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DISTRICT I

August 19, 2019

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

2018AP1700-CR State of Wisconsin v. Richard Allen Lindsey
(L.C. # 1988CF883287)

Before Brash, P.J., Kessler 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).

Richard Allen Lindsey, *pro se*, appeals an order denying his motion for postconviction relief. He alleges that a new factor warrants sentence modification. 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.

In September 1991, a jury convicted Lindsey of first-degree murder, attempted first-degree murder, and armed robbery.[2] Lindsey faced a mandatory life sentence for the first-degree murder conviction, and at sentencing he submitted a memorandum in support of his request for a parole eligibility date that would allow him some chance for release from confinement during his lifetime. The circuit court, however, imposed a life sentence for the first-degree murder conviction with parole eligibility in 2065, the year in which Lindsey would have his 100th birthday. The circuit court imposed concurrent twenty-year sentences for the attempted murder and armed robbery convictions.

Lindsey pursued an appeal in 1992, and we affirmed. *See* ***State v. Lindsey***, No. 1992AP1850-CR, unpublished slip op. (WI App Oct. 26, 1993). In 1997, Lindsey filed a motion for a new trial under WIS. STAT. § 974.06 (1997-98), alleging multiple violations of his constitutional rights. We summarily affirmed. *See* ***State v. Lindsey***, No. 1997AP1705, unpublished op. and order (WI App Nov. 25, 1998). Lindsey next sought postconviction relief in 2006, alleging that he was entitled to sentence modification because the circuit court erroneously exercised its sentencing discretion. We again summarily affirmed. *See* ***State v. Lindsey***, No. 2006AP227-CR, unpublished op. and order (WI App Dec. 13, 2006).

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

[2] The 1991 trial was Lindsey's second in this case. A jury first convicted Lindsey following a trial in 1989, but, following his 1990 sentencing, the circuit court granted his postconviction motion for a new trial.

In August 2018, Lindsey filed the postconviction motion underlying this appeal. He alleged that a new factor warranted modification of his parole eligibility date. He argued that the circuit court did not properly consider his sentencing memorandum and merely "paid lip service" to the character evidence he presented in that submission. The circuit court rejected the claim as an untimely effort to challenge the exercise of sentencing discretion. Lindsey appeals.

A circuit court may modify a sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The convicted person has the burden of proving by clear and convincing evidence that a new factor exists. *See* ***id.***, ¶36. 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." ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *See* ***id.***, ¶38. If the person shows that a new factor exists, the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

Here, Lindsey failed as a matter of law to present a new factor in his postconviction motion. Rather, he pointed to the memorandum that he submitted at sentencing and that the circuit court reviewed before pronouncing sentence.[3] The information in his postconviction

[3] Lindsey concedes that the circuit court read the sentencing memorandum and was aware of its contents at the time of sentencing.

motion therefore was neither unknown to the original sentencing court nor unknowingly overlooked by all of the parties. *See* ***id.***, ¶40.

Moreover, as explained in the order denying sentence modification, Lindsey's argument is couched as a new factor claim but is in fact a challenge to the circuit court's exercise of sentencing discretion. Lindsey contends that the character evidence he introduced at his sentencing "was highly relevant" but "the [circuit] court incorrectly viewed that evidence as an aggravating, rather than [a] mitigating factor." *Cf.* ***McCleary v. State***, 49 Wis. 2d 263, 277-82, 182 N.W.2d 512 (1971) (setting forth the framework for the exercise of sentencing discretion).

We conclude that Lindsey is barred from challenging the circuit court's exercise of sentencing discretion.[4] Lindsey had the opportunity to challenge the circuit court's exercise of sentencing discretion in his direct appeal under WIS. STAT. RULE 809.30 (1991-92). *See* RULE 809.30(2) (1991-92). Lindsey's direct appeal rights, however, are now exhausted. Alternatively, Lindsey could have elected not to pursue an appeal under RULE 809.30 (1991-92), and instead filed a motion for sentence modification within ninety days after sentencing under WIS. STAT. § 973.19 (1991-92). Lindsey made a different choice, and the ninety-day deadline for pursuing relief under § 973.19 (1991-92), has long since passed. Lindsey is also unable to pursue his sentencing claim under WIS. STAT. § 974.06. A motion under § 974.06 is available after the time for a direct appeal has expired, but such a motion is "limited to constitutional and jurisdictional challenges. It cannot be used to challenge a sentence based on an erroneous exercise of

[4] For the sake of completeness, we observe that a sentencing court has discretion to determine whether a factor is aggravating or mitigating. *See* ***State v. Thompson***, 172 Wis. 2d 257, 267, 493 N.W.2d 729 (Ct. App. 1992).

discretion when a sentence is within the statutory maximum or otherwise within the statutory power of the court." ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765 (citation omitted).

No other avenue exists for Lindsey to pursue his claim. Indeed, he recognizes as much, acknowledging that his claim "is in fact barred" if we determine that it "does not rise to the level of a new factor." Because Lindsey fails to demonstrate the existence of a new factor, and because he fails to demonstrate any other basis on which he may pursue his claim for sentence modification, we affirm the order of the circuit court.

IT IS ORDERED that the circuit court's 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