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DISTRICT I

April 25, 2019

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

2018AP1160-CR State of Wisconsin v. James A. Graham (L.C. # 2002CF6126)

Before Brennan, 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).

James A. Graham, *pro se*, appeals from an order of the circuit court that denied his "petition for writ of error." 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] The order is summarily affirmed.[2]

In October 2002, Graham robbed a Family Dollar store and attempted to rob a second store. Graham was charged with armed robbery and attempted armed robbery, contrary to WIS. STAT. § 943.32(1)(b) and (2) (2001-02). A jury convicted Graham of both offenses. In July 2003, he was sentenced to twenty-six years and three months of imprisonment for the armed robbery and twenty-five years of imprisonment for the attempted armed robbery, to be served concurrently. In 2005, Graham brought a postconviction motion, which was denied. He appealed, and we affirmed.

At the beginning of 2002, armed robbery was a Class B felony, *see* WIS. STAT. § 943.32(2) (2001-02), with a maximum possible sixty years' imprisonment, *see* WIS. STAT. § 939.50(3)(b) (2001-02). On July 26, 2002, the legislature enacted 2001 Wis. Act 109 as part of Wisconsin's transition to Truth-in-Sentencing. Under the act, many felonies were reclassified; armed robbery became a Class C felony with a maximum possible forty years' imprisonment. *See* 2001 Wis. Act 109, §§ 553, 767. Believing these changes to have been effective on the date of enactment, and because his judgment of conviction listed his convictions as Class C felonies,

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

[2] The parties also discuss a March 7, 2018 order that denied Graham's motion for sentence modification; however, it appears that we lack jurisdiction over that order. Because this appeal is not governed by WIS. STAT. RULE 809.30, any notice of appeal from the March 7, 2018 order was due by June 5, 2018. *See* WIS. STAT. § 808.04(1). This deadline is not extendable. *See* WIS. STAT. RULE 809.82(2)(b). The notice of appeal in this matter was filed on June 18, 2018. "The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal." WIS. STAT. RULE 809.10(1)(e). However, while we apparently lack jurisdiction over the order denying sentence modification, we note that the issues raised in the petition for a writ of error are virtually identical to those raised in the modification motion, so the reasoning in this opinion applies equally to that order.

Graham filed a *pro se* motion to commute his sentence in 2007, arguing that his sentences exceed the maximum allowed for a Class C felony. The circuit court denied the motion, explaining that Graham had actually been convicted of Class B felonies and the judgment designating them Class C was incorrect. Graham appealed. We affirmed, explaining that the reclassification of armed robbery to a Class C felony was not effective until February 1, 2003. *See* ***State v. Graham***, No. 2007AP1041-CR, unpublished slip op. ¶¶1, 2 n.2 (WI App Jan. 15, 2008). Graham then filed several subsequent postconviction motions over the next few years, at least five of which challenged his sentence in some way.

The most recent motion was Graham's March 1, 2018 motion for sentence modification based on a new factor, in which he argued that the "new factor" was the circuit court's erroneous belief that "Wis. Stat. 943.32(1)(b)(2) was a Class B felony in 2002"[3] when, in fact, the statute was amended in July 2002 to make the offense a Class C felony. The circuit court denied the motion, explaining again that the effective date of the reclassification was February 1, 2003, so the felonies were Class B at the time of their commission. The circuit court also noted that the reclassification of offenses is not a new factor for purposes of sentence modification. *See* ***State v. Trujillo***, 2005 WI 45, ¶2, 279 Wis. 2d 712, 694 N.W.2d 933, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48, 333 Wis. 2d 53, 797 N.W.2d 828.

[3] "WIS. STAT. § 943.32(1)(b)(2)" is not an accurate citation. Rather, WIS. STAT. § 943.32(1) defines the crime of robbery and contains two paragraphs, (a) and (b). Section 943.32(2) then defines the crime of armed robbery by providing that whoever commits the crime of robbery under subsection (1) "by use or threat of use of a dangerous weapon" is guilty of a greater felony. This is true for both the 2001-02 and current versions of § 943.32.

