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DISTRICT I

May 31, 2023

To:

Hon. Glenn H. Yamahiro
Circuit Court Judge
Electronic Notice

Sarah Burgundy
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Perk Eugene Thomas 235340
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P.O. Box 3310
Oshkosh, WI 54903-3310

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

2022AP619-CR State of Wisconsin v. Perk Eugene Thomas
(L.C. # 1997CF972838)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Perk Eugene Thomas, *pro se*, appeals from a March 30, 2022 order denying his motion to reconsider a December 8, 2021 decision that denied postconviction relief. 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 conclude that we lack jurisdiction over Thomas's appeal. Therefore, the appeal is dismissed.

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

Thomas pled guilty in 1998 to first-degree intentional homicide. The circuit court sentenced him to life imprisonment with eligibility for parole after forty years. He then pursued a series of postconviction motions and appeals. As relevant here, Thomas filed a motion on December 6, 2021, alleging multiple bases for sentencing relief, namely: (1) his trial counsel was constitutionally ineffective at the sentencing hearing for failing to argue that the presentence investigation report (PSI) included inaccurate information; (2) he suffered a violation of his due process right to be sentenced on the basis of accurate information; and (3) the allegedly inaccurate information in the PSI was a new factor warranting sentence modification. On December 8, 2021, the circuit court denied the motion on the grounds that the constitutional claims were procedurally barred and the new factor claim was not premised on any new information.

Thomas moved for reconsideration, which the circuit court denied by order of March 30, 2022. Thomas filed a notice of appeal on April 15, 2022.

After the record reached this court, we issued an order explaining that we lacked jurisdiction over the circuit court's order of December 8, 2021, because Thomas filed his notice of appeal more than ninety days after entry of that order. *See* WIS. STAT. §§ 808.03(1), 808.04(1). We directed the parties to address in their briefs whether we had jurisdiction over the order of March 30, 2022, denying reconsideration.

Thomas argues that this court has jurisdiction of the appeal from the March 30, 2022 order based on our inherent authority and because “justice demands” that he receive redress.² The State asserts that we lack jurisdiction because Thomas’s motion to reconsider did not raise any issues that were not resolved in the order that Thomas asked the circuit court to reconsider. We agree with the State.

An appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered. *See Silverton Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). This rule is based on the rationale that motions for reconsideration cannot be used to extend the time to appeal from a judgment or order when that time has expired. *See id.*; *see also Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972). To determine whether a motion to reconsider presented a new issue, we compare the issues raised in the motion for reconsideration with those disposed of in the original order. *See Harris v. Reivitz*, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987). Whether a motion for reconsideration raised a new issue is a question of law, which we review *de novo*. *See State v. Edwards*, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136.

As *Harris* directs, we have compared the issues that Thomas raised in his December 6, 2021 postconviction motion with the issues that he raised in his motion to reconsider. We

² Thomas’s opening brief did not squarely address the question of this court’s jurisdiction. Thomas did, however, include a discussion of jurisdiction in his reply brief. Although normally “we do not consider matters argued for the first time in a reply brief because that precludes the respondent from being able to address those arguments[.]” *see Techworks, LLC v. Wille*, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727, in this case we directed the parties to address jurisdiction. We have therefore elected to consider the jurisdictional arguments that Thomas presented in his reply brief.

conclude that Thomas did not raise any new issues in his reconsideration motion that were not already disposed of by the original order.

First, the motion for reconsideration emphasized Thomas's claim that a new factor warranted sentence modification. Thomas, however, raised that claim in his original motion. While his motion for reconsideration asserted that the circuit court conducted a flawed analysis when denying his original motion, that assertion did not present a new issue. *See Ver Hagen*, 55 Wis. 2d at 26 (citation omitted) (explaining that “mere error in an order cannot be reached by appealing from an order denying a motion to set it aside”).

Second, the motion for reconsideration urged the circuit court to conclude that Thomas suffered a violation of his constitutional right to effective assistance of counsel at sentencing. Specifically, Thomas asserted that he “advised counsel that the PSI report was inaccurate and [that counsel] needed to move for a continuance to refute the information. Counsel refused his request[.]” This argument was not new. Thomas asserted in his original motion that “counsel failed to request a continuance so that the inaccuracies in the PSI could be investigated.... Thomas contends he was prejudiced by counsel's deficient performance because he was unable to refute the inaccurate information in the PSI[.]”

Third, Thomas argued in his motion for reconsideration that he suffered a violation of his right to “due process and equal protection” because “he was sentenced on the basis of inaccurate information and ... this was prejudicial. The burden shifts to the State to demonstrate that the error was harmless.” This argument reiterated Thomas's claim in his original motion that he “could demonstrate ... a due process violation showing that he was sentenced on the basis of

inaccurate information and that this was prejudicial. The burden should and must shift to the State to demonstrate that the error was harmless.”

In sum, the motion to reconsider merely restated the arguments that Thomas presented in his original motion and that he believed should have been decided in his favor. Accordingly, the motion to reconsider failed to raise any new issues that the circuit court did not resolve in the original order. We thus do not have jurisdiction over the appeal and must dismiss it. *See Harris*, 142 Wis. 2d at 87.

Therefore,

IT IS ORDERED that this appeal is dismissed for lack of jurisdiction.

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

Sheila T. Reiff
Clerk of Court of Appeals