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DISTRICT I

August 30, 2022

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

2021AP237-CR State of Wisconsin v. Leneral Lewis Williams
(L.C. # 2015CF3989)

Before Donald, P.J., Dugan and White, 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).

Leneral Lewis Williams appeals an order denying his motion for sentence modification and an order denying his motion for reconsideration. He claims that new factors warrant relief from his sentences. He also contends that his trial counsel was ineffective for failing to present the information underlying his new factor claims at the original sentencing. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We reject Williams's arguments and summarily affirm the orders of the circuit court.

In October 2015, the State filed a criminal complaint alleging that during the period from November 17, 2014, through November 24, 2014, when Williams was fifteen years old, he and two co-actors committed a series of armed robberies in Milwaukee County and conspired to commit another. Specifically, the State alleged that on November 17, 2014, Williams was riding in a car with Aquinas Rogers, then seventeen years old, and Celeste McGee, then nineteen years old. McGee stopped the car near a restaurant delivery worker who was walking towards the worker's vehicle. Williams, armed with an automatic firearm, approached the delivery worker and demanded all of her property, adding that she had "seconds before [he would] start shooting." The delivery worker gave him fifty dollars, and Williams and his co-actors then drove away. A few minutes later, McGee parked the car near a man and a woman walking together. Williams and Rogers got out of the car and robbed the two pedestrians at gunpoint, taking a purse and a wallet before fleeing. Williams again was the gunman, and he again threatened to shoot the victims if they did not surrender their property. On November 21, 2014, Williams, McGee, and a third person, all wearing black masks, entered a Tri-City Bank. Williams pointed a gun at a teller and demanded money. The teller complied, and the three co-actors escaped with thousands of dollars.[2] On November 24, 2014, Williams and Rogers, wearing black face coverings, entered a Great Midwest Bank. Williams was carrying a handgun.

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

[2] The complaint reflects that investigators received conflicting information about whether Rogers was the third person who robbed the Tri-City Bank with Williams and McGee.

He demanded money, but the tellers did not comply, and he and Rogers fled without receiving anything.

The State charged Williams with five felonies: three counts of armed robbery as a party to a crime stemming from the robberies on November 17, 2014; one count of robbery of a financial institution as a party to a crime stemming from the robbery of the Tri-City Bank on November 21, 2014; and one count of conspiracy to commit robbery of a financial institution stemming from the attempted robbery of the Great Midwest Bank on November 24, 2014. *See* WIS. STAT. §§ 943.32(1)(b),(2), 939.05, 943.87, 939.31 (2013-14). Pursuant to a plea agreement, Williams pled guilty as charged; two additional counts of robbery of a financial institution—one count arising on November 18, 2014, and one count arising on November 21, 2014—were not charged, but were read in for sentencing purposes.

For each of the five convictions, Williams faced a maximum fine of $100,000 and a maximum forty-year term of imprisonment. *See* WIS. STAT. § 939.50(3)(c) (2013-14). The trial court imposed an aggregate evenly bifurcated thirty-four year term of imprisonment and found Williams eligible for the challenge incarceration program and the substance abuse program, after he serves twelve years of initial confinement.

Williams pursued postconviction relief, alleging that the trial court imposed seventeen years of initial confinement for the arbitrary reason that Williams was seventeen years old at the time of sentencing. Williams also alleged that his trial counsel was ineffective for failing to object to the allegedly improper sentencing rationale. The trial court denied the claims, and we affirmed. *See* ***State v. Williams*** (***Williams I***), No. 2017AP596-CR, unpublished op. and order (WI App Jan. 23, 2018). We concluded that the trial court had not "imposed a sentence designed

to match Williams's age;" rather, Williams had misconstrued the trial court's remarks about the difficulty of fashioning a sentence for a youthful offender. *See* ***id.*** at 7. Because we rejected Williams's allegations of an improper sentencing consideration, we also rejected his claim that his trial counsel was ineffective for failing to object to the trial court's sentencing remarks. *See* ***id.***

Represented by successor counsel, Williams next filed the motion for sentence modification at issue here. As grounds, he claimed that his co-actors, who were adults at the time of the offenses, told him to carry the gun because he was the youngest and would not get into trouble.[3] He further claimed that the older co-actors coached him as to what he should do and say during the robberies and directed him afterwards not to "snitch." According to Williams, he and his mother told his trial counsel about the manipulative actions of the older co-actors and about facts in Williams's background and personal history that made him vulnerable to manipulation, but trial counsel failed to bring the information to the attention of the sentencing court. Williams asserted that the information therefore constituted a new factor warranting sentencing relief.

Williams also alleged that scientific research regarding adolescent brain development, in tandem with a series of United States Supreme Court cases regarding the differences between the workings of adult and juvenile minds, constituted an additional new factor warranting sentence modification. Williams acknowledged that most of the cases addressing the scientific research at

[3] "[F]or purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law ..., 'adult' means a person who has attained 17 years of age." WIS. STAT. § 938.02(1). The record reflects that both McGee and Rogers were charged in federal court, not Wisconsin state court, with crimes arising out of the November 2014 incidents giving rise to Williams's convictions.

issue were in existence at the time of his sentencing, but he argued that because his trial counsel failed to cite those cases and the sentencing court failed to consider them, the information was "new."

The circuit court denied Williams's claims, concluding that he had not identified a new factor as that term is defined in Wisconsin law.[4] Specifically, the circuit court determined that information about Williams's upbringing and role in the offenses did not qualify as a new factor because that information was known to Williams at the time of his sentencing. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. The circuit court further determined that, pursuant to ***State v. McDermott***, 2012 WI App 14, ¶21, 339 Wis. 2d 316, 810 N.W.2d 237, research regarding juvenile brain development does not constitute a new factor. The circuit court went on to conclude that, assuming *arguendo* that Williams did allege one or more new factors, sentence modification was not warranted given the nature of his offenses.

Williams moved for reconsideration, challenging the circuit court's interpretation of Wisconsin precedent governing the analysis of new factor claims. He also emphasized that trial counsel had not brought the personal and scientific information at issue to the sentencing court's attention, and he characterized this omission as ineffective assistance of trial counsel. He went on to allege that his first postconviction counsel should have challenged trial counsel's effectiveness on this basis, and that postconviction counsel was thus ineffective in turn for failing to pursue such a challenge. The circuit court concluded that it had not erred in analyzing

[4] The Honorable Pedro Colon presided over the sentencing proceedings and the original postconviction motion in this matter. We refer to Judge Colon both as the trial court and as the sentencing court. The Honorable Jean Marie Kies presided over the postconviction motion and the motion to reconsider underlying this appeal. We refer to Judge Kies as the circuit court.

Williams's new factor claims, and it further determined that Williams was attempting to conflate his new factor claims with ineffective assistance of counsel claims that he had not adequately developed. The circuit court therefore denied the motion for reconsideration. Williams appeals.

In this court, Williams first renews his allegation that new factors warrant sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The claim is governed by familiar principles that we review briefly here.

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). A circuit court has inherent authority to modify a sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, a defendant must satisfy a two-prong test that requires the defendant: (1) to demonstrate by clear and convincing evidence that a new factor exists, *see* ***id.***, ¶36; and (2) to show that the alleged new factor justifies sentence modification, *see* ***id.***, ¶¶36-38. The court may consider either prong first, and if a defendant fails to satisfy one prong of the new factor test, the court need not address the other. *See* ***id.***, ¶38.

Whether a fact or set of facts constitutes a new factor is a question of law that this court considers *de novo*. *See* ***id.***, ¶33. Whether a new factor warrants sentence modification rests in the circuit court's discretion. *See* ***id.*** We review discretionary sentencing decisions under a highly deferential standard. *See* ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

In this appeal, we need not determine whether Williams satisfied the first prong of the new factor test. We conclude that, regardless of whether he identified a new factor within the

meaning of ***Harbor***, the circuit court properly exercised its discretion in denying sentence modification. The record shows that Williams was the gunman in multiple armed robberies, he terrified his victims, he never tried to curtail his criminal behavior while the crimes were underway, and he began the crime spree at issue here a mere nine days after his release from a secure juvenile placement in an unrelated matter. The circuit court explained that, even taking into account Williams's upbringing, the influence of the older co-actors, and concerns about adolescent brain development, "the defendant's conduct in this case is simply too serious to sanction any less confinement, and ... the [aggregate] sentence imposed by [the sentencing judge] represents the minimum amount of time necessary to accomplish the goals of punishment, deterrence, and community protection."

The circuit court considered proper factors and did not take into consideration any improper factors. We are satisfied that the circuit court correctly exercised its discretion in denying Williams's claims that one or more alleged new factors warranted sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶63.

Williams also claims that his trial counsel was ineffective for failing to draw the sentencing court's attention to the information that he offers now in support of his motion for sentence modification. We agree with the circuit court that this claim is undeveloped and therefore inadequate to earn Williams any relief.

A request for relief based on alleged ineffective assistance of counsel presents a constitutional claim. *See* ***State v. Lepsch***, 2017 WI 27, ¶16, 374 Wis. 2d 98, 892 N.W.2d 682. WISCONSIN STAT. § 974.06 provides the mechanism for raising constitutional claims in circuit court when, as here, a defendant has exhausted his or her direct appellate rights. *See* ***State v.***

Henley, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. There are, however, limitations on the pursuit of such claims because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Accordingly, under § 974.06(4), a person who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address his or her claims in the first postconviction proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184.

In this case, Williams asserted in his motion for reconsideration that his trial counsel was ineffective for failing to present relevant information at sentencing and that he had a sufficient reason for not presenting that claim earlier: his "postconviction counsel was ineffective for failing to raise" the claim in the original postconviction motion. Ineffective assistance of postconviction counsel for failing to raise claims in the original postconviction motion may in some circumstances constitute a sufficient reason for an additional postconviction motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. However, a bare allegation of ineffective assistance of postconviction counsel is not enough to clear the procedural bar imposed by ***Escalona-Naranjo*** and WIS. STAT. § 974.06. Rather, a convicted person must "make the case" of counsel's alleged ineffective assistance. *See* ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334. Accordingly, we assess Williams's allegation of postconviction counsel's ineffectiveness to determine whether he made his case as ***Balliette*** requires.

We assess claims of ineffective assistance of postconviction counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Balliette***, 336 Wis. 2d 358, ¶28. The test requires that the convicted person show both a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. If the

convicted person fails to make an adequate showing as to one prong, we need not address the other. *See* ***id.*** at 697.

Here, the deficiency prong is dispositive. When a convicted person claims that postconviction counsel was ineffective for ignoring issues, proof of the deficiency prong requires the convicted person to show that the neglected issues were "clearly stronger" than the claims postconviction counsel pursued. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. That showing requires "compar[ing] the issue not raised in relation to the issues that were raised[.]" *See* ***Lee v. Davis***, 328 F.3d 896, 900 (7th Cir. 2003). Our case law provides a well-settled methodology for a convicted person such as Williams to apply in making that comparison: he must allege "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks." *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶58 (citation omitted). Williams, however, did not acknowledge, much less apply, the "clearly stronger" standard in either his postconviction motions or in his appellate briefs. He neither examined the specifics of both the current and the original postconviction claims, nor assessed the comparative merits of the original claims in relation to the new claim of ineffective assistance of trial counsel. Indeed, he offered only a bald statement that postconviction counsel was ineffective without including any analysis of the who, what, where, when, why, and how of his postconviction counsel's allegedly deficient performance.[5]

[5] We observe that, on appeal, Williams offers some discussion of the who, what, where, when, why, and how of his claim that trial counsel was ineffective for omitting personal and scientific information at sentencing. That discussion does not aid him, however, absent an analysis showing that his postconviction counsel was ineffective for failing to raise the claim in the earlier postconviction motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶53, 360 Wis. 2d 522, 849 N.W.2d 668.

Williams thus did not demonstrate that his postconviction counsel was ineffective in the original postconviction proceedings for failing to raise his current constitutional claim of ineffective assistance of trial counsel. He therefore failed to carry his burden to show a sufficient reason for raising that claim in a second postconviction motion. Accordingly, the claim is procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 186. For all the foregoing reasons, the circuit court's orders are affirmed.

IT IS ORDERED that the circuit court's orders are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals