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DISTRICT IV

May 14, 2019

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

2018AP1262-CR State of Wisconsin v. Lewis Altman, Jr. (L.C. # 1993CF156)

Before Lundsten, P.J., Blanchard and Fitzpatrick, 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).

Lewis Altman, Jr., pro se, appeals an order denying his sentence modification motion. 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 affirm.

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

In 1993, Altman fired several shots at a passing vehicle. He claimed he did so in response to a racist remark. Altman pled guilty to one count of attempted first-degree intentional homicide and three counts of first-degree recklessly endangering safety. He received an indeterminate forty-year sentence.

On direct appeal, Altman filed a postconviction motion for plea withdrawal alleging ineffective assistance of counsel. The circuit court denied relief, and we affirmed Altman's conviction pursuant to the WIS. STAT. RULE 809.32 no-merit process. ***State v. Altman***, No. 1995AP3109-CRNM, unpublished slip op. and order (WI App July 29, 1996). Altman has since challenged his conviction and sentence through a series of motions and appeals we need not recount.

Underlying this appeal is a 2017 motion for sentence modification based on an alleged new factor, namely, that the racist words purportedly prompting Altman to shoot were "fighting words" unprotected by the First Amendment. The circuit court denied relief because "the sentencing transcript of the court clearly shows that the alleged racial slur was in fact considered by the court, as Mr. Altman presented it to the court to request leniency during sentencing." The circuit court explained that the sentencing court "decided that, even if the allegation of a racial slur were true, it was insufficient to overcome the violent nature of [Altman's] crime and his past criminal history." On appeal, Altman maintains that if the sentencing court "knew of the 'Fighting words' it would not have sentence[d] him to a total of 40 years imprisonment."

A new factor is "a fact or 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 … it was unknowingly overlooked by all of the parties." ***State v. Harbor***,

2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Deciding a new-factor sentence modification motion is a two-step inquiry. ***Id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.*** Second, if there is a new factor, the circuit court determines whether it justifies modification of the sentence. ***Id.***, ¶37.

We conclude that, as a matter of law, Altman has not established a new factor. *See* ***id.***, ¶36 (whether the set of facts put forth by the defendant constitutes a new factor is a question of law). The notion that Altman was provoked to shoot by a racial slur is hardly "new." It is referenced in the criminal complaint, pretrial motions, and presentence investigation report, and, as set forth in the circuit court's order denying relief, was expressly presented to the sentencing court for consideration.

Altman attempts to cast as a new fact the legal principle that racial slurs are "fighting words," which are not protected free speech under the First Amendment. Altman's argument misses the mark for several reasons, including that the fighting words doctrine addresses whether the speaker should be subject to criminal punishment, not whether the listener is culpable. *See, e.g.*, ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 570, 573-74 (1942). There is no relevant link between the fighting words doctrine and Altman's sentence. Additionally, the First Amendment cases cited by Altman preceded his criminal case; the jurisprudence is not "new." Finally, on direct appeal, we expressly acknowledged Altman's claim that he was provoked to act by "someone in the other vehicle [who] uttered a racial slur." *See* ***Altman***, No. 1995AP3109-CRNM at 2-3. Arguments addressed in that appeal cannot be relitigated now. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). To the extent he believes his "fighting words" argument is new, Altman does not remotely suggest a sufficient reason for

failing to raise it in his prior postconviction motions and appeals. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit 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