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DISTRICT III

February 13, 2018

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

2016AP2194-CR State of Wisconsin v. Jared S. Sanders (L. C. No. 2001CF489)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jared Sanders, pro se, appeals an order denying his postconviction 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. We reject Sanders' arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 2001, Sanders pleaded no contest to second-degree sexual assault of a child and entered into a deferred acceptance of guilty plea agreement.[2] The agreement was revoked in 2002, after Sanders violated its terms. The circuit court withheld sentence and placed Sanders on eight years' probation. Sanders' probation was later revoked in this and another case, Outagamie County case No. 2002CF79, after he was charged with sexually assaulting a thirteen-year-old girl in Michigan. The circuit court imposed a sentence of ten years in prison,[3] consecutive to his sentence in case No. 2002CF79 and concurrent with any sentence Sanders was then serving.

In imposing the sentence, the circuit court noted that Sanders would be sentenced "under the old sentencing law … so there will be a parole system there." The court added that the sentence was "not a fixed term" and it was "determined by the parole board as to when [Sanders] would be released." The court determined that the time had come for Sanders to be incarcerated "to protect the public from further criminal acts." The court continued:

> [M]y paramount concern here is to protect the public for a considerable period of time. Now, the question still remains whether you'll ever get free in society again[.] I don't know. There may be a Chapter 980 case. You'll deal with that if it comes. But if you do get free in society again … another consideration is that you've had sufficient length of incarceration as we understand is necessary to get through the treatment programs.

The court further stated: "Is it likely that you're going to get paroled right away? I don't think so. Is it likely that you'll get paroled halfway through that 10-year sentence? Yes. It depends

[2] Although the parties referred to a deferred "prosecution" agreement, it is more properly described as a deferred acceptance of guilty plea agreement.

[3] Because the offense at issue in this appeal occurred in August 1999, the circuit court imposed an indeterminate sentence. "Truth-in-sentencing" revisions were enacted in 1998 and are applicable to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

on how you do and if you're ready for parole at that time." Sanders did not directly appeal his conviction or sentence.

In 2010, Sanders filed a pro se motion to eliminate the DNA surcharge. That motion was denied. In 2013, Sanders filed a pro se postconviction motion to modify his sentence "to time served as of January 23, 2013." Sanders claimed that the sentencing court intended Sanders to be released on parole after serving only fifty percent of his imposed sentence if he completed programming. At a motion hearing, the circuit court indicated it was never the sentencing court's "intent that you only serve [fifty] percent of the incarceration sentence"—instead, the court had stated only that release on parole midway through the sentence "was a possibility." In denying Sanders' motion for sentence modification, the court found that the fact Sanders had not been released on parole as early as the court thought he might was "not highly relevant to the imposition of this sentence" and did not constitute a new factor. The court added that the "highly relevant" factor to its sentence was that Sanders get the treatment he needed during his incarceration, not that he get released on parole at his earliest opportunity. Again, Sanders did not appeal the court's order.

In 2016, Sanders filed a pro se motion to "adjust" his sentence after revocation, again seeking to modify his sentence based on a new factor. Specifically, Sanders claimed that because he had completed his treatment, the circuit court's original sentencing intent had been "frustrated" because he had not been paroled. In a supplemental filing, Sanders added that when imposing the sentence after probation revocation, the circuit court did not understand, or was unaware of, a 1993 change in the sentencing laws that would impact Sanders' parole eligibility. Sanders also claimed the plea agreement was somehow breached because he had completed treatment and was nevertheless denied release on parole. The circuit court denied Sanders'

motion without a hearing, concluding there was "[n]o legal basis or factual basis to support any modification."[4] Sanders' motion for reconsideration was denied, and Sanders now appeals the order denying his motion for sentence modification.

We conclude Sanders' arguments are procedurally barred, as he either did raise, or could have raised, his claims in previous postconviction motions. In ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), our supreme court held that "a motion under [WIS. STAT. §] 974.06 could not be used to review issues which were or could have been litigated on direct appeal." ***Id.*** at 172. The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions." ***Id.*** at 184.

We determine the sufficiency of a defendant's reason for circumventing ***Escalona-Naranjo***'s procedural bar by examining the "four corners" of the subject postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. With respect to his claim that the sentencing court did not understand a 1993 change in sentencing law, Sanders' motion offered no reason, much less a sufficient reason, for failing to raise his present claims in his earlier postconviction motions. Any claim that the passage of a 1993 sentencing law is a "new factor" that could not have been raised earlier is unavailing.

On appeal, Sanders asserts he could not have earlier raised his plea breach argument because it is based on recent events—namely, the denial of release on parole following his completion of sex offender treatment. Sanders claims he entered a no-contest plea "with not

[4] Honorable Dee R. Dyer presided over Sanders' plea and sentencing; his sentencing after revocation; and his 2013 postconviction motion for sentence modification. Honorable Mark J. McGinnis decided the 2016 postconviction motion for sentence modification and motion for reconsideration.

mere hope for early release but the promise of the court to release him after 6.6 years of his 10 year sentence." According to Sanders, the plea agreement was "breached" when Sanders completed treatment and was nevertheless denied release on parole. This argument, however, is merely an attempt at repackaging Sanders' claim that the circuit court intended him to be released early on parole, which was raised and rejected in Sanders' first motion for sentence modification. In denying that first sentence modification motion, the circuit court noted it made no promise at sentencing that Sanders would be released early from prison and clarified that Sanders' early release from prison was not the sentencing court's objective. Rather, the sentencing court's "paramount" interest was protection of the public, with a stated concern that Sanders receive necessary treatment before his release. As the circuit court informed Sanders at sentencing, the parole board would determine his release date. Sanders cannot relitigate his earlier failed argument no matter how artfully it is rephrased. *See* ***State v. Witkowski***, 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because Sanders' claims either were or could have been raised on direct appeal or in his earlier motions, he is barred from raising or relitigating them now.

Upon the foregoing,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals