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DISTRICT IV

July 23, 2020

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

2019AP738-CR State of Wisconsin v. David Wayne Hardaway
(L.C. # 1985CF2623)

Before Fitzpatrick, P.J., Blanchard, and Graham, 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).

David Hardaway appeals an order denying motions and a writ petition. 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 unless otherwise noted.

Hardaway was convicted in 1986 of burglary and sexual assault. The court imposed indeterminate sentences of ten years for the burglary count and sixteen years for the sexual assault count.

Hardaway first argues that the sexual assault sentence exceeded the maximum permitted by statute. He argues that at the time of his crime the permissible sentence for that charge was ten years, with only an additional four years available as a repeater, rather than the six years that were added by the sentencing court.

The State responds that at the time of Hardaway's offense in 1985, the applicable repeater provision allowed for an additional six years when the underlying maximum term was not more than ten years, and the defendant's prior conviction was for a felony. *See* WIS. STAT. § 939.62(1)(b) (1983-84). The State is correct. Hardaway's sentence did not exceed the maximum allowed by law as of the date of his offense.

Hardaway next argues that the Department of Corrections has not properly counted the time he has spent in custody. The State responds that we lack jurisdiction to address this issue because Hardaway filed a motion on that issue on the same day he filed his notice of appeal, and the circuit court did not rule on the motion.

The State is incorrect. The State fails to recognize that Hardaway raised this issue in a pleading Hardaway styled as a "Petition for a Writ of Certiorari" filed in the circuit court in September 2018 in this action. That petition appears to have remained pending at the time of the circuit court's March 2019 "Order Denying All Requests For Relief Brought By Defendant." Therefore, the issue is before us in this appeal by Hardaway from that order.

However, there is a different problem that prevents us from reviewing the issue. Hardaway's certiorari petition sought review of a parole revocation and reconfinement decision. Normally, in a certiorari review the court would receive the underlying agency record to review. In this case, the record was not brought up. It is not clear why. There are two letters from the court telling Hardaway that he must send the court a writ to send to the agency to bring up the record. Hardaway then sent the court a document that appears to be an attempt to provide that writ. But apparently that writ was not sent out, and the record was never provided to the court.

Without the record from the agency proceeding, we are unable to review the parole revocation and reconfinement decision. And, Hardaway does not argue that the circuit court erred by not bringing up the record, or by denying his writ petition without bringing up the record. Therefore, we do not further review Hardaway's argument that the Department has not properly credited his time spent in custody.

Finally, Hardaway argues that the circuit court erred by amending the judgment of conviction in 2017 to indicate that Hardaway's convictions were as a repeater. The amendment did not change the length of his sentences or any other aspect of the judgment. Hardaway argues that the amendment violates his expectation of finality. He does not cite any legal authority that supports this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 933 (Ct. App. 1992) (stating we need not consider arguments unsupported by reference to legal authority).

If Hardaway is arguing that he developed an expectation that the sexual assault sentence of sixteen years would eventually be amended to a ten-year sentence because the judgment did not have a repeater designation on it, that expectation was not reasonable. It was not reasonable because before sentencing the circuit court held a separate evidentiary hearing on whether

Hardaway was a repeater. Hardaway was present for that hearing, and the court found that he was a repeater. In addition, the court described Hardaway as a repeater when imposing the sentence.

IT IS ORDERED that the order appealed from is summarily affirmed under 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