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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 2, 2024

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

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

Anne Christenson Murphy
Electronic Notice

Jotaviaous J. Cheese 548947
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2022AP841-CR State of Wisconsin v. Jotaviaous J. Cheese (L.C. # 2011CF5685)

Before White, C.J, Geenen and Colón, 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).

Jotaviaous J. Cheese, *pro se*, appeals an order denying his postconviction motion for sentence modification. Based upon a 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.

In 2011, Cheese and Deangelo Webster were visiting their friend Dominique Thomas when Neil Tellis walked through the alley behind Thomas's home. Thomas told his friends to

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

"pop" Tellis, and both Cheese and Webster fired guns at Tellis. The State concluded that Cheese's shot was not fatal and that Webster's shot struck Tellis in the torso and killed him. The State charged Cheese, Thomas, and Webster with first-degree intentional homicide. Webster agreed to testify against Cheese and Thomas, but ultimately all three individuals decided to resolve their cases short of trial. Pursuant to a plea agreement, Cheese pled guilty to first-degree reckless homicide as a party to a crime, a conviction carrying a maximum penalty of sixty years of imprisonment. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), 939.05 (2011-12). The matter proceeded to sentencing in 2012. The State, as promised, recommended a twenty-five-year term of initial confinement and made no recommendation regarding extended supervision. The circuit court imposed twenty years of initial confinement and ten years of extended supervision.

Cheese, by his appellate counsel, filed a no-merit appeal but voluntarily dismissed it to pursue a postconviction motion. ***State v. Cheese*** (***Cheese I***), No. 2013AP2076-CRNM, unpublished op. and order (WI App Feb. 11, 2014). Cheese prevailed in the motion, which challenged a DNA surcharge. His appellate counsel then filed a second no-merit appeal. This court affirmed. ***State v. Cheese*** (***Cheese II***), No. 2014AP803-CRNM, unpublished op. and order (WI App July 16, 2014). Cheese did not seek review of our decision.

Cheese filed postconviction motions on his own behalf in 2016 and 2018. Both motions raised challenges to his restitution obligation. The circuit court denied the claims, and Cheese did not appeal from either of the postconviction orders.

In 2022, Cheese filed the postconviction motion for sentence modification that underlies this appeal. He alleged an erroneous exercise of sentencing discretion, the existence of new

factors warranting sentencing relief, and ineffective assistance of counsel. The circuit court rejected his claims without a hearing. Cheese appeals.

We begin with Cheese's claim that the circuit court erroneously exercised its sentencing discretion. This claim is no longer available to Cheese.

Pursuant to WIS. STAT. § 973.19(1)(a), a defendant may seek sentence modification on any ground within ninety days after sentencing. ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 794 N.W.2d 765. Cheese filed his most recent postconviction motion approximately ten years after expiration of his deadline under § 973.19(1)(a). A defendant who does not proceed under § 973.19(1)(a) may alternatively seek sentence modification on any ground within the deadlines for a direct appeal set forth in WIS. STAT. RULE 809.30. ***Nickel***, 330 Wis. 2d 750, ¶5; *see also* § 973.19(1)(b), (5). Cheese's direct appeal concluded in 2014, with the resolution of ***Cheese II***. *See* ***State v. Lagundoye***, 2004 WI 4, ¶20 & n.13, 268 Wis. 2d 77, 674 N.W.2d 526. Cheese therefore may not now rely on either § 973.19 or RULE 809.30 to challenge the circuit court's exercise of sentencing discretion. A defendant may raise constitutional and jurisdictional challenges under WIS. STAT. § 974.06(1) at any time after the expiration of the defendant's direct appeal rights, but § 974.06 "cannot be used to challenge a sentence based on an erroneous exercise of discretion 'when a sentence is within the statutory maximum or otherwise within the statutory power of the court.'" ***Nickel***, 330 Wis. 2d 750, ¶7 (citation omitted). Cheese fails to identify any other mechanism that would allow him to challenge the circuit court's exercise of sentencing discretion at this juncture.

Moreover, Cheese's challenge to the circuit court's exercise of sentencing discretion is barred even if Cheese could identify some legally cognizable mechanism for pursuing the claim.

In ***Cheese II***, we determined that the circuit court properly exercised its sentencing discretion. ***Id.***, No. 2014AP803-CRNM, at 6. "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). The rule is no less applicable when the prior litigation was a no-merit appeal, as "the no merit process 'necessarily implicates the merits of an appeal,'" and an issue resolved during that process "'can only be understood as a merits-based decision with respect to each of the claims raised in the petition[.]'" ***State v. Tillman***, 2005 WI App 71, ¶18, 281 Wis. 2d 157, 696 N.W.2d 574 (citation omitted).

However, before applying a procedural bar to a postconviction motion filed after a no-merit appeal, we consider whether the no-merit procedures were followed and whether they warrant sufficient confidence to permit application of the bar. *See* ***State v. Allen***, 2010 WI 89, ¶62, 328 Wis. 2d 1, 786 N.W.2d 124. Here, our review of ***Cheese II*** reflects that appellate counsel filed a no-merit report and that Cheese elected not to file a response. Our opinion shows that we considered appellate counsel's no-merit report and independently reviewed the record. We discussed a variety of potential issues and noted our agreement with appellate counsel's conclusions that the potential issues lacked merit. Ultimately, we determined that the record did not reveal any arguably meritorious basis for appeal. The proceedings in ***Cheese II*** clearly demonstrate compliance with the no-merit procedures, *see* ***Tillman***, 281 Wis. 2d 157, ¶17, and thus warrant confidence in the outcome of the appeal. Accordingly, Cheese may not relitigate the claims that we resolved in ***Cheese II***, including a claim that the circuit court erroneously exercised its sentencing discretion. ***Allen***, 328 Wis. 2d 1, ¶63.

We turn to Cheese's claims that one or more new factors warrant sentence modification. 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 if the defendant demonstrates the existence of a new factor. ***Id.***, ¶35.

As a new factor here, Cheese first asserts that after he received a twenty-year term of initial confinement, the circuit court sentenced Thomas and Webster to, respectively, seventeen-year and eighteen-year terms of initial confinement. We agree with the circuit court that the later-imposed sentences that Thomas and Webster received do not constitute a new factor.

The prosecutor stated at Cheese's sentencing (and therefore the circuit court was aware) that the State intended to seek slightly shorter sentences for Thomas and Webster than for Cheese. The prosecutor explained that the relative leniency sought for Thomas and Webster was based on the State's conclusions that Thomas, unlike his co-actors, did not fire a gun; and that Webster deserved more credit than did Cheese for accepting responsibility because Webster had been willing to testify against his co-actors. The circuit court then fashioned an individualized sentence for Cheese in light of the mandatory sentencing factors, the goals of punishment, deterrence, and protection of the community, and Cheese's "litany of needs." ***Cheese II***, No. 2014AP803-CRNM, at 6-8. Cheese's sentence was based on proper factors, and he failed to show that the disparity between his sentence and the sentences that his co-actors received constituted a new factor.

Cheese next alleges that a new factor exists because the circuit court overlooked that he was seventeen years old at the time of the homicide and thus younger than his co-actors, who were both twenty years old. This argument lacks support in the record. During the sentencing hearing, Cheese's trial counsel reminded the circuit court about the ages of all three co-actors, and the circuit court expressly considered Cheese's age as a mitigating factor at sentencing. Accordingly, his age is not a "new factor" now. ***Harbor***, 333 Wis. 2d 53, ¶57 (providing that facts known to the trial judge at sentencing are not new factors).

Cheese next alleges that a new factor exists because the circuit court did not consider "the correct holdings and reasoning[]" of ***Miller v. Alabama***, 567 U.S. 460 (2012). This argument lacks support in the law. ***Miller*** holds that the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." ***Id.*** at 479. That holding is not implicated when, as here, a youthful offender does not face a mandatory sentence of life in prison without the possibility of parole. ***State v. Barbeau***, 2016 WI App 51, ¶41, 370 Wis. 2d 736, 883 N.W.2d 520. Because ***Miller***'s holding is inapplicable to Cheese's circumstances, it is not "'highly relevant to the imposition of [his] sentence,'" and therefore is not a new factor. ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted).

Cheese next argues that his rehabilitation while in prison constitutes a new factor. Cheese is wrong. "Post-sentence conduct is not a new factor for sentence modification

purposes."[2] ***State v. Dowdy***, 2010 WI App 158, ¶35, 330 Wis. 2d 444, 792 N.W.2d 230 (citation omitted). Indeed, rehabilitation "is not relevant to sentence modification." ***State v. Kluck***, 210 Wis. 2d 1, 9, 563 N.W.2d 468 (1997).

Cheese next claims that the State's sentencing remarks breached the plea agreement. He faults the State for deeming him "uncooperative" based on his failure to identify his co-actors, and he contends that the State's remarks constituted a breach "because the agreement never called for [Cheese] to name the [other] two individuals in this case." Cheese characterizes this as a new factor warranting sentence modification. However, facts known either to the circuit court or the defendant at the time of sentencing do not constitute a new factor. ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. Cheese was aware at sentencing of both the terms of the plea agreement and the State's sentencing remarks. The State's remarks therefore do not constitute a new factor.

Moreover, a defendant forfeits a challenge to the State's conduct at sentencing if the defendant fails to make a contemporaneous objection. ***State v. Weigel***, 2022 WI App 48, ¶9, 404 Wis. 2d 488, 979 N.W.2d 646. Cheese did not make a contemporaneous objection to the State's sentencing remarks here, and therefore he may challenge the alleged breach of the plea agreement only under the rubric of ineffective assistance of counsel. ***Id.***

[2] Cheese appears to argue at some points in his appellate brief that his alleged presentence rehabilitation, not his alleged post-sentence rehabilitation, constitutes a new factor. In support, he directs our attention to portions of his sentencing argument describing positive changes that he made after his arrest. The circuit court properly rejected any suggestion that Cheese's presentence rehabilitation constitutes a new factor for sentence modification purposes. Information presented at a defendant's sentencing is not a new factor for purposes of a later sentence modification. ***State v. Harbor***, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828.

Accordingly, we turn to Cheese's allegations of ineffective assistance of counsel. An allegation of ineffective assistance of counsel raises a constitutional claim. ***State v. Domke***, 2011 WI 95, ¶34, 337 Wis. 2d 268, 805 N.W.2d 364. As we have already explained, WIS. STAT. § 974.06 is the mechanism for a defendant to raise such claims after the deadline for a direct appeal has passed. ***Nickel***, 330 Wis. 2d 750, ¶7; *see also* § 974.06(1). A defendant who has previously pursued postconviction relief, however, may not raise claims under § 974.06, absent a sufficient reason for failing to raise the claims in earlier postconviction litigation. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

Cheese suggests that he neglected to raise his current claims earlier because his postconviction counsel was ineffective for failing to identify and pursue them. This allegation is inadequate to overcome the procedural bar imposed by ***Escalona-Naranjo*** because that current allegation does not explain why Cheese failed to raise his current claims when he pursued postconviction motions *pro se* in 2016 and 2018. Accordingly, his claims of ineffective assistance of counsel are procedurally barred.

Cheese contends that, notwithstanding any deficits in his most recent postconviction motion, the circuit court erred by failing to address the merits of his constitutional claims because courts must liberally construe documents filed by *pro se* prisoners. In support, Cheese cites ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521-22, 335 N.W.2d 384 (1983). Cheese misunderstands ***bin-Rilla***. While that case obligates courts to liberally construe mislabeled pleadings, ***id.*** at 522, the obligation does not extend to creating an issue or making an argument for a party, ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998). "The trial court is not an advocate[.]" ***Fowler v. Fowler***, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990).

Last, Cheese alleges that his twenty-year term of initial confinement is "unduly harsh and excessive" in light of the shorter terms of initial confinement that Thomas and Webster received. A court has inherent authority to modify a sentence if it is unduly harsh or excessive. ***State v. Cummings***, 2014 WI 88, ¶¶71-72, 357 Wis. 2d 1, 850 N.W.2d 915. In ***Cheese II***, however, this court examined Cheese's sentence and determined that it "was *not* unduly harsh or excessive." ***Id.***, No. 2014AP803-CRNM, at 8 (emphasis added). The issue is therefore concluded, *see* ***Witkowski***, 163 Wis. 2d at 990, and the sentences that Thomas and Webster received do not affect our conclusion. "[L]eniency in one case does not transform a reasonable punishment in another case into a cruel one." ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

For all the foregoing reasons,

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