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March 19, 2013

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

2011AP2205-CR State of Wisconsin v. Darius M. Littlejohn (L.C. # 2002CF2139)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Darius M. Littlejohn appeals an order of the circuit court denying his motion to vacate an order denying Littlejohn's motion for sentence modification. He also appeals an order denying reconsideration. Based on 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 (2011-12).[1] We affirm.

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

On July 21, 2011, Littlejohn filed a motion under WIS. STAT. § 806.07(1)(a) requesting that the circuit court vacate and reenter an order from November 4, 2009, so that he could timely appeal that order. On July 22, 2011, the circuit court denied Littlejohn's motion to vacate. On August 16, 2011, Littlejohn filed a motion for reconsideration. The circuit court denied that motion on the same day.

The circuit court reasonably denied Littlejohn's motion to vacate because he failed to file his motion within a reasonable time. WISCONSIN STAT. § 806.07 provides, in part, that a court "may relieve a party … from a judgment, order or stipulation" for a number of reasons, including: "(a) Mistake, inadvertence, surprise, or excusable neglect" or "(h) Any other reasons justifying relief from the operation of the judgment." WIS. STAT. § 806.07(1)(a) and (h). A motion under § 806.07 must be made "within a reasonable time," § 806.07(2), and, if brought under § 806.07(1)(a), must be brought "not more than one year after the judgment was entered or the order … was made." WIS. STAT. § 806.07(2); *see also* ***Rhodes v. Terry***, 91 Wis. 2d 165, 171, 280 N.W.2d 248 (1979) ("[T]he one year period constitutes the maximum time allowed or a 'statute of limitations' period for bringing the motion to vacate on the grounds of mistake, surprise, inadvertence or excusable neglect.").

It is undisputed that Littlejohn's motion to vacate was filed more than a year after the November 4, 2009 order. Moreover, the circuit court found that Littlejohn had not filed his motion within a reasonable time under WIS. STAT. § 806.07(2). In addition, in an order dated May 24, 2010, in case no. 2010AP941-CR, we dismissed Littlejohn's direct appeal from the November 4, 2009 order as untimely, and informed Littlejohn that his remedy, if any, would be to file a motion in the circuit court for relief from the November 4 order under § 806.07. Littlejohn did not pursue such a motion in the circuit court until July 2011, over a year after this

court's May 2010 order. Based on this evidence, the circuit court's conclusion that Littlejohn did not act within the requisite reasonable amount of time under § 806.07(2) was not erroneous.

In his reconsideration motion, Littlejohn argues that he was precluded from filing the WIS. STAT. § 806.07 motion when he received our May 24, 2010 order because he had a habeas corpus petition pending in this court that deprived the circuit court of competency to hear any other motions. This argument fails because, as the State points out, Littlejohn did not have any other actions pending in this court when the May 24, 2010 order was issued alerting Littlejohn of his potential remedy under § 806.07. Rather, Littlejohn's habeas petition was filed August 10, 2010.

For the first time on appeal, Littlejohn argues that the circuit court erroneously exercised its sentencing discretion by applying a mechanistic sentencing approach without considering individual factors, and that ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), does not bar him from asserting this argument. Because these arguments were not raised before the circuit court, we do not consider them for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved at the circuit court level generally will not be considered on appeal).

Littlejohn also argues that this court should vacate the November 4, 2009 order of the circuit court because that order lacked language stating that it was a final order from which an appeal could be taken. We agree with the State that we have already effectively decided, in our May 24, 2010 order denying Littlejohn's appeal from the circuit court's November 4, 2009 order as untimely filed, that the November 4 order was final.

Littlejohn asks us to reverse the circuit court in the interest of justice pursuant to our discretionary reversal authority under WIS. STAT. § 752.35. We use our authority to grant a discretionary reversal "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Under § 752.35, we may reverse an order appealed from in a case where either the real controversy has not been fully tried or there has been a probable miscarriage of justice. This is not a case where the real controversy was not fully tried, and Littlejohn has failed to convince us that this case exhibits a miscarriage of justice. We therefore decline to use our discretionary power of reversal.

Therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals