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DISTRICT II

May 17, 2023

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Edwin Hagen, #648892
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1293 State of Wisconsin v. Edwin Hagen (L.C. #1989CF1042)

Before Gundrum, P.J., Grogan and Lazar, 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).

Edwin Hagen appeals from an order denying his postconviction motion wherein he sought sentence modification based on his claim of the existence of a new factor. In 1991, a jury convicted Hagen of first-degree intentional homicide while armed with a dangerous weapon, as a party to the crime. The alleged new factor, according to Hagen, was information showing that the decedent's father had used his influence and money to secure Hagen's conviction by bribing the police and other witnesses. 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 affirm.

In 1984, Hagen and two others kidnapped Sanford Gross in Chicago, forced him to sign checks totaling $50,000, which they cashed, and then drove Sanford to Racine, where they killed and buried him. Sanford's father, Jerry Gross, was married to Hagen's mother, Sheila Gross, making Hagen and Sanford stepbrothers. Hagen was charged in federal court for the kidnapping, and a jury convicted him in 1986.[2] The federal court sentenced Hagen to 150 years in prison.

In 1991, the State put Hagen on trial for first-degree intentional homicide, and the jury found Hagen guilty. At sentencing, the trial court[3] imposed the maximum sentence of life imprisonment, plus five years for the weapon enhancer, consecutive to each other and to the federal sentence. The court based its sentence on the severity of the crime and the need to protect the public.

In 2022, Hagen filed a WIS. STAT. § 974.06 postconviction motion asking for sentence modification based on a new factor. The circuit court[4] held a hearing on this motion with Hagen appearing by video conference instead of transporting Hagen to the courtroom. Hagen did not object to appearing by video conference. The court heard from Hagen first and then asked to hear from the prosecutor. When the prosecutor began to talk, Hagen spoke over the prosecutor,

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

[2] Hagen was not charged with homicide in the federal case because Sanford's body was not located until 1986.

[3] The Honorable Dennis J. Flynn presided over the jury trial and imposed Hagen's sentence.

[4] The Honorable Faye M. Flancher presided over the 2022 postconviction motion hearing.

which prompted the court to tell Hagen it was the prosecutor's turn to talk. Hagen apologized and advised the court that he did not mean to interrupt, but he could not hear the prosecutor. The court then instructed the prosecutor to speak into the microphone. After that, Hagen did not object or indicate a problem with the audio at any subsequent point in the hearing.

The circuit court denied Hagen's motion, explaining that the information he relied upon in his motion did not constitute a new factor because all of the information existed at the time he was tried. The circuit court noted that even the affidavits from his mother, Sheila, which were signed in 2017 and 2018, "talk[ed] about knowledge that … she would have had at the time of your trial." As a result, there was no legal basis for the court to conclude that this information constituted a new factor. Hagen now appeals.

Hagen's claim that the circuit court erred when it held the hearing by video conference.

Hagen first claims his due process rights were violated because the circuit court required him to appear for the postconviction motion hearing by video conference. He claims an "audio malfunction" prevented him from hearing the prosecutor, and therefore he could not adequately respond to the prosecutor's argument. We reject Hagen's claim because the Record reflects that he forfeited any right to raise this issue.

A circuit court may use video conferencing for a post-trial proceeding. WIS. STAT. § 967.08(1). The court may do so on its own motion or at the request of any party. Sec. 967.08(1). If a defendant objects, the court must determine whether the defendant is

lawfully entitled to be physically present in the courtroom.[5] If a defendant is entitled to be physically present in the courtroom, the court must sustain an objection to remote attendance. Sec. 967.08(4). Here, Hagen did not object to appearing by video conference. In fact, in his postconviction motion, he specifically advised the circuit court that he could appear either in person *or* by telephone. By agreeing to appear by telephone and by failing to object to the use of video, Hagen forfeited his claim to raise this issue on appeal. ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727.[6]

Hagen's claim that the circuit court erred when it rejected his new factor claim.

Hagen next argues the circuit court erred in concluding the information he submitted about Jerry unlawfully influencing the police and paying witnesses to secure Hagen's conviction did not meet the definition of a new factor. We reject Hagen's claim because he failed to prove that this information constituted a new factor.

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[5] WISCONSIN STAT. § 971.04(1) identifies the proceedings when a defendant "shall be present personally" in the courtroom. A postconviction hearing for sentence modification is not listed in this statute.

