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DISTRICT III

September 27, 2022

To:

Hon. Leon D. Stenz
Circuit Court Judge
Electronic Notice

Marilyn Baraniak
Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2021AP988-CR State of Wisconsin v. Dennis E. Pearson (L. C. No. 2005CF148)

Before Stark, P.J., Hruz and Gill, 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).

Dennis Pearson, pro se, appeals from an order denying his postconviction motion for sentence modification or resentencing. Pearson also appeals from an order denying his motion for reconsideration of that order. 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] We summarily affirm the circuit court's orders.

In 2006, a jury convicted Pearson of two counts of repeated sexual assault of the same child and one count of second-degree sexual assault of a child. The following year, Pearson filed

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

a postconviction motion under WIS. STAT. § 974.02 seeking a new trial and seeking to vacate his second-degree sexual assault conviction on the grounds that the charge violated WIS. STAT. § 948.025(3). The State conceded that Pearson's second-degree sexual assault conviction violated § 948.025(3), and the circuit court vacated that conviction. The court denied Pearson's motion for a new trial on the remaining counts. Pearson appealed, and this court affirmed Pearson's amended judgment of conviction and the order denying his motion for a new trial.

In 2012, Pearson filed a postconviction motion under WIS. STAT. § 974.06, seeking a new trial based on the ineffective assistance of his trial and postconviction counsel and alleged ***Brady***[2] violations. The circuit court denied Pearson's motion, and we affirmed the court's decision in March 2016.

In March 2021, Pearson filed the postconviction motion for sentence modification or resentencing that is at issue in this appeal. Pearson argued that a new factor warranting sentence modification existed because "'No Sexual Assault Kit' was collected or done on [the victims.]" In the alternative, Pearson argued that he was entitled to resentencing because the circuit court had relied on inaccurate information regarding his criminal history at sentencing, which violated his constitutional due process right to be sentenced based upon accurate information.[3]

[2] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

[3] Pearson's March 2021 postconviction motion also asserted that the circuit court had imposed an "illegal" bifurcated sentence on Count 1 because the conduct underlying that count began before Wisconsin's Truth-in-Sentencing legislation went into effect. Pearson mentions this issue in his primary brief on appeal, albeit without developing any argument in support of it. In his reply brief, Pearson clarifies that he has chosen not to pursue this issue on appeal. Accordingly, we do not further address Pearson's illegal sentence claim.

The circuit court denied Pearson's March 2021 postconviction motion without a hearing. The court determined that Pearson's proffered "new factor" was not actually "new" because "[t]he fact that a sexual assault kit was not provided to [Pearson] in discovery was known early in this case" and "[i]t was known that there was no sexual assault kit admitted at trial." The court further noted that the lack of a sexual assault kit had been raised and considered in Pearson's previous appeal.

The circuit court also rejected Pearson's claim that he had been sentenced based upon inaccurate information. The court explained, "[A]ny allegation that the Court relied on inaccurate information raises a constitution[al] due process claim and should have been pursued in you[r] post-conviction direct appeals and [WIS. STAT. §] 974.06 motions. This claim [cannot] be raised at this time." The court further concluded that Pearson had failed to present a sufficient reason for his failure to raise his inaccurate information claim in his prior postconviction motion or on direct appeal.

Pearson moved for reconsideration. He acknowledged that he had previously raised the "issue of 'no sexual assault kit'" in his 2012 postconviction motion and in his appeal from the order denying that motion. He asserted, however, that the issue was never actually litigated or decided in the prior postconviction or appellate proceedings. He also claimed that he had a sufficient reason for failing to raise his inaccurate information claim earlier because he was "unlettered in law" and lacked access to "legal resource materials." The circuit court denied Pearson's motion for reconsideration, and this appeal follows.

We conclude that both of the claims at issue in this appeal are procedurally barred. Pearson's claim for sentence modification is based on his assertion that no sexual assault kit was

completed for either of the two victims. Pearson has conceded, however, that he previously raised the issue of "no sexual assault kit" in his 2012 postconviction motion and in his subsequent appeal of the circuit court's order denying that motion. Our review of the record confirms that Pearson previously raised this issue. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Pearson cannot seek to relitigate his argument that he is entitled to relief because no sexual assault kits were completed by rephrasing that argument as a claim for sentence modification.

As in his motion for reconsideration, Pearson claims on appeal that no court has ever "ruled" on his "no sexual assault kit" claim, and, therefore, the issue has not been "legally litigated." The record does not support this assertion. In his 2012 postconviction motion, Pearson argued that his postconviction attorney was constitutionally ineffective in his WIS. STAT. § 974.02 postconviction motion and direct appeal by failing to raise various claims that Pearson's trial attorney was constitutionally ineffective. Two of Pearson's new ineffective-assistance-of-trial-counsel claims were premised on the fact that no sexual assault kits had been completed during a physician's examination of the victims.

The circuit court denied Pearson's 2012 postconviction motion. The court concluded that Pearson's postconviction attorney was not ineffective by failing to raise Pearson's new ineffective-assistance-of-trial-counsel claims because Pearson had not shown that trial counsel's alleged errors were prejudicial to his defense. We affirmed the court's decision on appeal, stating, "Under the totality of the circumstances, there is no basis to conclude that the errors Pearson asserts trial counsel committed prejudiced him." Thus, contrary to Pearson's assertion, his previous claims regarding the absence of sexual assault kits were litigated in his prior

postconviction proceedings and appeal. Accordingly, Pearson's current claim for sentence modification based on the absence of sexual assault kits is procedurally barred.[4] *See* ***Witkowski***, 163 Wis. 2d at 990.

Pearson's claim for resentencing is also procedurally barred. After the time to pursue a postconviction motion under WIS. STAT. § 974.02 has expired, a prisoner may file a postconviction motion under WIS. STAT. § 974.06 "claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state." Sec. 974.06(1). Section 974.06(4), however, provides that "[a]ll grounds for

[4] In any event, we would also reject Pearson's sentence modification claim on the merits. To obtain sentence modification based on a new factor, a defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a fact or set of facts that was "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 (citation omitted).

In this case, there is nothing in the record to suggest that, at the time of sentencing, the circuit court believed that sexual assault kits had been completed for the victims or was unaware that no sexual assault kits had been completed. No testimony was introduced at trial to suggest that the physician who examined the victims had completed sexual assault kits. In fact, the physician expressly testified at trial that he had not performed a particular test that is used to detect sperm in a woman's vagina and that he did not "look for sperm" because he "was told that it had not happened recently enough to make that worthwhile." Moreover, Pearson would have been aware at the time of sentencing that no evidence regarding sexual assault kits had been provided to him in pretrial discovery. The record therefore belies Pearson's claim that the court and the parties were unaware at the time of sentencing that no sexual assault kits had been completed.

In addition, there is nothing in the sentencing transcript to suggest that the lack of sexual assault kits was "highly relevant to" the imposition of Pearson's sentences. *See* ***id.*** (citation omitted). During its sentencing remarks, the circuit court emphasized that Pearson had repeatedly engaged in penis-to-vagina sexual intercourse with the victims, as opposed to sexual contact. In support, the court cited the victims' credible testimony that intercourse had occurred, as well as the physician's testimony that his physical examinations indicated that both victims had engaged in sexual intercourse on multiple occasions. Nothing in the court's sentencing remarks suggests that the lack of sexual assault kits—even if that fact was not known to the court at the time of sentencing—would have affected the court's sentencing decision.

relief available to a person under [§ 974.06] must be raised in his or her original, supplemental or amended motion." Thus, § 974.06 cannot be used to review an issue that was, or could have been, raised in a previous § 974.06 motion or on direct appeal unless a "sufficient reason" exists for the defendant's failure to raise the issue earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994) (quoting § 974.06(4)).

Pearson's claim for resentencing is a constitutional claim. He contends that the circuit court violated his constitutional right to due process by sentencing him based upon inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (stating that a defendant "has a constitutionally protected due process right to be sentenced upon accurate information" and "[w]hether a defendant has been denied this due process right is a constitutional issue"). Pearson's resentencing claim therefore falls within the ambit of WIS. STAT. § 974.06. As such, Pearson's claim is procedurally barred under § 974.06(4) and ***Escalona-Naranjo*** unless he can show a sufficient reason for his failure to raise the claim in his prior postconviction motions and appeals.

In his appellate briefs, Pearson does not allege any reason—let alone a sufficient reason—for his failure to raise his resentencing claim in his prior postconviction and appellate proceedings. Pearson contends, however, that he is not required to show a sufficient reason because his resentencing claim does not actually fall under WIS. STAT. § 974.06. Pearson instead asserts that his resentencing claim challenges the circuit court's exercise of sentencing discretion. He cites ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978), in which our supreme court stated that a § 974.06 motion "cannot be used to challenge a sentence because of an alleged abuse of discretion" and that the "proper remedy" for such a claim "is a motion for modification of sentence."

Pearson's argument fails for two reasons. First, Pearson's March 2021 postconviction motion and his primary brief in this appeal clearly assert that the circuit court violated his "constitutional due process right to be sentenced on [the] basis of accurate information" by relying on "inaccurate information" regarding his criminal history at sentencing. (Formatting altered.) When a defendant claims that a court violated due process by relying on inaccurate information at sentencing, the proper remedy is resentencing, not sentence modification. *See, e.g.*, ***Tiepelman***, 291 Wis. 2d 179, ¶26; *see also* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81. As explained above, a claim for resentencing due to the circuit court's reliance on inaccurate information is a constitutional due process claim and, therefore, falls within the ambit of WIS. STAT. § 974.06.

Second, even if Pearson's resentencing claim could be construed as a claim for sentence modification based upon an erroneous exercise of the circuit court's sentencing discretion, his claim would be untimely. A motion for sentence modification that is not based on the existence of a new factor must be filed within ninety days of the date of sentencing. *See* WIS. STAT. § 973.19(1); ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895 (differentiating a motion for sentence modification under § 973.19(1), which must be filed within ninety days of sentencing, and a motion for sentence modification based on a new factor, which may be filed at any time). Pearson's current postconviction motion was filed approximately fifteen years after his sentencing hearing. Thus, even if Pearson's request for resentencing were construed as a motion for sentence modification under § 973.19(1), the motion would be untimely.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. 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