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DISTRICT I

November 26, 2019

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

2019AP92-CR

State of Wisconsin v. Mackenzie Carey Burse
(L.C. # 1995CF952806)

Before Brash, P.J., Kessler 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).

Mackenzie Carey Burse, *pro se*, appeals from an order of the circuit court that denied his motion for 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 The order is summarily affirmed.

Burse is serving a forty-two-year indeterminate sentence, imposed in 1995 following a combination of guilty and *Alford*² pleas to three offenses. After his convictions, Burse filed a *pro se* motion to modify his sentence, which was denied. He then pursued a direct appeal in which counsel filed a no-merit report and Burse filed a response. We affirmed the judgment of conviction, expressly rejecting Burse's contention that trial counsel was ineffective for failing to investigate Burse's history of psychological treatment for depression and behavioral problems. *See State v. Burse*, No. 2001AP2866-CRNM, unpublished op. and order (WI App Sept. 24, 2002). Burse's petition for review was denied.

In 2003, Burse filed a *pro se* WIS. STAT. § 974.06 motion, arguing that postconviction counsel was ineffective for failing to investigate his history of depression and conduct/adjustment disorders. Burse also claimed that postconviction counsel should have hired a psychiatrist to testify about how Burse's "low IQ and psychological complexity" served as mitigating sentencing factors. We rejected these arguments as a repackaging of the claim Burse had raised in his no-merit response. *See State v. Burse*, No. 2003AP3516, unpublished op. and order at 3 (WI App Sept. 27, 2004).

In December 2018, Burse filed the motion underlying this appeal. He moved for sentence modification on the grounds of a new factor, claiming that the sentencing court had

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

² *See North Carolina v. Alford*, 400 U.S. 25 (1970).

“sentenced Burse on inaccurate character information by considering incomplete character information relating to Burse’s personality.” On appeal, Burse explains that the character information the sentencing court had available to it at the time:

did not contain the information that Burse’s borderline mental retardation prevented Burse’s mind from developing a psychological baseline, that Burse’s mother never taught Burse how to cope effectively and appropriately, that Burse’s lack of nurturance [sic] as a child caused Burse to [develop] poor and ineffective coping mechanisms, that these factors in their totality caused Burse’s mind to create an overcomplicated thought process consisting of various copying styles Burse used to deal with day-to-day life problems and that inpatient psychiatric care had been recommended to deal with Burse’s psychological and emotional impairments.

This claim is based on psychological evaluations completed in 1992 and 1993.³

The circuit court denied the motion, noting that “[a]ll of these materials the defendant has submitted in support of his motion were known to him prior to sentencing. They were known to him after sentencing as well and could have been raised previously.” Thus, the circuit court concluded, the motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). On appeal, Burse complains that the circuit court erred in applying *Escalona* rather than analyzing his claim under new factor law.

³ Burse also alleged, as a second new factor, that the sentencing court “was unaware that Department of Corrections Program Review [Committee] had a policy prohibiting old-law prisoners from participating in treatment programs until old-law prisoners were one year from mandatory release.” In his appellant’s brief, however, Burse indicates that he “has decided not to address” this argument because, due to an administration change in the governor’s office, “the parole commissioner endorsed Burse for the programs he needed and Burse was placed into the programs. Therefore, arguing the issue would only waste the court’s time.”

Based on Burse’s decision to abandon the issue, we deem it waived and discuss it no further.

A prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a “sufficient reason” for failing to raise it earlier. *See id.* at 185; *see also* WIS. STAT. § 974.06(4). Despite the existence of a procedural bar, a circuit court may still modify a sentence if the defendant shows a new factor that warrants modification. *See State v. Harbor*, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. 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, even though it was then in existence, it was unknowingly overlooked by all the parties.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also Harbor*, 333 Wis. 2d 53, ¶¶40, 52. Whether the facts constitute a new factor is a question of law. *See Harbor*, 333 Wis. 2d 53, ¶36.

Here, the circuit court implicitly concluded that Burse’s psychological evaluations were not a new factor because they were known to Burse both before and after his sentencing hearing. Burse counters in his reply brief that the evaluations constitute a new factor not because they did not exist at the time of sentencing but because they were “unknowingly overlooked” by his counsel, the presentence investigation report writer, and the sentencing court. However, a new factor must be overlooked by *all* of the parties, and that includes Burse. Burse does not explain how he unknowingly overlooked the evaluations, and a defendant’s failure to provide information does not transform that information into a new factor at a later date. *See, e.g., Rosado*, 70 Wis. 2d at 288-89. Accordingly, we conclude that Burse has failed to show a new factor as a matter of law.

With respect to the circuit court’s reliance on *Escalona*: Burse’s motion alleged that he had been sentenced on inaccurate information because the psychological information available to

the circuit court had been incomplete, and that inaccuracy is what constitutes a new factor. However, a claim that a defendant was sentenced on inaccurate information is a constitutional due process claim. *See State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Though a new factor claim is not subject to a time limitation and may be brought at any time, *see State v. Noll*, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895, constitutional claims are nevertheless subject to *Escalona*.⁴ *See* WIS. STAT. § 974.06(1), (4).

Assuming without deciding that the inaccuracy of Burse's incomplete psychological records constitutes a new factor because the evaluations he now cites were overlooked at the original sentencing hearing, thereby creating an inaccuracy, Burse does not account for his failure to raise the inaccuracy in his prior *pro se* WIS. STAT. § 974.06 motion. We thus conclude that the circuit court properly relied on *Escalona* to deny the motion. *See, e.g., State v. Casteel*, 2001 WI App 188, ¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338 (where the alleged "new factor" derived from a law passed in 1989, and defendant-appellant had brought seven appeals between then and 2001, the new factor claim was procedurally barred).

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed. *See* WIS. STAT. RULE 809.21.

⁴ Generally, in order for inaccurate information to constitute a new factor, the inaccuracy itself must be new. *See, e.g., State v. Norton*, 2001 WI App 245, ¶14, 248 Wis. 2d 162, 635 N.W.2d 656 (where the inaccuracy at issue—the fact that Norton's probation was revoked in another case despite the sentencing court relying on a representation that it would not be—did not exist until Norton's probation was actually revoked subsequent to his sentencing hearing, the inaccuracy of the representation relied upon qualified as a new factor).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals