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May 30, 2013

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

2012AP1052-CR

State of Wisconsin v. Wayne E. Williams (L.C. # 2004CF7134)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

Wayne Williams appeals orders denying his motion for a new trial and his motions for sentence modification. Williams contends that he is entitled to a new trial or sentence modification based on evidence that he was incarcerated for part of the time period of the charged sexual assaults and that the State did not specify in the criminal complaint the exact dates of the assaults within that time period. Based upon 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 summarily affirm.

In August 2005, Williams was convicted, following a jury trial, of three counts of second-degree sexual assault of a child between December 2003 and October 2004. The court sentenced Williams to fifteen years of initial confinement and fifteen years of extended supervision. We affirmed the judgment of conviction and sentence on Williams' no-merit appeal.

In March 2012, Williams moved for a new trial. He argued that evidence that he was incarcerated from May 23, 2004 to September 8, 2004 constituted newly discovered evidence. Williams argued that his incarceration for part of the time period charged established reasonable doubt that he committed the crimes. Williams also argued that the State was required to specify in the criminal complaint the dates and times of the charged sexual assaults. The circuit court denied the motion, explaining that the fact that Williams was in custody for part of the period of the charged offense did not undermine the court's confidence in the jury's verdict because Williams was not incarcerated for the entire time period. The court also determined that Williams was procedurally barred from challenging the sufficiency of the pleadings because he failed to raise that issue during his no-merit appeal.

In April 2012, Williams filed a motion for sentence modification. He argued that the same facts asserted in his motion for a new trial constituted a new factor justifying sentence modification. The court denied the motion. The court explained that it had already determined

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

that the fact that Williams was incarcerated for part of the time period of the charged assaults did not undermine the court's confidence in the verdicts; that the court's sentencing decision had been based primarily on the aggravated nature of the offenses and Williams' rehabilitative needs; and that Williams had not asserted facts highly relevant to the sentencing. Williams then filed another motion for sentence modification raising the same arguments, which the court construed as a motion for reconsideration and denied.

A motion for a new trial based on newly discovered evidence must establish that the new evidence was discovered after conviction, the defendant was not negligent in seeking the evidence, and the evidence is material to an issue in the case and not merely cumulative. *See State v. Avery*, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. If those criteria are met, “the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” *Id.* (quoted source omitted). A motion for sentence modification must establish existence of a new factor, that is, a set of facts highly relevant to sentencing which the court did not know at the time of sentencing. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

On appeal, Williams argues that he is entitled to relief because his incarceration during part of the time period charged and the State's failure to specify the exact dates of the charged assaults create reasonable doubt of his guilt. However, as to the motion for a new trial, those

facts would have been known to Williams before his conviction, and thus do not constitute newly discovered evidence.² See *Avery*, 345 Wis. 2d 407, ¶25.

As to the motion for sentence modification, Williams has not asserted facts that are highly relevant to sentencing. Williams asserts facts that he believes create a reasonable doubt of his guilt – that he was in jail for three and one-half months of the ten months charged. At sentencing, however, Williams’ guilt had already been established. Thus, the sentencing court was not concerned with whether there were facts that would support reasonable doubt as to Williams’ guilt. Rather, the court considered the standard sentencing factors and objectives, including the gravity of the offense, Williams’ character and criminal history, and the need to protect the public. See *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude that the facts asserted by Williams are not highly relevant to sentencing, and thus do not establish a new factor in support of sentence modification.

Therefore,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

² On appeal, Williams does not dispute the court’s determination that Williams is barred from challenging the sufficiency of the State’s charging documents because he did not raise that issue in his no-merit appeal. See *State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Rather, Williams argues that he is not barred from presenting that fact in his motion for sentence modification. He points out that a motion for sentence modification may be made at any time. See *State v. Noll*, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. Because we conclude that Williams’ challenge to the State’s charging documents does not establish a new factor for sentence modification purposes, we do not address whether the issue was properly raised.