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DISTRICT I

May 2, 2023

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Daniel J. O'Brien
Electronic Notice

Reginald S. Curtis 396562
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8500 Rainbow Rd.
Lake Tomahawk, WI 54539-9558

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

2021AP1632-CR State of Wisconsin v. Reginald S. Curtis (L.C. # 2000CF3363)

Before Brash, C.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).

Reginald S. Curtis, *pro se*, appeals an order of the circuit court denying his motion for sentence modification, as well as an order denying his motion for reconsideration. 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 (2021-22).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In October 2000, Curtis was convicted of first-degree reckless homicide with the use of a dangerous weapon. He was sentenced to twenty-seven years of initial confinement to be followed by thirteen years of extended supervision.

This is Curtis's fourth appeal in this case. In his direct appeal, he argued that there was newly discovered evidence relating to a gun that was found near the victim, which entitled him to a new trial. We concluded that the alleged new evidence was "not relevant" to the case and "not likely to yield a different result if a new trial were to be granted," and affirmed. *See* ***State v. Curtis***, No. 2002AP292-CR, unpublished op. and order at 1-2 (WI App Mar. 10, 2003).

Curtis, acting *pro se*, subsequently filed two WIS. STAT. § 974.06 motions, in 2006 and 2013. In his first § 974.06 motion, Curtis argued that his trial counsel was ineffective for failing to object to the circuit court answering jury questions outside of his presence, and that his postconviction counsel was ineffective for failing to raise that issue. *See* ***State v. Curtis***, No. 2006AP909, unpublished slip op., ¶1 (WI App Feb. 6, 2007). The circuit court denied the motion, and we affirmed. *See* ***id.***, ¶17.

In his second WIS. STAT. § 974.06 motion, Curtis alleged newly discovered evidence in the form of expert reports relating to the bullet's trajectory and his state of mind at the time of the shooting, which he claimed supported his theory that he had acted in self defense. *See* ***State v. Curtis***, No. 2013AP2384, unpublished slip op., ¶¶5-7 (WI App July 22, 2014). We rejected Curtis's arguments as being procedurally barred as well as failing on the merits, referencing the speculative nature of the report regarding his state of mind, and the lack of relevance regarding the trajectory of the bullet as it relates to proving first-degree reckless homicide. *See* ***id.***, ¶¶13-15, 19.

Curtis has now filed the postconviction motion for sentence modification, which underlies this appeal. In that motion, he argued that the circuit court did not consider his age for purposes of sentencing—he had just turned eighteen years old at the time of the offense—and failed to consider other mitigating factors, which would support a lesser sentence. In support of his argument, he cited cases that discussed research relating to adolescent brain development as it pertains to juvenile offenders who are serving life sentences or "*de facto*" life sentences. The circuit court rejected his arguments, noting that this research was previously rejected as constituting a new factor for purposes of sentence modification, and further, that Curtis is not serving a life sentence. Additionally, it found that to the extent that Curtis was challenging the court's exercise of sentencing discretion, his arguments were procedurally barred. The court, therefore, denied Curtis's motion. Curtis then filed a motion for reconsideration, which the court also denied. Curtis appeals.

In order to prevail on a motion for sentence modification, a defendant must demonstrate both that a new factor exists and that the alleged new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. Whether the evidence presented by the defendant constitutes a new factor is a question of law that we review *de novo*. ***Id.***, ¶33.

With regard to Curtis's assertion that "new" research on adolescent brain development is newly discovered evidence, Wisconsin courts have previously rejected arguments that this information constitutes a new factor. *See* ***State v. Ninham***, 2011 WI 33, ¶92, 333 Wis. 2d 335, 797 N.W.2d 451 ("'new' scientific research regarding adolescent brain development ... only confirms the conclusions about juvenile offenders that the [United States] Supreme Court had 'already endorsed' as of 1988." (citation omitted)); *see also* ***State v. McDermott***, 2012 WI App

14, ¶¶17-22, 339 Wis. 2d 316, 810 N.W.2d 237 (relying on ***Ninham*** to reject a similar argument, as well as observing "that adolescents are generally more impulsive than adults has been known since humans were able to observe their environment"). We are compelled to follow that precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Therefore, Curtis's motion for sentence modification fails.

Curtis's remaining arguments generally relate to alleged errors by the circuit court in exercising its discretion at sentencing. For example, Curtis asserts that the court did not consider mitigating factors, put too much weight on deterrence, and failed to consider Curtis's rehabilitative needs. Curtis also alleges that the court relied on "incorrect information" in referencing both initial and amended charges from his prior juvenile record at sentencing; however, Curtis does not contend that the information was actually inaccurate, but rather, that it "bolstered" the State's sentencing recommendation.

There is no longer any avenue available to Curtis under which he can pursue these arguments. He did not challenge his sentence in his direct appeal. Additionally, he did not raise claims of ineffective assistance of counsel relating to a failure by counsel to object to, or raise allegations of, errors in exercising sentencing discretion in either of his WIS. STAT. § 974.06 motions.[2] As a result, any ineffective assistance of counsel claim would now be procedurally barred unless Curtis provides a "sufficient reason" that the claim was not previously raised in his

[2] A challenge relating to sentencing discretion is not permitted under WIS. STAT. § 974.06, because motions under that statute are "limited in scope" to jurisdictional matters, or to pursue constitutional issues, such as a claim of ineffective assistance of counsel. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350 (citation omitted).

prior postconviction proceedings and appeals. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994).

Whether a defendant has alleged a sufficient reason for failing to raise an available claim earlier is a question of law that we review *de novo*. ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. While a claim of ineffective assistance of postconviction counsel may in some cases be a sufficient reason "for failing to raise an available claim in an earlier motion or on direct appeal," the defendant must nevertheless demonstrate "that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." ***Id.***, ¶¶4, 36. Furthermore, to prove that postconviction counsel was ineffective for failing to bring ineffective assistance of trial counsel claims, the defendant must prove that trial counsel did indeed provide ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Curtis fails to meet these burdens. The only reason he proffers for failing to bring his sentencing challenges in previous postconviction motions and appeals is that he was previously "unaware of the statutory and constitutional requirements" the circuit court is required to consider during sentencing. However, "[i]gnorance of the law" is not a sufficient reason for failing to previously raise these arguments, *see* ***State v. Jensen***, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230, and further, the conclusory nature of Curtis's statements in his

motion certainly do not demonstrate that these arguments are clearly stronger than any of those previously raised, *see* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 37.[3]

Therefore, all of Curtis's arguments fail. Accordingly, we affirm the circuit court's denial of his motion for sentence modification and his motion for reconsideration.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. *See* 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

[3] Curtis also alleges that the circuit court failed to explain his bifurcated sentence, as required pursuant to ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, instead leaving it to Curtis's trial counsel to explain. However, the requirements set forth in ***Brown*** pertain to the requirements of the circuit court when engaging in a plea colloquy, *see* ***id.***, ¶52, and are therefore inapposite here. In any event, we conclude that this claim also fails under the clearly stronger standard. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668.