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DISTRICT II

December 29, 2021

To:

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Circuit Court Judge
Electronic Notice

Melissa M. Pingel
Clerk of Circuit Court
Winnebago County
Electronic Notice

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Thomas J. Geske, #487431
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1380-CR State of Wisconsin v. Thomas J. Geske (L.C. #2004CF708)
2020AP1381-CR State of Wisconsin v. Thomas J. Geske (L.C. #2005CF213)

Before Gundrum, P.J., Neubauer and Reilly, 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).

In these consolidated cases, Thomas J. Geske appeals an order denying 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 (2019-20).[1] Because Geske has not established the existence of a new factor, we affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In 2005, Geske was convicted of five felony offenses stemming from two violent sexual assaults involving two separate victims. The circuit court imposed a global bifurcated sentence comprising twenty-five years of initial confinement followed by twenty years of extended supervision. We affirmed the judgments and orders denying postconviction relief. ***State v. Geske***, No. 2006AP2068-CR and 2006AP2069-CR, unpublished slip op. (WI App Sept. 19, 2007). Relevant to this appeal, we recognized that Geske was only fourteen years old when he committed the offenses but determined that his sentence represented a proper exercise of discretion and was not unduly harsh. ***Id.*** at 4-5.

Thereafter, Geske filed a postconviction motion under WIS. STAT. § 974.06, claiming that the State breached the plea agreement by undermining the bargained-for sentencing recommendation and that trial and postconviction counsel were ineffective for failing to raise that claim. The circuit court denied the motion and we affirmed. ***State v. Geske***, No. 2010AP2939, unpublished slip op. and order (WI App May 8, 2012).

In June 2020, Geske filed a motion alleging that the existence of a new factor warranted sentence modification. His motion asserted that the sentencing court failed to consider "the effects of endogenous drugs" on a juvenile's developing brain and that the defense expert who testified at sentencing "misdiagnosed [Geske] with being bipolar." Geske's motion theorized that these facts constituted "mitigating factors" that were "overlooked" at sentencing and therefore, "denied the [sentencing] judge an accurate picture of who the defendant was at the time he committed his crimes." The circuit court summarily denied the motion and Geske appeals.

A circuit court may modify a sentence based on the existence of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 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 of the parties." ***Id.***, ¶40 (quoting another source). The defendant bears the burden to establish a new factor by clear and convincing evidence. ***Id.***, ¶36. Whether a new factor exists presents a question of law we review de novo. ***Id.***, ¶33.

For many reasons, we conclude that Geske has failed to establish the existence of a new factor. First, as the State recognizes in its brief, Geske has not met his burden to prove the predicate facts underlying his new-factor claim. His provides no scientific authority or documentation supporting his conclusory assertions that "endogenous drugs" cause adolescent impulsivity or were a factor in his crimes, or that his bipolar diagnosis was incorrect. Rather, without citing to any alternative diagnosis or expert evaluation, Geske's motion simply asserts: "A more accurate diagnosis is that the defendant was suffering from hyperactive sexual desire, adolescent explosiveness, and was under the influence of endogenous drugs, amounting to disassociative personality disorder, paraphilia, and borderline sexual sadism."

Second, the factors he alleges are not new. Geske fully concedes that he "in no way argues new brain evidence," and is instead arguing that "well established brain evidence regarding the effects of endogenous drugs on a child's brain should have been considered at the time of sentencing as a mitigating factor …." In asserting that his bipolar diagnosis was incorrect, Geske relies on the fact that trial counsel and the State stipulated to Geske's expert's qualifications, along with the notion that the expert never specified "what type of bipolar the

defendant suffered from." These circumstances existed at the time of Geske's sentencing hearing. Not only do these "facts" fail to prove a "misdiagnosis," they are not new.

Third, though the phrase "endogenous drugs" was not mentioned at Geske's sentencing or in prior appeals, the fact of the immature and undeveloped juvenile brain was acknowledged at sentencing and further litigated postconviction and on direct appeal. At bottom, Geske's central sentence-modification argument is that "because of influences beyond his control and understanding as a child, he should be found less culpable by reason of adolescence." The bulk of his arguments rehash those made in the course of his direct appeal. *See* ***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.").

Fourth, as stated before, Geske acknowledges that juvenile brain chemistry, including the effects of endogenous drugs on impulse control, is "well established." Yet he utterly fails to explain why he did not raise this issue earlier, as part of his direct appeal or in WIS. STAT. § 974.06 proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (absent a sufficient reason, a defendant is procedurally barred from bringing claims that could have been raised in an earlier postconviction motion or appeal).

Fifth, we agree with the State that Geske has failed to show that his purported new factor, including his alleged bipolar misdiagnosis, was highly relevant to his sentence. The defense offered the bipolar diagnosis in mitigation, as a medical explanation for Geske's violent acts. The sentencing court suggested that a bipolar diagnosis might be aggravating in that the condition could worsen if left untreated. The sentencing transcript reveals that the court's

sentencing decision was based on the gravity and violence of the offense, the impact on the victims, and the need to protect society from Geske's predation. The court's remarks about bipolar disorder, a diagnosis offered by Geske himself, were not highly relevant to its imposition of a lengthy sentence.

Finally, we reject Geske's argument that the circuit court erred by failing to explain its reasons for denying his sentence modification motion. Whether or not the defendant has proven the existence of a cognizable new factor is a legal question, not a discretionary determination. As such, the court's lack of on-the-record reasoning "is of no consequence." ***State v. McDermott***, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237.

Upon the foregoing reasons,

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