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March 13, 2019

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

2017AP2454-CR

State of Wisconsin v. Carlos D. Robinson (L.C. # 2004CF3436)

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).

Carlos D. Robinson, *pro se*, appeals a circuit court order denying his postconviction motion to modify his sentence. Based upon our review of the briefs and the record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2017-18).¹ We summarily affirm the order.

Background

In 2004, Robinson was convicted on his guilty plea of felony murder while committing an armed robbery. In his direct appeal, Robinson argued that he was entitled to withdraw his plea because the circuit court stated at the plea hearing that the maximum penalty for his offense was thirty-five years' imprisonment, when he actually faced a potential maximum fifty-five year prison sentence. *See State v. Robinson*, No. 2005AP2491-CR, unpublished op. and order at 1 (WI App Aug. 1, 2006). The circuit court denied Robinson's postconviction plea withdrawal motion without a hearing, and we summarily affirmed. *See id.* at 1-2.

In 2007, Robinson, *pro se*, asked the postconviction court to modify his sentence based on various "facts," including a detective's report stating that the victim was found with \$500 in his pants. Robinson argued that the fact that the victim had money was contrary to representations that were made during his sentencing hearing to the effect that Robinson robbed the victim. The postconviction court denied Robinson's request for sentence modification. The postconviction court explained that "[a]lthough the prosecutor indicated at sentencing that money was taken from the victim ... there is no indication that [the circuit court] ever specifically relied on this when [it] sentenced the defendant." The postconviction court further concluded that Robinson's remaining claims were waived by the entry of his guilty plea.

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

Later that same year, Robinson, *pro se*, filed another postconviction motion. He alleged that his trial counsel was ineffective, his due process rights were violated, he did not waive his right to challenge the circuit court's misstatement as to the maximum penalty he faced, and the circuit court erred in accepting his plea. The postconviction court denied Robinson's motion after concluding that it was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In addition, the postconviction court noted that Robinson was re-raising issues that had previously been resolved.

In 2011, Robinson, *pro se*, asked the postconviction court to modify his sentence. He argued that the circuit court misinterpreted the evidence when it considered his culpability and that purported new factors supported modification. The postconviction court denied the motion.

This brings us to Robinson's fifth postconviction motion, which was filed in 2017 and is the subject of this appeal. In this *pro se* filing, Robinson asked the postconviction court to modify his sentence based on a new factor. Specifically, he claimed that he was not told the potential punishment he faced until after he entered his guilty plea. The postconviction court denied the motion explaining that Robinson "has filed numerous prior motions for postconviction relief. His present claim is not a new factor claim but a challenge to the voluntariness of his plea[,] which could have been raised in any of his previous postconviction

motions.” The postconviction court held that Robinson’s claim was barred by *Escalona*, and this appeal followed.²

Discussion

The State argues that Robinson’s current claim is procedurally barred by past proceedings in which he either could have raised it or actually did raise it. *See generally Escalona*, 185 Wis. 2d at 185 (explaining that claims that could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding); *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.”).

Robinson argues that, because he alleged a new factor that he believes justifies modification of his sentence, the procedural bar against successive WIS. STAT. § 974.06 motions should not apply. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828

² After Robinson filed his notice of appeal, he filed another motion asking the postconviction court to modify his sentence based on a new factor. He claimed that if the postconviction court had properly reviewed his prior motion, “[it] would have seen that the new factor is that Robinson was charged with the robbery of someone who had money in both pockets according to Milwaukee police detectives and the Milwaukee County [Medical Examiner]’s ... reports that Robinson submitted with this motion.” (Some uppercasing omitted.) The Medical Examiner’s report was attached to his original motion; however, it does not appear that Robinson developed an argument related to it in that motion.

CCAP records indicate that Robinson’s follow-up motion was denied *after* the record was transmitted. As such, that order is not included in the appellate record. We take judicial notice of CCAP records. CCAP is an acronym for Wisconsin’s Consolidated Court Automation Programs. The online website reflects information entered by court staff. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

(clarifying that despite other procedural bars that may exist, a circuit court may modify a sentence if the defendant shows a new factor that warrants modification). The new factor he relies on is “the actual physical evidence” of the detective’s report and the Milwaukee County Medical Examiner’s report, which he contends show that the victim was not robbed. While he concedes that he previously raised this claim before the postconviction court, he submits that at that time he “only had his word and not the actual evidence to prove that no robbery was committed[.]” For the reasons discussed below, we agree with the State that Robinson’s claim is barred.

As stated, in the postconviction motion that led to this appeal, Robinson argued that his sentence should be modified because he was not told the potential punishment he faced until after he entered his guilty plea. The postconviction court concluded his claim was barred by *Escalona*, and Robinson does not pursue this argument on appeal.

Instead, on appeal, he asserts his sentence should be modified because the circuit court sentenced him on inaccurate information that he stole money from the victim before he shot and killed him. Robinson submits that he has recently come into the possession of an investigation report from the Milwaukee County Medical Examiner and a statement made by a Milwaukee police detective, both of which indicated that the victim had a large amount of money on him. Consequently, he argues he was sentenced for the robbery of a victim “who clearly wasn’t robbed[.]”

Even if we set aside the impropriety of raising a new argument on appeal, this claim is the same one Robinson made in his 2007 postconviction motion. The postconviction court denied that motion, and Robinson did not appeal that decision. While Robinson now references

a report from the Milwaukee County Medical Examiner as additional support for his claim that he was sentenced based on misinformation that he robbed the victim, information of that nature was previously presented in the detective's report he submitted in 2007. Consequently, this claim is barred. *See Witkowski*, 163 Wis. 2d at 990. As summed up by the State, Robinson cannot evade *Escalona* simply by repackaging his claim as a "new factor" and seeking sentence modification.

Therefore,

IT IS ORDERED that the order 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