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DISTRICT IV

May 7, 2013

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

2012AP707-CR

State of Wisconsin v. Armando P. Rodriguez (L.C. # 2006CF889)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Armando P. Rodriguez, pro se, appeals an order of the circuit court denying Rodriguez's motion to modify his sentence. 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.

Rodriguez was charged with sexual assault of a child under the age of sixteen, as a repeat offender. As the result of a plea bargain, Rodriguez pled no contest to one count of third-degree

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

sexual assault, as a repeater. Before sentencing, Rodriguez moved to withdraw his plea on the ground that he was actually innocent of the crime. The circuit court denied Rodriguez's motion to withdraw his plea. The circuit court imposed a sentence of nine years of initial confinement and five years of extended supervision.

We affirmed Rodriguez's conviction in its entirety pursuant to a no-merit report. *See State v. Rodriguez*, No. 2009AP509-CRNM, unpublished slip op. (WI App Nov. 5, 2009).

Rodriguez later filed a series of postconviction motions, including a motion to withdraw his plea, and the motion at issue here, to modify his sentence. We recently affirmed the decision of the circuit court to deny Rodriguez's motion to withdraw his plea. *See State v. Rodriguez*, No. 2011AP2471, unpublished slip op. (WI App Apr. 3, 2013). Rodriguez now appeals the circuit court's denial of his motion to modify his sentence.

Rodriguez's first argument on appeal is that the circuit court misused its discretion by failing to inform Rodriguez that the hearing on his sentence modification motion would be held in person rather than via telephone. Rodriguez has forfeited this argument on appeal by failing to raise an objection before the circuit court to his in-person appearance. *See State v. Rogers*, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must raise them before the circuit court); *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (“[A] mere failure to object constitutes a forfeiture of the right on appellate review.”).

Rodriguez also appears to argue that we should reverse the circuit court's decision to deny his motion to modify his sentence because the State failed to timely respond to that motion. This argument is undeveloped. Rodriguez claims that the State failed to respond in writing to

Rodriguez's motion prior to the motion hearing, but he provides no argument as to why this failure on the State's part requires us to reverse the circuit court's decision. We need not consider this insufficiently developed argument. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Moreover, it is hard to understand how the State's failure could possibly be grounds for reversal.

Rodriguez may also be arguing that his sentence should be modified because of the existence of new factors, namely, DNA evidence that the victim's child was not fathered by Rodriguez, but rather by a different man, and evidence that the other man, who was allegedly also charged with sexual assault of the victim, received a more favorable sentence. Rodriguez, however, raises this argument for the first time in his reply brief, and we reject it on that basis. See *Baraboo Nat'l Bank v. State*, 199 Wis. 2d 153, 157 n.1, 544 N.W.2d 909 (Ct. App. 1996) ("As a general rule, we do not review issues raised for the first time in a reply brief.").

Even if we were to address the merits of Rodriguez's DNA-newly-discovered-evidence argument, it appears to have no merit. The DNA evidence was not new information; the circuit court was aware of that information prior to Rodriguez's sentencing. See *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (a new factor must have been unknown to the circuit court at the time of sentencing).

We note that, if Rodriguez means to argue that the sentence given to the other man is a new sentencing factor, Rodriguez fails to explain why that factor justifies sentence modification. See *State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828 ("[I]f a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.").

Finally, Rodriguez argues that the circuit court erred by not having Rodriguez physically present at the hearing on his motion to withdraw his plea. This argument is wholly unrelated to Rodriguez's motion to modify his sentence. As noted above, this court has already denied Rodriguez's appeal regarding his plea withdrawal motion. See **Rodriguez**, No. 2011AP2471, unpublished slip op.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals