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DISTRICT II

June 12, 2019

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

2018AP1558-CR

State of Wisconsin v. Gerald Lee Baumeister, Jr.
(L.C. #2013CF207)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Gerald Lee Baumeister, Jr., appeals from a judgment and an order of the circuit court denying his motion for sentence modification based upon a “new factor.” 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.

To succeed on a motion for sentence modification based upon a new factor, a defendant must first establish by clear and convincing evidence that a new factor in fact exists. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a defendant has established this is a question of law we review independently. *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

Baumeister’s appeal fails because he has not established the existence of a new factor by clear and convincing evidence. His appeal is founded on his assertion that after he was sentenced, the department of corrections (DOC) “diagnosed” him with “Posttraumatic Stress Disorder” (PTSD).² He claims that this “diagnosis” in “2016” “would be highly relevant to what sentence should have been imposed and therefore constitutes a ‘new factor.’” The problem is, as the State points out in its response brief, Baumeister was never diagnosed with PTSD.

According to the “Psychological Services Clinical Contact” reports Baumeister submitted with his motion, there was “[n]o diagnosis” and “[n]o mental health concerns noted” in his first DOC clinical contact in “2016.” In his second clinical contact in 2016, the “IMPRESSIONS” from the psychological associate indicate that “[f]urther monitoring of Mr. Baumeister’s

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

² Referring to comments made by the circuit court at sentencing that Baumeister had a “Conduct Disorder,” Baumeister also states in his brief-in-chief: “In addition, the Department of Corrections did not diagnose Baumeister with a conduct disorder.” This “issue” is completely undeveloped; as a result, we do not address it. *See Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 (“We will not address undeveloped arguments.”).

symptoms may yield evidence for Posttraumatic Stress Disorder, *but this diagnosis cannot be given confidently today.*” (Emphasis added.) There are no other “2016” reports, and the next two reports are from January and February of 2018, nearly two years after Baumeister was sentenced.

As indicated, Baumeister’s appeal is founded upon his position that he was diagnosed by DOC with PTSD. He bases that position on these four reports, the last three of which indicate “R/O Posttraumatic Stress Disorder” under “Diagnoses.” Baumeister submitted no evidence with his motion, and provides no indication on appeal, as to what “R/O” means. In its response brief, the State asserts on this point:

“R/O” is a medical abbreviation for the term “rule out.” *A Practical Guide to Clinical Medicine*, University of California, San Diego, <https://meded.ucsd.edu/clinicalmed/abbreviation.htm> (last visited January 18, 2019). “Rule out” is “a common expression in psychiatric diagnosis and is often seen in reports, especially from professionals with medical training or experience in medical settings.... ‘Rule out’ is typically used to identify an alternative diagnosis that is being actively considered, but for which sufficient data has not yet been obtained.” *In re Meirhofer*, 343 P.3d 731, 734 n.3 (Wash. 2015) (quoting Alvin E. House, DSM–IV Diagnosis in the Schools 33 (2002)).

Consistent with this definition and her “R/O” notation, Dr. McKown reported, “[f]urther monitoring of Mr. Baumeister’s symptoms may yield evidence for Posttraumatic Stress Disorder, but this Diagnosis *cannot be given confidently today.*” (R. 45:8) (emphasis added). In other words, Dr. McKown merely identified a potential diagnosis that might apply to Baumeister, but she was unprepared to make this diagnosis without additional information. Because no one actually diagnosed Baumeister with PTSD, he did not prove the existence of a new factor.

In his reply brief, Baumeister develops no argument to counter the State on these points, and, as a result, we deem him to have conceded them. See *Dalka v. Wisconsin Cent., Ltd.*, 2012 WI App 22, ¶15 n.1, 339 Wis. 2d 361, 811 N.W.2d 834 (“Unrefuted arguments are deemed

admitted.”). Furthermore, the State’s asserted interpretation of “R/O” in this context rings true in that, as the State points out, under “Diagnoses” in McKown’s August 26, 2016 clinical contact report, she states “R/O Posttraumatic Stress Disorder,” and immediately below that, under “IMPRESSIONS,” states “[f]urther monitoring of Mr. Baumeister’s symptoms may yield evidence for Posttraumatic Stress Disorder, *but this diagnosis cannot be given confidently today.*” (Emphasis added.) We cannot believe that McKown was diagnosing Baumeister with PTSD in the “Diagnoses” section of the report when immediately below she clearly indicates that she could not confidently make such a diagnosis.

While the State’s unchallenged assertion regarding the meaning of “R/O” appears correct, *see, e.g., Garner v. Commissioner of Soc. Sec.*, No. 2:17-CV-00232-LRS, unpublished slip op. at 3 (E.D. Wash. May 15, 2018) (“A ‘R/O’ (Rule Out) diagnosis means there is uncertainty about the diagnosis and although there is evidence that the criteria for the diagnosis may be met, more information is needed to rule it out.”), we need not make that determination definitively. It is Baumeister’s burden to demonstrate by clear and convincing evidence that a new factor exists, *see Harbor*, 333 Wis. 2d 53, ¶36, and, at a minimum, he has failed to satisfy that burden. As a result, we affirm.

IT IS ORDERED that the judgment and order of the circuit court 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