[6] Moreover, any violation of WIS. STAT. § 971.04(1) is subject to the harmless error rule. *See* ***State v. Harris***, 229 Wis. 2d 832, 839-40, 601 N.W.2d 682 (Ct. App. 1999). Having Hagen appear by video conference was harmless. The Record reflects that Hagen had no problem hearing the circuit court. At the start of the hearing, the court gave Hagen the first opportunity to make arguments, and there were several questions and answers between the court and Hagen. When the court thought Hagen had completed his presentation, the court gave the prosecutor an opportunity to respond. The Record reflects that when the prosecutor first spoke, Hagen continued to talk, but the court stopped him and indicated that the prosecutor was speaking. Hagen apologized and informed the court that he could not hear the prosecutor. The court then instructed the prosecutor to use the microphone. After that, nothing in the transcript suggests Hagen could not hear the prosecutor. Hagen did not interrupt again and did not object. After the brief comment by the prosecutor, the court asked Hagen a question, which he answered. The court and Hagen had some additional conversation where Hagen did not hesitate to speak up on his own behalf. It is clear from our review of the Record that there was no "audio malfunction[.]"

"Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a "fact or set of facts" "constitutes a 'new factor' is a question of law." ***Id.*** 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant bears the burden of establishing the existence of a new factor "by clear and convincing evidence[.]" ***Harbor***, 333 Wis. 2d 53, ¶36.

If a new factor exists, the defendant is not automatically entitled to sentence modification. ***Id.***, ¶37. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id.*** Whether a new factor justifies sentence modification is within the circuit court's discretion. ***Id.*** When the circuit court concludes as a matter of law that there is no new factor, it is unnecessary to "determine whether, in the exercise of its discretion, the sentence should be modified." ***Id.***, ¶38. "[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification," it is unnecessary for the court to "determine whether the facts asserted by the defendant constitute a new factor as a matter of law." ***Id.***

A new factor is defined as a fact not known at the time of sentencing either because it was not in existence or because it was unknowingly overlooked. In either case, the new factor must be highly relevant to the imposition of the sentence to meet the new factor definition. Hagen failed to prove by clear and convincing evidence that the information did not exist or that it was highly relevant to his sentence. The information Hagen submitted about Jerry using his influence to obtain convictions for the homicide of his son was all in existence at the time of

Hagen's trial. These alleged payments to obtain the cooperation of witnesses and his friendly relationship with the investigating officers are not new information. Hagen himself actually admits these facts were in existence at the time of his trial. But, he says this information was not available to him until Jerry died and his mother Sheila found papers about Jerry's actions. In essence, Hagen is really arguing that this information was unknowingly overlooked by the parties at trial. But, even if we agreed with Hagen on that point, he failed to prove that any of this information was highly relevant to his *sentence*.

All of the information Hagen proffers addresses the investigation into his crime or alleges his innocence. He claims that Jerry improperly influenced the police investigation and induced the cooperation of witnesses against him. But, the jury convicted Hagen beyond a reasonable doubt. Thus, the information Hagen submits is not relevant to his *sentence*, which was primarily based on the serious nature of the offense for which he was convicted. Rather, it is relevant to whether the police investigation was proper and whether any of the information would have secured an acquittal for Hagen if he had the information at the time he was tried.[7]

In his appellate brief, Hagen also mistakenly conflates the new factor test with the newly discovered evidence test. He criticizes the circuit court for only addressing the new factor test. Hagen's postconviction motion, however, only sought relief on the basis that his information constituted a new factor that warranted sentence modification. Accordingly, the circuit court

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[7] Although Hagen's information alleges improper conduct by Jerry, the factual section of Hagen's brief seems to admit that he killed Sanford. Specifically, he states that he and a codefendant "removed [Sanford] Gross from the rear compartment of the U-Haul and walked him 1/8 mile down a set of railroad tracks where [Sanford] Gross was struck in the back of the head with a blunt instrument and buried in a (3 [1]/2 deep) shallow grave." Still, to the extent Hagen believes the information he submitted proves he is innocent of the crimes for which he was convicted, a motion to modify his sentence based on a new factor is not the method to obtain relief.

properly considered the argument that Hagen actually raised. Like the circuit court, we limit our review to the legal issue Hagen raised below. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983) ("Generally, issues not raised or considered by the trial court will not be considered for the first time on appeal.").

Therefore,

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