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DISTRICT I

August 1, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
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Donald V. Latorraca
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Dontre K. Johnson 259802
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Black River Falls, WI 54615-0233

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

2022AP1294-CR State of Wisconsin v. Dontre K. Johnson (L.C. # 2011CF97)

Before White, 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).

Dontre K. Johnson, *pro se*, appeals an order denying his motion for relief from the aggregate forty-year term of imprisonment that he received for two counts of repeated sexual assault of a child. He alleges that a new factor warrants sentence modification. Alternatively, he alleges that he is entitled to a new trial in the interest of justice. Based upon a review of the briefs and record, we conclude at conference that this matter 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.

A jury in 2011 found Johnson guilty of two felony counts of repeated sexual assault of a child and one misdemeanor count of exposing genitals to a child. With the assistance of appointed counsel, he pursued a motion for postconviction relief. The circuit court vacated the misdemeanor conviction and otherwise rejected his claims. He appealed, alleging that the charging period spanned too many years; a charging delay deprived him of adequate notice; his trial counsel was ineffective for failing to object to the alleged lack of adequate notice; and the inadequate notice constituted plain error. We affirmed. *See* ***State v. Johnson*** (***Johnson I***), No. 2014AP997-CR, unpublished slip op. (WI App Apr. 7, 2015).

Johnson obtained new counsel and filed a motion under WIS. STAT. § 974.06, collaterally attacking his felony convictions. He alleged that his trial was tainted by a biased juror, Juror 22, his trial counsel was ineffective in selecting the jury, and his first postconviction attorney was ineffective for failing to raise these claims. The circuit court denied relief, and Johnson appealed. We affirmed the circuit court, and we also denied Johnson's request that this court grant him a new trial in the interest of justice. *See* ***State v. Johnson*** (***Johnson II***), No. 2017AP1581, unpublished slip op. ¶2 (WI App Aug. 14, 2018).

Johnson next filed the postconviction motion underlying this appeal. As relevant here, he alleged that the hardship suffered by his wife and child following his sentencing constituted a new factor warranting sentence modification. The circuit court denied the claim without a hearing. Johnson appeals, renewing his claim that a new factor warrants sentencing relief and, additionally, again requesting a new trial in the interest of justice under WIS. STAT. § 752.35.

We begin with Johnson's allegation that a new factor warrants modification of the sentences imposed in this case. 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, the defendant must satisfy a two-prong test. *See* ***id.***, ¶36. One prong requires the defendant to demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents an issue of law for our *de novo* review. *See* ***id.***, ¶¶33, 36. The other prong requires the defendant to demonstrate that the alleged new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** If a defendant fails to satisfy one prong of the test, a court need not address the other. *See* ***id.***, ¶38.

Johnson asserts that his wife and daughter have experienced physical, economic, and emotional hardship since his sentencing. In support, he describes his daughter's depression, his wife's bouts with COVID-19 and other illnesses, and financial burdens that led his wife to declare bankruptcy. He posits that these circumstances constitute one or more new factors because they did not exist at the time of his sentencing. Johnson fails, however, to demonstrate that any of these matters was '"highly relevant to the imposition of sentence."' *See* ***id.***, ¶40 (citation omitted).

Our examination of the record reveals that, when sentencing Johnson, the circuit court focused on: (1) the gravity and aggravated nature of the offenses—which continued, as the circuit court emphasized, for "a very lengthy period of time"; (2) Johnson's character, which the circuit court noted with concern permitted him to "present himself well, and [then] on the other side of it whenever he got these kids alone, sexually assault them"; and (3) the "significant risk" that Johnson posed to the community, specifically, "a risk of repeating this type of behavior with

another child." The circuit court acknowledged that Johnson had a work history, recognized that he had the "ability ... to live in the community, to give back to [the community] ... in certain ways," and the circuit court stated that it did "not doubt that he loves his children." The circuit court then explained that it had weighed the "good things that [Johnson had] done" against "these terrible terrible things [he had] done ... over the course of many years" and concluded that the charges of repeated sexual assault of a child warranted two consecutive terms of twenty years in prison, each term bifurcated as thirteen years of initial confinement and seven years of extended supervision.

In light of the foregoing, Johnson fails to demonstrate that either his absence from the family home or the hardship that his wife and daughter might experience due to his absence was "highly relevant" to the circuit court when imposing his sentences. Accordingly, we conclude as a matter of law that he fails to demonstrate the existence of a new factor as that term is defined in ***Harbor***. The circuit court, therefore, properly denied his motion for sentence modification.

Johnson alternatively requests that this court grant him a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, this court may grant a new trial in the interest of justice when the real controversy has not been fully tried or when it is probable that justice has miscarried. Our power of discretionary reversal under § 752.35, however, "may be exercised only in direct appeals from judgments or orders." ***State v. Allen***, 159 Wis. 2d 53, 55, 464 N.W.2d 426 (Ct. App. 1990). Accordingly here, where Johnson appeals from a circuit court order denying sentence modification, we cannot exercise our discretionary power of reversal to set aside the judgment of conviction.

Moreover, were we to conclude that the instant appeal is a viable mechanism for Johnson to request a new trial under WIS. STAT. § 752.35, we would deny the request. Johnson bases his current claim for a new trial on his theory that Juror 22 "introduced extraneous information" during deliberations and improperly influenced the other jurors by revealing her own sexual assault. Johnson's previous request for a new trial under § 752.35, presented us with that same argument. *See* ***Johnson II***, No. 2017AP1581, ¶¶29, 34. We denied his claim. *See* ***id.***, ¶34. Johnson is barred from raising the claim again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (prohibiting repetitive litigation). In enforcing the bar, we have considered and rejected Johnson's contention that his request for a new trial in ***Johnson II*** rested primarily on his allegation of juror bias rather than on the claim of improper juror influence that he emphasizes now. Johnson may have shifted the emphasis of his complaints about Juror 22, but "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *See* ***Witkowski***, 163 Wis. 2d at 990. For all the foregoing reasons, we affirm.

Upon the foregoing,

IT IS ORDERED that the postconviction order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals