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DISTRICT IV

August 12, 2016

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

2015AP1687-CR State of Wisconsin v. Brian J. McLeod (L.C. # 2014CF113)

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

Brian McLeod appeals a judgment of conviction and order denying postconviction relief. Based upon our review of the record and briefs, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We summarily affirm.

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

McLeod was convicted of arson and burglary of a building or dwelling, both as party to a crime and as a repeater. Two other charges were dismissed and read-in for sentencing. At sentencing, the circuit court deemed McLeod eligible for the Substance Abuse Program after serving five of the nine years of the confinement portion of his sentence. Following sentencing, McLeod filed a motion for postconviction relief, seeking a resentencing limited to his request that the court deem him immediately eligible for the Substance Abuse Program on the basis that the circuit court did not consider the financial costs of incarceration when it sentenced McLeod. McLeod had not attempted to present evidence or argument related to the costs of incarceration at sentencing. The court denied McLeod's request for an evidentiary hearing and denied the motion.

On appeal, McLeod acknowledges that he is not arguing that a "new factor" exists that entitles him to resentencing. Rather, McLeod suggests that the costs to society of incarceration is a factor that the circuit court was required by law to consider in sentencing him. However, McLeod points to no legal authority supporting his suggestion.

Neither the sentencing statute, WIS. STAT. § 973.017(2), nor current governing case law requires that the circuit court consider the costs of incarceration when sentencing a defendant. *State v. Gallion*, 2004 WI 42, ¶¶40-43 n.9-11, 270 Wis. 2d 535, 678 N.W.2d 197, a seminal sentencing case, lists more than fifteen individual factors a court may consider in sentencing, none of which relate to the costs of incarceration. Nevertheless, McLeod, conceding that this court is "an inappropriate forum" to consider the evidence he wishes to present at resentencing, seeks "an order declaring that information [relating to the costs of incarceration] not provided to the trial court at sentencing was necessary to the imposition of a complete and informed sentence." That is not our role. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246

(1997) (the supreme court, not the court of appeals, is the “law-declaring court” (quoted source omitted)); *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶25, 279 Wis. 2d 335, 693 N.W.2d 756 (the court of appeals is an error-correcting court and does not make policy decisions for the state).

McLeod argues that because he was sentenced on “incomplete” information—that is, that the circuit court did not have information relating to the costs of incarceration before it—he is entitled to resentencing pursuant to *State v. Tiepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. However, as noted above, McLeod cites no authority for his proposition that the financial costs of incarceration is an appropriate factor for the circuit court to consider at sentencing and that the absence of that factor somehow renders the sentencing information before the court “incomplete.” Further, *Tiepelman* discusses “inaccurate,” not “incomplete,” information furnished and relied upon at sentencing. *Id.*, ¶¶9-10, 31.

As McLeod notes, if a postconviction motion does not state facts that would entitle the defendant to relief, the circuit court has discretion, but is not required, to hold an evidentiary hearing. *State v. Pinno*, 2014 WI 74, ¶38, 356 Wis. 2d 106, 850 N.W.2d 207. McLeod fails to state facts that would entitle him to relief. We conclude that the circuit court properly exercised its discretion in denying the request for a hearing, as well as in denying the motion for postconviction relief.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals