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DISTRICT II

January 30, 2019

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

2018AP796 State of Wisconsin v. Mark J. Brady (L.C. #2009CF411)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Mark J. Brady, pro se, seeks a new sentencing hearing on the grounds that the circuit court erred in denying his motion that his trial counsel was prejudicially ineffective for not investigating prior OWI convictions and denying his motion for sentence modification based upon a new factor (that two prior convictions were removed from his Washington and Wisconsin driving records). 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 affirm Brady's judgment of conviction for operating while intoxicated as a ninth offense (OWI-9th) and the circuit court's orders denying Brady's postconviction motions.

On October 31, 2009, Brady was arrested and subsequently charged with OWI-9th, contrary to WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)6. Brady pled guilty to OWI-9th on August 17, 2016, in a negotiated plea agreement in which charges in three other felony matters were dismissed and read in, and a joint recommendation was made by the parties that Brady serve a prison sentence of ten years, comprised of five years' initial confinement and five years' extended supervision. Brady stipulated at the plea hearing that this conviction would be his ninth OWI conviction. The court expressly asked Brady at the plea hearing if he had previously been convicted for operating while intoxicated on 9/19/89, 4/15/90, 12/15/91, 10/9/92, 10/17/92, 10/2/94, 5/7/95 and 5/14/96. Brady responded he was guilty, and the court found him guilty of OWI-9th and followed the joint sentencing recommendation.

A year later, Brady filed a motion for sentence modification on the ground that the State of Washington driving abstract no longer showed two of his prior convictions for operating while intoxicated. The circuit court appropriately noted that Brady did not argue in his motion that the convictions did not occur, just that they no longer showed on his State of Washington driving abstract. The court found that Brady had not shown a "new factor" and denied his motion for sentence modification.

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

Brady filed a "nearly identical" motion to modify his sentence two months later, which the court summarily denied without a hearing. A month later, Brady filed another motion seeking modification of his sentence on the ground that "[t]he court base[d] prior OWI convictions solely on Wis. DMV records." The court again denied Brady's motion as his arguments mirrored those raised in his earlier motions. The court also denied Brady's claim that his trial counsel was ineffective for not investigating the prior countable offenses as "largely unsupported and conclusory." We agree with the circuit court.

Brady does not proffer that he has not been convicted nine times for OWI; he argues only that records in the State of Washington have changed.[2] Brady does not challenge his admission at his plea hearing that he was convicted of OWI on 9/19/89, 4/15/90, 12/15/91, 10/9/92, 10/17/92, 10/2/94, 5/7/95 and 5/14/96. Brady also "stipulated" to the convictions as part of his plea agreement. "[A] defendant does not need to admit to the factual basis in his or her own words; the defense counsel's statements suffice." *See* ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. The court may also look at the totality of the circumstances to determine whether a defendant has agreed to the factual basis underlying the guilty plea. *See* ***id.*** Whether facts presented constitute a new factor is a question of law we review independent of the circuit court. ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

We agree with the circuit court that no new factor is present as Brady stipulated as part of a plea bargain to having eight prior OWI convictions and also admitted to the actual dates of those convictions. The fact that the State of Washington may have purged old convictions from

[2] As part of his motion, Brady submitted a driving record abstract from the State of Washington that indicated "[n]o violations, convictions, or accidents currently on file for this record."

their records is not a new factor as to whether Brady had eight prior convictions for OWI prior to his plea in this case.

Even if we accepted Brady's arguments, they would not change the outcome as only two of his three State of Washington convictions would fall off his State of Washington driving record. Whether the conviction before us is a seventh or a ninth is not material as the maximum sentence and minimum term of initial confinement is the same for a seventh and ninth OWI offense. *See* WIS. STAT. § 346.65(2)(am)6.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and orders denying Brady's postconviction motions of the circuit court are summarily affirmed, pursuant to 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