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**DISTRICT II**

May 1, 2013

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

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2012AP634-CR

State of Wisconsin v. John D. Bunch (L.C. # 1992CF10)

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

John Bunch appeals from a circuit court order denying his sentence modification motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

Bunch was convicted in 1993 of four counts of first-degree sexual assault of a child (via sexual contact and sexual intercourse). We affirmed his conviction in 1995. *State v. Bunch*, 191

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

Wis. 2d 501, 529 N.W.2d 923 (Ct. App. 1995). In that appeal, we rejected Bunch's challenge to the circuit court's denial of a mistrial motion and the exclusion of evidence of a prior sexual assault of the victim. *Id.* at 505.

After we affirmed his conviction, Bunch brought several WIS. STAT. § 974.06 motions challenging his conviction. All of those efforts were unsuccessful. We held in *State v. Bunch*, No. 2002AP1304, unpublished op. and order at 4 (WI App Nov. 20, 2002), that Bunch's most recent claim of ineffective assistance of trial counsel was barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because the claim could have been raised in a prior postconviction motion or on direct appeal, and Bunch did not present a sufficient reason for failing to raise it in his prior proceedings. *Id.* at 185.

The motion which is the subject of this appeal sought sentence modification due to new factors and the progress Bunch had made in prison. He argued that the circuit court did not employ the sentencing guidelines and the court sentenced Bunch based on a prior sexual assault conviction he did not have. The circuit court denied the motion because the motion was untimely, Bunch had filed numerous postconviction motion and appeals, and his progress in prison did not constitute a new factor.

The State argues on appeal that Bunch's sentence modification motion was barred by *Escalona*. We agree. *Escalona* held as follows:

[A]ll claims of error that a criminal defendant can bring should be consolidated into one motion or appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.

*State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Bunch's motion does not offer a reason for his failure to raise his new factor claim in any of his numerous prior challenges to his conviction. *Escalona* applies, and the circuit court properly denied Bunch's motion.

Even if *Escalona* did not apply, we would reject Bunch's claims. Even if the guidelines applied to Bunch's conviction, which we need not decide, Bunch's guidelines claim is moot. WISCONSIN STAT. § 973.017(2)(a), requiring the sentencing court to consider applicable sentencing guidelines, was repealed effective July 1, 2009. 2009 Wisconsin Act 28, s. 3386m. Prior to repeal of that provision, the Wisconsin Sentencing Commission was defunded. *State v. Barfell*, 2010 WI App 61, ¶4, 324 Wis. 2d 374, 782 N.W.2d 437, review denied, 2011 WI 15, 331 Wis. 2d 46, 794 N.W.2d 900. *Barfell* holds that the repeal of § 973.017(2)(a) is applied retroactively. *Barfell*, 324 Wis. 2d 374, ¶8. Bunch's guidelines issue is moot. *Id.*, ¶9.

We would also reject Bunch's complaint that the circuit court erroneously considered his history of sexual assault. The circuit court properly considered Bunch's history of sexual assaults, and Bunch did not dispute that history at sentencing or after. A circuit court need not restrict its consideration of prior conduct to circumstances where the defendant was convicted of such conduct. *State v. Arredondo*, 2004 WI App 7, ¶¶53-55, 269 Wis. 2d 369, 674 N.W.2d 647 (sentencing court may consider facts of offenses in which defendant was not charged or for which defendant was acquitted).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to

WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*