Graham then filed a "petition for writ of error"[4] with the circuit court, complaining that his motions have been denied "continuously over the course of years … without knowledge of the law that was enacted at the time the offenses were committed in this case." Graham reasserted his claim that because the felony reclassification was enacted on July 26, 2002, four months before he committed his offenses in October 2002, he "therefore … should have been sentenced according to the law at that time." The circuit court denied the petition, stating it was "summarily denied for the reasons stated in the court's prior decisions and orders denying his previous motions." Graham appeals.

Graham has already litigated the issue of his felony classification at least once before. *See* ***Graham***, No. 2007AP1041-CR, ¶¶2, 4-5. He acknowledges this to be true. However, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."[5] *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Even if Graham had not litigated this specific issue previously, any postconviction claim that could have been raised in a prior proceeding is barred in a subsequent proceeding, absent a sufficient reason for the failure to raise the issue in the prior proceedings. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). While a new factor may sometimes

[4] Generally, the "writ of error" is synonymous with an appeal. *See* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 2.3 (5th ed. Dec. 2012); *see also* ***Tobler v. Door Cty.***, 158 Wis. 2d 19, 24, 461 N.W.2d 775 (1990) ("'writ of error procedure was made the same as the procedure for appeals'" by WIS. STAT. RULE 809.01(1) (citation omitted)). The circuit court, however, properly addressed the document based on its substance rather than its label.

[5] Indeed, the circuit court has cautioned Graham that "additional motions of this nature will not be entertained and may result in the assessment of costs."

constitute a sufficient reason for not raising an issue earlier, a law change enacted in 2002 is not a sufficiently new factor to justify a motion brought in 2018 when there have been multiple motions brought in the interim. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 336 (where alleged "new factor" derived from law passed in 1989, and defendant-appellant had brought seven appeals between then and 2001, the new factor claim was procedurally barred).

Finally, we note, again, that the felony reclassification for armed robbery that Graham cites did not take effect until February 1, 2003. *See* ***Trujillo***, 279 Wis. 2d 712, ¶4. To counter this reality, Graham included a letter from the office of a state senator in the appendix to his appellant's brief. This letter was evidently sent in a response to a letter he wrote to the senator, inquiring about "2001 Wisconsin Act 109 and statute 943.32(2)." This letter tells Graham that "the amendment changed the offense of armed or threatening armed robbery from a Class B felony to a Class C felony. This amendment to Wisconsin statute 943.32(2), took effect on July 26, 2002 as a part of 2001 Wisconsin Act 109." Graham insists that this letter demonstrates the accuracy of his claim that the law change took effect before he committed his crimes.

This letter is dated June 28, 2018, a month after the circuit court denied Graham's petition for a writ of error. This means the letter was not a document before the circuit court when it decided Graham's petition, and it does not appear to be a part of the record. It is inappropriate for an appellant to use his appendix to supplement the record, *see* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989), and we could strike the inappropriate document as a sanction.

It is not necessary for us to strike the document, though, because the letter from the senator's office is simply incorrect. First, 2001 Wis. Act 109 was *enacted* on July 26, 2002, but, contrary to what the letter states, acts do not take effect on the date of enactment. *See* WIS. STAT. §§ 991.11 ("Every act and every portion of an act … which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication[.]"), 35.095(1)(b) ("'Date of publication' means the day after the date of enactment.").

Second, relative to the felony reclassifications, the legislature "expressly prescribe[d] the time when" the amendment to WIS. STAT. § 943.32 would take effect. Specifically, the legislature provided that "the amendment of sections … 943.32 (1) (intro.) [and] 943.32 (2) … take[s] effect on the first day of the 7th month beginning after publication." *See* 2001 Wis. Act 109, § 9459(1). In other words, the legislature specified that the amendments to § 943.32, including the felony reclassification, would not take effect until February 1, 2003.

As has been explained now multiple times, Graham's offenses were Class B felonies when committed, the felony reclassification was not effective until February 1, 2003, and Graham was properly sentenced based on the maximum potential penalties for Class B felonies as those penalties existed in October 2002. *See* ***State ex rel. Singh v. Kemper***, 2016 WI 67, ¶36, 371 Wis. 2d 127, 883 N.W.2d 86 (Ordinarily, "an inmate will be convicted and sentenced under the law that was in effect *at the time the offense was committed*.") (emphasis added). Therefore, the circuit court properly rejected Graham's claims to the contrary and properly denied his petition for a writ of error.

Upon the foregoing,

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