar version of it, in prior postconviction motions. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

Even if Jones's argument was not procedurally barred, he would not be entitled to relief. It is well established that conviction of both felony murder and the felony underlying the felony

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

murder conviction—here, armed burglary—constitutes a double jeopardy violation. *See* ***State v. Gordon***, 111 Wis. 2d 133, 136, 330 N.W.2d 564 (1983). Here, however, Jones was not convicted of both felony murder and armed burglary. Jones was convicted of felony murder and armed robbery. Because Jones was not convicted of both felony murder and the underlying felony, there is no double jeopardy violation.

Upon the foregoing,

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

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

Sheila T. Reiff
Clerk of Court of Appeals