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DISTRICT II

February 13, 2013

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

2012AP466	State of Wisconsin v. Ronnie L. Thums (L.C. #2004CF301)
2012AP467	State of Wisconsin v. Ronnie L. Thums (L.C. #2004CF132)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated cases, Ronnie L. Thums appeals pro se from an order denying his postconviction motion seeking sentence modification. The circuit court denied Thums' motion without a hearing on the basis of waiver and being procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. See WIS. STAT. RULE 809.21 (2011-12).¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Upon his pleas of no contest, Thums was convicted in 2004 of stalking, with the use of a dangerous weapon, second-degree recklessly endangering safety, and fleeing or eluding an officer. Five additional charges and two repeater enhancements were dismissed but read in at sentencing. In 2005, Thums moved for postconviction relief, seeking resentencing. The circuit court rejected his claim that he was improperly sentenced for stalking under truth-in-sentencing (TIS) I rather than TIS-II. Thums appealed and this court reversed and remanded for resentencing. Thums moved again for postconviction relief in 2007 on the basis that the judgment of conviction incorrectly indicated that his stalking conviction was for a Class C felony. The circuit court issued a second amended judgment of conviction reflecting that the stalking conviction was for a Class F felony.

In 2012, this time pro se, Thums again sought sentence modification on the basis that the presentence investigation report (PSI) contained inaccurate information amounting to a new factor. The circuit court denied Thums' motion without a hearing. The court concluded that Thums waived the issue by failing to object at his sentencing hearings and by not raising it in his prior motions for postconviction relief. Thums appeals.

A circuit court may modify a sentence if the defendant demonstrates the existence of a new factor by clear and convincing evidence. *State v. Harbor*, 2011 WI 28, ¶¶35-36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a fact or set of facts that is “highly relevant” to the sentence and either was not in existence, or was overlooked, at sentencing. *Id.*, ¶40. Whether a new factor exists is a question of law that we review independently. *Id.*, ¶33.

Thums contends that inaccurate information in the second PSI² is a new factor. Thums' ex-wife told the PSI writer that Thums once held a gun to her head in front of their children. Thums "swear[s] that [he has] never pointed a gun at another person." He explains that he did not object to the alleged inaccuracy at his sentencing hearings or in either of his postconviction motions because he was "unaware" that this information was in the PSI. Thums asserts that he missed the "incredibly horrendous damaging statement" because he read only the original PSI and, as his defense counsel told him the second PSI "was essentially the same as the first," he "did not insist upon reading it."

Thums could have advised the court that he had not read the second PSI and either objected or disputed in his allocution the stalking victim's assertion at sentencing that Thums "put [a] gun in [his] ex's mouth." A prisoner must raise all grounds for relief in his or her original, supplemental or amended postconviction motion. *Escalona-Naranjo*, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06. This encompasses a direct appeal. *See State v. Lo*, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756. Successive motions and appeals are procedurally barred unless the defendant can show a "sufficient reason" for failing to previously raise the newly alleged errors. *See Escalona-Naranjo*, 185 Wis. 2d at 185. "Ignored" is not the same as "overlooked." Thums has not shown either the existence of a new factor or established a "sufficient reason" for failing to raise this issue earlier.

Besides failing on procedural grounds, Thums' claim fails on the merits. Assuming arguendo that the information in the PSI is inaccurate, neither sentencing court mentioned a gun

² The first PSI was stricken because the writer was a close relative of Thum's ex-wife.

incident involving Thums and his ex-wife, not even after the stalking victim accused Thums of “put[ting] the gun in [his] ex’s mouth.” As was proper, the courts addressed the threatening and abusive nature of Thums’ treatment of his ex-wife, but did not allude to her allegation regarding the gun. Thums thus has not established by clear and convincing evidence that the sentencing court actually relied on the claimed inaccuracy—that is, gave it “explicit attention” or “specific consideration” such that it formed part of the basis for the sentence. *See State v. Tiepelman*, 2006 WI 66, ¶¶14, 31, 291 Wis. 2d 179, 717 N.W.2d 1.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals