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DISTRICT I

September 15, 2015

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

2014AP2779-CR State of Wisconsin v. Rufus Patterson West (L.C. #1994CF942994)

Before Curley, P.J., Kessler and Brennan, JJ.

Rufus Patterson West, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification. 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 (2013-14).[1] The order is summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In 1996, West was sentenced to twenty-eight years' imprisonment following a jury's verdict convicting him of armed robbery, while concealing identity, as a habitual criminal. West was also given a concurrent six-year sentence for possession of a firearm by a felon as a habitual criminal. West had a direct no-merit appeal, then pursued two postconviction motions under WIS. STAT. § 974.06, a petition for a writ of *habeas corpus*, and a third § 974.06 motion.

In October 2014, West filed a motion for sentence modification based on what he claimed was a new factor. In particular, he alleged that the sentencing court had "significantly relied on evidence presented to it stating that West had been in '50-100' foster homes while growing up." However, in 2011, he had contacted Pennsylvania, the state in which these placements allegedly occurred, to confirm the number. West asserted that the answer from Pennsylvania shows only four foster-home placements.

The circuit court denied the motion, holding it was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, because West could have raised the issue regarding the number of foster-home placements in a response to the no-merit report. West appeals.

A prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. *See* ***Escalona***, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4). Although a defendant is not required to respond to a no-merit report, "a defendant may not raise issues in a subsequent § 974.06 motion that he could have raised in [a] response[.]" ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

The circuit court noted that West must have had some first-hand knowledge of his various placements throughout his life, which would have allowed him to raise the issue as a response in the no-merit appeal. West counters that he did not know the number was *not* fifty to one hundred placements until he received confirmation from Pennsylvania, which he obtained in 2011. West also asserts that his last foster-home placement occurred when he was eight years old. West does not explain, however, why he failed to contact Pennsylvania authorities until fifteen years after sentencing to verify the number of foster home placements if he believed the number cited was incorrect.

We will assume without deciding that West really did not know the true number of placements until Pennsylvania confirmed the number in 2011. This means that West could not have raised the issue in a response to the no-merit appeal that was prosecuted in 1996. However, the procedural bar still applies, because West provides no reason, much less sufficient reason, for his failure to raise the issue in his 2013 motion for postconviction relief when he had this information. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338 (where alleged "new factor" derived from law passed in 1989, and defendant-appellant had brought seven appeals between then and 2001, the new-factor claim was procedurally barred).

Despite the existence of a procedural bar, a circuit court may still modify a sentence if the defendant shows a new factor that warrants modification.[2] *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" is a fact or facts "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); see also ***Harbor***, 333 Wis. 2d 53, ¶¶40, 52. "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Harbor***, 333 Wis. 2d 53, ¶36. Whether facts constitute a new factor is a question of law. *See* ***id.*** We conclude that West has not shown a new factor.

At sentencing, West's attorney repeated information from the presentence investigation report that West had been in thirty (not fifty) to one hundred "foster homes in his childhood." The attorney indicated she had confirmed this with West's sister. While the response West received from Pennsylvania appears to list only four formally designated foster homes, there are entries for twenty-six different placements in shelters, foster homes, or with his parents, from 1973 through 1987.[3] Thus, the discrepancy in information may not be as large as West implies.

[2] West, whose motion in the circuit court seeks "sentence modification based on a newly discovered evidence," claims the circuit court erred as a matter of law when it ruled that "[a] motion for sentence modification may not be based on newly discovered evidence." It is true that a motion for sentence modification because of a new factor may be brought at any time. *See* ***State v. Nickel***, 2010 WI App 161, ¶8, 330 Wis. 2d 750, 794 N.W.2d 765. However, a claim of "newly discovered evidence" is a slightly different claim than a "new factor" allegation. *See* ***State v. Avery***, 2013 WI 13, ¶16 n.14, 345 Wis. 2d 407, 826 N.W.2d 60 (newly discovered evidence test); ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (defining new factor).

[3] West, born in 1971, was sixteen years old in 1987.

West nevertheless contends that "the sentencing court would not have sentenced him to the excessively high prison sentence, but would have instead given him a much lighter prison sentence around 5 years and possibly probation" had it known the actual number of foster homes he was in. However, it is clear from the sentencing court's comments that West's argument is misguided because his placement history was not "highly relevant" to the imposition of sentence such that resentencing is warranted on the basis of West's information from Pennsylvania.

It is not clear that the sentencing court fully believed the presentence report, commenting, "I was going to ask about the number of foster homes, but [counsel] repeated the same range that was given in the memorandum. That -- That alone, *if it's anything close to that number*, certainly helps give us some explanation of why you might have been capable of this crime." (Emphasis added.) Further, the sentencing court went on to explain that "this matter of an abusive childhood is both a mitigating and an aggravating circumstance," but also commented that "it takes on less weight when the offense is as serious as this one was and where there is already a significant felony record" as West had.

Rather, the sentencing court focused on the seriousness of the offense—it involved a firearm, was "immensely frightening" to the victim and had a significant and lasting effect on her, and "involved the effort of concealing identity." The sentencing court also noted multiple aggravating factors: four prior convictions, one a serious misdemeanor and three felonies; the fact that West was on parole for a serious offense at the time of the armed robbery; and had a dismal record on that and earlier periods of supervision, all within the context of West being only twenty-three years old at the time of sentencing. It is therefore evident that West's placement history, whether it involved four placements or one hundred placements, was notable, but not

highly relevant to the imposition of his sentence, so West's updated information is not a new factor.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals