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**DISTRICT I**

February 28, 2019

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

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2018AP1363-CR State of Wisconsin v. Mark Daniel Cabagua
(L.C. # 2008CF005374)

Before Kessler, P.J., Brennan 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).**

Mark Daniel Cabagua, *pro se*, appeals from an order denying his postconviction motion, which sought sentence modification, resentencing, or plea withdrawal. 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(1) (2017-18).[1] We conclude that Cabagua's resentencing and plea withdrawal claims are procedurally barred and that he has not shown a new factor justifying sentence modification. Therefore, we summarily affirm.

In 2008, Cabagua entered ***Alford***[2] pleas to three felonies: one count of repeated sexual assault of a child (penis-to-mouth sexual intercourse); one count of first-degree sexual assault of a child (penis-to-vagina sexual intercourse); and one count of second-degree sexual assault of a child (penis-to-vagina sexual intercourse). *See* WIS. STAT. §§ 948.025(1)(a), 948.02(1), and 948.02(2) (2005-06, 2007-08). The victim was a minor who lived with Cabagua. The trial court accepted Cabagua's ***Alford*** pleas and found him guilty.[3]

At the sentencing hearing, the State said that the criminal complaint "accurately describe[s] the progression of events beginning with how these things started, continuing on to what they escalated to at the second residence, and then how they escalated to intercourse, penis to vagina, when they were at the third and final residence." Trial counsel did not contradict the State except to note that the allegations in the complaint did not reference violence as the State had suggested.

The trial court imposed sentences totaling fifty years of imprisonment, bifurcated as twenty-five years of initial confinement and twenty-five years of extended supervision.

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[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] The Honorable Carl Ashley accepted Cabagua's pleas, sentenced him, and denied his first postconviction motion.

Represented by postconviction counsel, Cabagua filed a postconviction motion seeking resentencing because an earlier offer letter from the State had been improperly placed in the court file. The trial court denied Cabagua's motion, stating that it had not seen or read the letter. Cabagua did not appeal.

In 2015, Cabagua filed a *pro se* WIS. STAT. § 974.06 motion alleging numerous bases for relief, including ineffective assistance of trial counsel. In a supplemental motion for postconviction relief, Cabagua submitted three documents that he characterized as "new evidence," including a sexual assault medical examination report indicating that the victim's hymen was intact, a DNA report indicating that no semen was recovered from a bedsheet, and a police report concerning interviews with the victim and others. The trial court denied Cabagua's postconviction motion and supplemental postconviction motion.[4]

This court affirmed the denial of those motions. *See* ***State v. Cabagua***, No. 2015AP2267, unpublished slip op. ¶1 (WI App Jan. 17, 2018). In the course of addressing Cabagua's appeal, we rejected Cabagua's assertion that the medical examination report provided proof that he did not engage in sexual intercourse with the victim. *See* ***id.***, ¶23. We explained:

> The medical report provides that the victim had a normal genital exam. The report specifically showed that the victim's hymen was intact; however, there was a written notation that most children who are victims of sexual abuse have normal medical exams. The nurse practitioner who conducted the examination made it a point to tell the police that the fact that a young girl's hymen is still intact does not mean she did not experience sexual activity. The medical report does not rule out the possibility that the victim had

[4] The Honorable Thomas J. McAdams denied the postconviction motion and the Honorable Mark A. Sanders denied the supplemental postconviction motion.

> sexual intercourse, and, therefore, does not create a reasonable probability that the result of the proceeding would have been different.

***Id.*** The Wisconsin Supreme Court subsequently denied Cabagua's petition for review.

In June 2018, Cabagua filed the postconviction motion that is the subject of his current appeal. That motion, which he titled, "Motion for Sentence Modification/Re[s]entencing," presented three primary issues. (Some capitalization omitted.) First, Cabagua alleged that his trial counsel provided ineffective assistance by failing to contradict the State's sentencing argument that Cabagua had sexual intercourse with the victim and by erroneously informing Cabagua that he would serve only five years in prison.[5] Second, Cabagua sought resentencing on grounds that he was sentenced based on inaccurate information because the trial court erroneously believed Cabagua had sexual intercourse with the victim. Third, Cabagua argued that sentence modification was appropriate based on a new factor: the existence of medical evidence demonstrating that Cabagua "did not commit the statutory crimes charged." (Emphasis omitted.)

The trial court denied Cabagua's motion in a written order.[6] It characterized Cabagua's motion as "a frivolous motion for sentence modification or resentencing," noting that the motion was "predicated" on the same medical report Cabagua relied upon in earlier postconviction

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[5] It appears that this court previously addressed the same issue or a similar issue concerning trial counsel's representations about the length of time Cabagua would serve in prison. *See* ***State v. Cabagua***, No. 2015AP2267, unpublished slip op. ¶37 (WI App Jan. 17, 2018) (rejecting Cabagua's claim that he was misled by trial counsel "'stating the plea was for five years'").

[6] The Honorable Mark A. Sanders denied the motion.

proceedings.[7] The trial court recognized this court's decision that the medical report Cabagua provided did not disprove sexual intercourse, and it reiterated that the medical report did not support Cabagua's "inaccurate information and new factor claims because it does not provide clear and convicting evidence that the defendant never engaged in sexual intercourse with the victim."

The trial court further concluded that Cabagua's claims, including his assertion "that trial counsel misrepresented that the State had agreed to a five-year plea deal," were procedurally barred because Cabagua did not provide a sufficient reason for failing to raise the claims in his prior motion for postconviction relief. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (A prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that could have been raised in the earlier proceeding unless there is a "sufficient reason" for failing to raise it earlier.). This appeal follows.

We agree with the trial court that Cabagua's plea withdrawal and resentencing claims are procedurally barred, for several reasons. First, as noted, ***Escalona-Naranjo*** bars prisoners like Cabagua who have filed prior postconviction motions from seeking collateral review of issues that could have been raised previously unless the prisoner provides a "sufficient reason" for failing to raise those issues earlier. *See* ***id.***, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4).

[7] The trial court also observed that "[t]he only conceivable new factor argument the defendant has raised is his self-described exemplary prison behavior," which the trial court said was not a basis for sentence modification. On appeal, Cabagua clarifies that he is not seeking sentence modification based on his rehabilitation, stating that he "was not arguing his prison behavior as a new factor; he was simply trying to explain to the court his behavior in the prison was not troublesome." Because Cabagua is not relying on his rehabilitation as a new factor justifying sentence modification, we do not discuss this further.

Cabagua's postconviction motion did not offer any reason why he did not previously challenge the trial court's reliance on inaccurate information or trial counsel's failure to make certain objections at the sentencing hearing.[8] Therefore, those claims are procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Second, to the extent Cabagua's prior WIS. STAT. § 974.06 motion and supplemental motion addressed issues that he is raising again now—such as his claim that the medical report proves he did not have sexual intercourse with the victim and his claim that trial counsel erroneously told him he would serve only five years in prison—he is barred from relitigating those issues.[9] *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.").

Finally, we recognize that despite the existence of a procedural bar, a trial court may still modify a sentence if the defendant shows a new factor that warrants modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" is "a fact or

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[8] On appeal, Cabagua asserts that his "failure to raise [his current] issues in prior postconviction proceedings is because he was not learned in the law and was not aware of the law" concerning resentencing and sentence modification. This explanation is insufficient. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) ("The right to self-representation is not a license not to comply with relevant rules of procedural and substantive law.") (brackets, internal quotation marks, and citation omitted). It is also offered for the first time on appeal. *See* ***Northbrook Wisconsin, LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

[9] To the extent Cabagua's argument about trial counsel's prediction of a five-year sentence is different than the argument he raised earlier, his latest claim is also barred because he has not offered a sufficient reason for failing to raise it in his prior postconviction motions. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

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, even though it was then in existence, it was unknowingly overlooked by all the parties." *See* ***id.***, ¶40 (citation omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor," and "[w]hether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." ***Id.***, ¶36.

Here, Cabagua claims the new factor justifying sentence modification is the "medical evidence that Cabagua did not commit the crime." However, this court has already rejected Cabagua's claim that the medical report proves he did not have sexual intercourse with the victim. *See* ***Cabagua***, No. 2015AP2267, unpublished slip op. ¶¶23, 33. Cabagua cannot relitigate the value of the medical report or rely on it to prove the existence of a new factor. *See* ***Witkowski***, 163 Wis. 2d at 990. Because Cabagua has not shown a new factor, he is not entitled to sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶36.

For the foregoing reasons, we conclude that Cabagua is not entitled to resentencing, sentence modification, or plea withdrawal.

IT IS ORDERED that the order of the trial court is 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*