OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 27, 2020

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233-1425

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Katherine Desmond Lloyd
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Jeffrey Donald Leiser 330229
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2019AP512 State of Wisconsin v. Jeffrey Donald Leiser (L.C. # 2003CF6154)

Before Blanchard, Dugan and Donald, 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).

Jeffrey Donald Leiser, *pro se*, appeals the order denying his third WIS. STAT. § 974.06 (2017-18)[1] 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. We further conclude that Leiser's § 974.06 claims are barred, he has not presented a new factor warranting

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

sentence modification, and he forfeited his claim that the circuit court unfairly required him to convert his habeas petition. As such, we summarily affirm.

Background

In 2004, a jury convicted Leiser of first-degree sexual assault of a child. The circuit court sentenced him to twenty-five years of initial confinement and twenty years of extended supervision.

Leiser subsequently filed a postconviction motion and argued that his trial counsel was ineffective for acquiescing to the State's request to admit evidence that Leiser's name had been on a sex offender registry at the time of the crime. The circuit court denied Leiser's motion, and he appealed. We affirmed, *see* ***State v. Leiser***, No. 2004AP3364-CR, unpublished slip op. (WI App Nov. 23, 2005), and the Wisconsin Supreme Court denied Leiser's petition for review. Since that time, Leiser has filed numerous motions and petitions challenging his conviction in the circuit court, this court, and the supreme court. Such filings include two prior WIS. STAT. § 974.06 motions.

In 2019, Leiser received a letter from the Milwaukee County circuit court enclosing Leiser's "petition for writ of habeas corpus, which [wa]s really a [WIS. STAT. §] 974.06 motion for postconviction relief."[2] The letter informed Leiser that the court would not accept the petition for filing because it did not comply with the applicable local rule and that he could refile

[2] The letter from the circuit court referencing the petition is in the record, but the petition itself is not.

the petition as a petition for habeas relief—but if he did so, the circuit court would convert it to a § 974.06 motion.

Shortly thereafter, Leiser filed the WIS. STAT. § 974.06 motion underlying this appeal. He argued that his trial and postconviction counsel were ineffective for failing to provide the jury with information that he offered to take and passed a lie detector test, the results of which he believed were admissible at trial. Next, Leiser claimed that the State violated his right to due process by not informing him that that victim's mother allegedly was sexually abused as a child and that trial counsel was ineffective for failing to investigate the State's witnesses. Leiser also argued that he was entitled to sentence modification based on a new factor—namely, a diagnosis of post-traumatic stress disorder (PTSD) and a report from the Department of Corrections (DOC) concluding that he is at a low risk to reoffend.

The circuit court denied Leiser's motion without a hearing, concluding that his claims were procedurally barred and that he had not presented a new factor for purposes of sentence modification. This appeal follows. We provide additional background information as needed below.

Discussion

A. Leiser's WIS. STAT. § 974.06 claims are procedurally barred.

The postconviction procedures of WIS. STAT. § 974.06 allow a convicted offender to attack a conviction after the time for a direct appeal has expired. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 176, 517 N.W.2d 157 (1994). The opportunity to bring postconviction motions, however, is not limitless. Section 974.06(4) requires a prisoner to raise all

constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental, or amended motion. *See* ***id.***; *see also* ***Escalona***, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. ***Escalona***, 185 Wis. 2d at 181-82. On appeal, we independently determine the sufficiency of an offender's reason for serial litigation by examining the four corners of his or her postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

The State argues that Leiser's current WIS. STAT. § 974.06 claims are procedurally barred by past proceedings in which he either could have raised them or actually did raise them. *See generally* ***Escalona***, 185 Wis. 2d at 185; ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

1. Polygraph Test

First, Leiser contends that he told his trial counsel that he wanted to take a polygraph test to show that he was not guilty and that he thought the results of the test would be admissible at trial. Leiser argues his trial counsel was ineffective for refusing to present this evidence to the jury. As a sufficient reason for not raising this claim earlier, Leiser cites postconviction counsel's ineffectiveness. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682,

556 N.W.2d 136 (Ct. App. 1996) (holding that postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for serial litigation).

In Wisconsin, the results of a polygraph examination are not admissible at trial. ***State v. Pfaff***, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562. However, a defendant's offer to take a polygraph examination may be admissible evidence if he believed the results of the examination could be used against him. ***Id.*** Leiser contends that trial counsel's and postconviction counsel's lack of knowledge surrounding the applicable law and the underlying facts is reflected by the fact that both failed to utilize the polygraph evidence.

To support his argument, Leiser points to a letter from a polygraph examiner to his postconviction counsel dated April 2006. Attached to the letter is a declaration from the examiner stating that he conducted a polygraph examination of Leiser on May 22, 2004, and forwarded it to Leiser's trial counsel three days later.[3] The jury found Leiser guilty in April of 2004.

Even if we set aside the seemingly problematic sequence of these events, with the polygraph examination taking place *after* the jury trial, we nevertheless conclude that Leiser could have raised this claim in his prior WIS. STAT. § 974.06 motions. As such, it is procedurally barred. In an effort to avoid this outcome, Leiser submits that he did not know what the law was and was ignorant of the facts underlying his claims. Leiser claims that his postconviction

[3] In his reply brief, Leiser submits that the date should have been March, not May, and contends that this "clerical error" will be clarified at an evidentiary hearing or a new trial. However, as explained, even if the polygraph examination was in March, Leiser's claim would still be procedurally barred.

counsel told him that the lie detector test could not be used in his direct appeal and that both trial and postconviction counsel provided him with false legal advice.

As summed up by the State, Leiser's postconviction motion lacks the necessary details:

> [Leiser] does not explain when he learned of the law that he now relies upon to assert that counsel was ineffective. He does not explain how he came to be aware of the law on the admission of a defendant's offers to take a polygraph examination. Leiser insists that he doggedly pursued taking a lie detector test and followed up with his attorneys on its results, and yet he offers no explanation for why it took him 15 years to complain about the absence of this evidence at trial.

To obtain an evidentiary hearing below, a "defendant must allege specific facts that, if proved, would constitute a sufficient reason for failing to raise the issues" previously. *See* ***State v. Allen***, 2010 WI 89, ¶91, 328 Wis. 2d 1, 786 N.W.2d 124. Leiser's allegations fall short. Therefore, this claim is procedurally barred.

2. Abuse of the Victim's Mother

Next, Leiser argues that the State violated his right to due process by dening him access to police reports or other evidence concerning a report that the victim's mother was abused as a child. He additionally argues that because this evidence was not turned over, he received the ineffective assistance of counsel. Leiser has previously raised this claim in a variety of forms. Consequently, it is barred. *See* ***Witkowski***, 163 Wis. 2d at 990.

B. Leiser is not entitled to sentence modification.

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. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. Leiser contends that the circuit court made clear that his lengthy

sentence was for treatment. However, because he continues to claim he is innocent, Leiser submits that "[a]s far as the DOC is concerned, [he] will not get treatment." This, he argues, "defeats the bases" for the circuit court's lengthy sentence and constitutes a new factor entitling him to sentence modification.[4] In the circuit court, Leiser also argued that a DOC report concluding that he is at a low risk to reoffend constituted a new factor. Although it is somewhat unclear from Leiser's briefing whether he is continuing to argue that his assessed risk constitutes a new factor, given that the State addresses this related claim in its response, we will do the same.

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 warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If a new factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

During sentencing, the circuit court primarily focused on Leiser's poor character and his refusal to take responsibility for his criminal behavior. To the extent the circuit court referenced Leiser's treatment needs or his risk to reoffend, it was within that context. For instance, although

---

[4] In his postconviction motion, Leiser argued that his PTSD diagnosis constituted a new factor warranting sentence modification. He does not pursue this facet of his sentence modification claim on appeal; therefore we deem it abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (explaining that arguments not pursued on appeal may be deemed abandoned). Although Leiser tried to revive his PTSD claim in his reply brief, that is too late. *See* ***id.*** ("It is inherently unfair for an appellant to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from the opposing party.").

the circuit court concluded that Leiser needed “significant mental health treatment and counseling,” it doubted that he would be capable of reaping rewards from any programming because he lacked “insight, instrospection[,] and a communication level” necessary to meaningfully participate. Similarly, while the circuit court placed Leiser at a high risk to reoffend, this again was based on Leiser’s “lack of introspection[,] of really understanding … the benefits of treatment and opening up.” Neither Leiser’s specific treatment needs nor his risk to reoffend were highly relevant to the circuit court’s sentence such that this information constitutes a new factor.[5]

C. Rejected Habeas Petition

Lastly, Leiser argues that the circuit court denied him due process when it forced him to file a WIS. STAT. § 974.06 motion instead of the petition for a writ of habeas corpus he initially filed. Rather than challenging the circuit court’s characterization, Leiser filed the motion underlying this appeal.

We agree with the State that by not objecting to the circuit court’s suggestion that he restyle his petition, Leiser forfeited his review of this claim.[6] *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited).

---

[5] In this section of his brief, Leiser relies on an unpublished per curiam opinion of this court, *see* ***State v. Wilson***, No. 2013AP415-CR, unpublished slip op. (WI App Nov. 13, 2013). We remind Leiser that, with limited exceptions that do not apply here, citation to unpublished per curiam opinions violates our appellate rules. *See* WIS. STAT. RULE 809.23(3).

[6] We note in passing that Leiser does not explain why WIS. STAT. § 974.06 was inadequate or why a petition for a writ of habeas corpus was the proper vehicle for the relief that he sought.

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