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July 22, 2020

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

2019AP566-CR

State of Wisconsin v. Donald G. Zabolski, Jr. (L.C. #2013CF244)

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).

Donald G. Zabolski, Jr. appeals from the denial of 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 We affirm.

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

In 2014, Zabolski pled no contest to four counts of second-degree sexual assault of a child and one count of possession of child pornography. The circuit court sentenced him to an aggregate sentence of forty years of initial confinement followed by twenty-five years of extended supervision. In 2017, Zabolski sought plea withdrawal, and we summarily affirmed his conviction. See *State v. Zabolski*, No. 2017AP987, unpublished op. and order (WI App May 16, 2018).

Zabolski now appeals the circuit court's denial of his 2019 motion for sentence modification. In his motion, Zabolski argued that he is not able to get sex offender treatment in prison because of his long prison sentence, a new factor justifying sentence modification. He also argued that the circuit court erroneously exercised its sentencing discretion.²

After a hearing, the circuit court concluded that Zabolski had not presented a new factor, but even if he had, a delay in receiving treatment did not justify modification of Zabolski's sentence. The court also concluded that it properly exercised its sentencing discretion by weighing the proper factors and rendering the sentence.

Whether a new factor exists presents a question of law that we review independently. *State v. Scaccio*, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. Even if proved, the circuit court maintains discretion to decide whether the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. We review that decision for an erroneous exercise of discretion. *Id.*, ¶33.

² Zabolski also sought judicial substitution and asserted the judge was biased, claims he has abandoned on appeal.

A defendant seeking a sentence modification must demonstrate, by clear and convincing evidence, that there is a new factor to justify the modification. *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). 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 of the parties.” *Id.* at 8 (citation omitted). If the defendant meets that standard, the circuit court must then determine, in its discretion, whether the new factor justifies sentence modification. *Id.* “[T]he defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence.” *Harbor*, 333 Wis. 2d 53, ¶38.

The circuit court properly denied Zabolski’s motion for sentence modification.

Zabolski repeatedly sexually assaulted a child. The victim told police that Zabolski sexually assaulted her “all the time” from age four to age ten. Zabolski contended that the assaults occurred over two years, which the sentencing court accepted for purposes of its sentence. Zabolski’s computer had “thousands” of photos of Zabolski engaging in sexual activity with the victim. At sentencing, the State recommended consecutive sentences on the five counts totaling fifty years of initial confinement followed by seventy years of extended supervision. The presentence investigation report recommended twenty years of initial confinement and five years of extended supervision for the four sexual assault counts, and a consecutive twenty-year term of probation with a consecutive withheld sentence for the child pornography count. Zabolski’s attorney recommended concurrent sentences totaling somewhere between five and ten years in prison.

The sentencing court noted that Zabolski committed multiple sexual assaults of the same victim and escalated the nature of the assaults over time. The court noted that the victim was Zabolski's niece and the assaults involved a breach of trust. Zabolski told her not to tell anyone. The court described Zabolski's actions as "extremely egregious," noting the substantial impact on the victim. The court rejected a testifying doctor's conclusion that Zabolski presented a low risk to reoffend and rejected the suggested alternative of sex offender treatment and a shorter prison sentence of five years. Instead, the court expressed concerns about Zabolski's risk of reoffending, noting Zabolski's comments that he knew it was wrong but could not stop, and his admission to grooming the victim. There was planning and forethought to the offenses. Thus, the court rejected Zabolski's attorney's recommendation because it unduly depreciated the severity of the offenses. The court said that Zabolski's offenses were too egregious to warrant a shorter sentence and that punishment required the lengthy sentence.

The court's sentencing comments and rejection of a shorter sentence combined with sex offender treatment, make clear that the availability of sex offender treatment was not highly relevant to his sentence. The court primarily based its lengthy prison sentence on the severity of Zabolski's crimes. The court believed that the aggravated nature of Zabolski's crimes justified a long prison sentence. The timing of Zabolski's prison sex offender treatment program was not highly relevant to his sentence and thus, not a new factor. In any event, the circuit court's extensive and thorough analysis also makes clear that the circuit court properly exercised its discretion when it denied Zabolski's motion for sentence modification, concluding that the delay in sex offender treatment would not justify a modification.

Zabolski also contends that the sentencing court erroneously exercised its discretion when it rejected the conclusions of the doctor at sentencing who testified that Zabolski presented a low

risk to reoffend and claims the sentencing court placed too much weight on punishment and not enough weight on his rehabilitative needs.

Zabolski's claim is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). A prisoner is barred from raising in a WIS. STAT. § 974.06 motion issues he could have, but did not, raise in a prior postconviction motion or on direct appeal unless he can show a "sufficient reason" for his failure to do so. *Escalona-Naranjo*, 185 Wis. 2d at 181.

Whether a defendant is procedurally barred from filing a successive postconviction motion under WIS. STAT. § 974.06(4) is a question of law subject to de novo review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

Although the circuit court did not consider whether Zabolski's motion was barred by *Escalona-Naranjo*, we may affirm on different grounds than the circuit court. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1994).

Zabolski did not raise his current claim that the sentencing court erroneously exercised its sentencing discretion in his first appeal. He only sought plea withdrawal, both before the circuit court and on appeal. He offers no reason why he did not raise his claim based on information that he knew on the date of his sentencing.

Because Zabolski failed to raise his claim in his first appeal, and offers no reason, much less a sufficient reason, for failing to do so, Zabolski cannot avoid the procedural bar. See *State v. Allen*, 2010 WI 89, ¶92, 328 Wis. 2d 1, 786 N.W.2d 124. Zabolski's sentencing discretion claim is barred.

Moreover, Zabolski cannot challenge the court’s exercise of sentencing discretion in a collateral WIS. STAT. § 974.06 motion, which is limited to jurisdictional and constitutional questions. See *State v. Balliette*, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Nickel*, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765; *Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978) (a § 974.06 motion cannot be used to challenge a sentence based on an erroneous exercise of discretion “when a sentence is within the statutory maximum or otherwise within the statutory power of the court”). Zabolski raises no constitutional or jurisdictional challenge. We therefore affirm the circuit court’s denial of Zabolski’s motion for sentence modification.

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