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DISTRICT I

March 21, 2019

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

2018AP923 State of Wisconsin v. Steven J. Earsley (L.C. # 1998CF1856)

Before Kloppenburg, Brash 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).

Steven J. Earsley, *pro se*, appeals an order denying his motion for resentencing and an order denying his motion for reconsideration. 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 (2017-18).[1] We summarily affirm.

In 1998, a jury found Earsley guilty of five felonies, including kidnapping and second-degree sexual assault with use of force. He was sentenced to a total of 135 years in prison. Represented by postconviction counsel, Earsley filed a postconviction motion pursuant to WIS. STAT. RULE 809.30. The motion challenged one of the convictions on double jeopardy grounds, raised a due process challenge related to another conviction, and alleged ineffective assistance of trial counsel with respect to both of those issues. The trial court granted the motion to dismiss one conviction and denied the remainder of Earsley's motion. An amended judgment reflects a total sentence of 125 years in prison for the four remaining convictions. Earsley did not appeal the trial court's order.

In 2000, Earsley filed two *pro se* motions: a motion seeking a copy of his presentence investigation report and a WIS. STAT. § 974.06 motion for postconviction relief. The trial court denied the motions. Earsley appealed the denial of his § 974.06 motion, and we summarily affirmed. *See* ***State v. Earsley***, No. 2000AP1145, unpublished op. and order (WI App Jan. 3, 2001).

In 2009, Earsley filed a *pro se* motion asking the trial court to "commence all consecutive sentences on the day they were imposed" so that his sentences would run concurrent to each other. The trial court denied the motion, and Earsley did not appeal.

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

In 2017, Earsley filed a *pro se* motion seeking permission to use funds from his release account to purchase legal documents. The trial court denied the motion, and Earsley did not appeal.

In 2018, Earsley filed the *pro se* motions that are the subject of this appeal. First, Earsley filed a motion for resentencing. In that motion, he identified two grounds for resentencing:

> (1) his sentence, which establishes a release eligibility date well beyond his life expectancy, is per se excessive because none of the crimes for which he was convicted carry a sentence of life imprisonment; or, alternatively, (2) while the trial court briefly mentioned the three primary sentencing factors, it failed to explain how these factors yield a 125-year sentence.

(Emphasis omitted.) The motion faulted the trial court for not more fully explaining the basis for the sentences imposed. Earsley also asserted that the 125-year total sentence, which he claims is beyond his life expectancy, "is far greater than necessary for the attainment of the trial court's identified societal goals."

The trial court denied the motion on procedural grounds. It noted that Earsley failed to bring his challenge to his sentence within the deadlines outlined in WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30. It further indicated that Earsley's motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), because Earsley previously filed two postconviction motions and an appeal.

Earsley filed a motion for reconsideration asserting that the trial court should have "liberally construed" his motion to be "a motion for resentencing based on the court[']s 'inherent authority' to consider new factors of which the 90 day rule does not apply." He also argued that "the procedural bar of ***Escalona-Naranjo*** does not apply to motions for resentencing based on a

'new factor.'" (Italics added.) Earsley asserted that his "exemplary military service record," which was mentioned in his postconviction motion, "was overlooked by all parties" and "should have been considered and discussed" at sentencing.

The trial court denied the motion for reconsideration. In doing so, it rejected Earsley's suggestion that his military service was a new factor, stating: "The defendant's claim that the trial court placed insufficient weight on factors such as his record of military service is not a new factor claim, but an [erroneous exercise] of discretion claim."

On appeal, Earsley argues that the trial court erroneously exercised its sentencing discretion, citing ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). His brief refers to both sentence modification and resentencing, although he ultimately asks to be resentenced. Earsley acknowledges that the trial court denied his motions on grounds that they were untimely, and he briefly addresses the issue of whether his motions are procedurally barred. Citing ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507, Earsley asserts that the trial court has "inherent power" to modify his sentence "at any time."

We agree with the trial court that Earsley's motion for resentencing is procedurally barred. We begin by recognizing that a defendant can challenge his or her sentence using procedures outlined in WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30. Those procedures are governed by specific deadlines, and it is uncontested that those deadlines expired years before Earsley filed his motions.

A defendant can also seek sentence modification by invoking the trial court's inherent authority to modify a sentence. *See* ***State v. Noll***, 2002 WI App 273, ¶11, 258 Wis. 2d 573, 653 N.W.2d 895. A defendant invoking that inherent authority must "demonstrate[] the existence of

a 'new factor' justifying sentence modification." ***Id.*** However, our supreme court has also recognized that "[u]nder other circumstances, a [trial] court has authority to modify a sentence even though no new factor is presented, such as when the court determines that the sentence is illegal or void … or when the court determines that the sentence is unduly harsh or unconscionable." *See* ***State v. Harbor***, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828.

Here, Earsley's motion sought resentencing. It did not seek sentence modification and did not indicate that Earsley was attempting to invoke the trial court's inherent authority to modify a sentence. In his motion for reconsideration, Earsley for the first time mentioned the trial court's "inherent authority." He argued that his "exemplary military service record," which was mentioned in his motion for resentencing, was a "new factor" that justified resentencing.[2] On appeal, Earsley does not argue that his military service meets the definition of a "new factor" as defined in ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), and its progeny. He also does not refute the State's assertion that the trial court considered Earsley's military service at the sentencing hearing.[3] We decline to develop a new factor argument for Earsley. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (holding that unrefuted arguments are deemed conceded); ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (stating that court will not address arguments that are inadequately developed).

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[2] Earsley's motion for reconsideration and appellate brief use the terms sentence modification and resentencing interchangeably.

[3] Earsley did not file a reply brief, but he filed a one-page letter indicating that he would rely on the arguments made in his opening brief.

Earsley's motion for resentencing did not present a specific argument that his sentence was "unduly harsh or unconscionable," *see* ***Harbor***, 333 Wis. 2d 53, ¶35 n.8, much less assert a "good reason" for the twenty-year delay in challenging his sentence, *see* ***Jones v. State***, 70 Wis. 2d 62, 72, 233 N.W.2d 441 (1975) (holding that trial court could, in its discretion, consider sentence modification motions made after the ninety-day statutory limit had expired where there was "good reason for the delay"). While Earsley claimed once in his motion that his sentence was "excessive" and suggested that his sentence was longer than necessary, his motion focused primarily on the trial court's alleged failure to adequately explain its sentence, apply specific sentencing factors to Earsley's case, and properly weigh the sentencing factors. To the extent Earsley intended to argue that he was entitled to sentence modification because his sentence was "unduly harsh and unconscionable" as that term is used Wisconsin case law, we conclude that the legal argument in his motions and appellate brief was inadequate, and we decline to develop an argument for him.[4] *See* ***Pettit***, 171 Wis. 2d at 647.

Finally, a defendant may raise constitutional issues related to his or her sentence using the postconviction procedure set out in WIS. STAT. § 974.06. For instance, a defendant may allege ineffective assistance of counsel or a due process violation. However, as both parties in this case agree, a WIS. STAT. § 974.06 motion "cannot be used to challenge a sentence because of an [erroneous exercise] of discretion." *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Further, successive postconviction motions are procedurally barred unless a defendant provides a sufficient reason for failing to raise the issue in earlier motions. *See* ***Escalona-***

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[4] Earsley's motion for resentencing and appellate brief do not include the words "unduly harsh and unconscionable." *See* ***State v. Harbor***, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828. His motion for resentencing mentions the phrase once when describing a case's holding.

Naranjo, 185 Wis. 2d at 181-82 (A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion.).

In this case, Earsley has not referenced WIS. STAT. § 974.06 and does not appear to be seeking relief pursuant to that statute. To the extent any of his claims raise constitutional issues, we conclude they are procedurally barred because Earsley has not identified a sufficient reason for failing to raise those issues in his prior postconviction motions. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

For the foregoing reasons, we agree with the trial court that Earsley's motion for resentencing is procedurally barred. We summarily affirm the order denying that motion and the motion for reconsideration.

IT IS ORDERED that the orders 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