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March 8, 2017

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

2016AP695-CR State v. Willie D. Pender, Jr.
(L.C. #2005CF003654)

Before Brennan, P.J., Brash and Dugan, JJ.

Willie D. Pender, Jr., *pro se*, appeals an order denying his motion for postconviction relief. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1) (2015-16).[1]

[1] Pender committed the underlying crimes in 2005. However, because the current version of the statutory sections cited in this opinion are the same in all relevant respects, references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Background

In 2005, the State charged Pender with one count of first-degree intentional homicide while armed. *See* WIS. STAT. §§ 940.01(1)(a), 939.63. The State subsequently filed an amended information charging Pender with one count of second-degree reckless homicide while armed, *see* WIS. STAT. §§ 940.06(1), 939.63, and one count of possession of a firearm by a felon, *see* WIS. STAT. § 941.29(2) (2005-06).

At the plea hearing, the State explained that pursuant to the plea agreement, Pender would plead guilty to both counts charged in the amended information. The State detailed what this meant for Pender in terms of sentencing:

> I filed an Amended Information with the [c]ourt charging Mr. Pender with Count 1, reckless homicide, second degree, while armed, it's a Class D felony carrying a maximum penalty of not more than $100,000 and imprisonment for not more than 25 years. It's broken down into 15 years of initial confinement, 10 years of extended supervision, with an additional 5 years for being while armed, for a total of 20 years of initial confinement and 10 years of extended supervision; Count 2 is possession of a firearm by a felon, I've filed that as Count 2, and Mr. Pender has agreed apparently to plead guilty to that charge also. The maximum penalty is 10 years of initial confinement—I'm sorry—5 years of initial confinement, 5 years of extended supervision. It is a Class G felony.

The circuit court then reiterated the punishment that Pender faced on the two counts:

> THE COURT: And you understand the penalties the [c]ourt can impose as to the second[-]degree reckless homicide while armed, that would carry apparently *with the penalty enhancer* 20 years of confinement time and 10 years of extended supervision?
>
> [PENDER]: Yes.
>
> THE COURT: And 10 years on the felon in possession?

[PENDER]: Yes.

(Emphasis added.)

After a colloquy, the circuit court accepted Pender's guilty pleas to both counts. The circuit court sentenced Pender to twenty years of initial confinement followed by five years of extended supervision on the second-degree reckless homicide while armed count. The court sentenced Pender to a concurrent sentence of five years of initial confinement and five years of extended supervision on the felon in possession of a firearm count.

Pender's appointed appellate counsel filed a no-merit appeal to which he did not respond. This court summarily affirmed. *See* ***State v. Pender***, No. 2006AP3155-CRNM, unpublished op. and order (WI App July 3, 2007). In doing so, we specifically concluded that the plea colloquy was adequate and the circuit court appropriately exercised its sentencing discretion. *See* ***id.*** No. 2006AP3155-CRNM, unpublished op. and order at 2-3.

In March 2016, Pender filed what he describes on appeal as a postconviction motion under WIS. STAT. § 974.06. He sought resentencing or sentence modification claiming that the circuit court did not adequately explain how it arrived at the sentence it imposed. Pender further asserted that the sentence was harsh and excessive and it exceeded the maximum penalty allowed for second-degree reckless homicide. According to Pender, his improper sentence constituted a new factor warranting modification.

The postconviction court noted that Pender "thr[ew] around legal terms like 'new factor, 'resentencing,' 'inaccurate information,' and 'sentence modification'" but concluded that when distilled to their essence, Pender's claims amounted to a challenge to the circuit court's exercise of sentencing discretion. The postconviction court explained that such a challenge needed to be

raised within ninety days of sentencing, *see* WIS. STAT. § 973.19, or pursuant to the appellate timelines under WIS. STAT. RULE 809.30. In denying the motion, the postconviction court held:

> The defendant did not raise his current claims in a response to the no-merit report and is precluded from doing so now. *See* ***State v. Tillman***, [2005 WI App 71, ¶27,] 281 Wis. 2d 157[, 696 N.W.2d 574] … (defendant's failure to raise issues in response to counsel's no merit report constitutes a waiver of those issues). Moreover, challenges to the [circuit] court's sentencing discretion are not permitted under [WIS. STAT. §] 974.06 …, *see* ***Smith v. State***, 85 Wis. 2d 650, 661[, 271 N.W.2d 20] (1978), and cannot be relabeled as "new factors" in order to avoid the procedural time limits for raising such claims.

It is from this order that Pender appeals.

Discussion

Pender raises three issues: (1) he challenges the validity of his guilty pleas; (2) he argues the circuit court erroneously exercised its sentencing discretion; and (3) he claims he received the ineffective assistance of both trial and appellate counsel. We will address each issue in turn.

A. *Validity of the Pleas*

Pender argues, for the first time on appeal, that his pleas were not knowing, intelligent, and voluntary. We could decline to address this issue on this basis alone. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (stating that an appellate court will generally not review an issue raised for the first time on appeal), *superseded on other grounds by* WIS. STAT. § 895.52. However, we additionally note that Pender is precluded from raising this issue under ***Tillman***.

A prior no-merit appeal "may serve as a procedural bar to a subsequent postconviction motion ... which raises the same issues or other issues that could have been previously raised."

Id., 281 Wis. 2d 157, ¶27. Here, counsel's no-merit report addressed the validity of Pender's pleas. We held that the issue lacked arguable merit for appeal. Pender cannot re-raise an issue that has already been adjudicated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

Lastly, in his brief on appeal, Pender acknowledges that "[t]he [c]ourt followed all of the requirements for a valid plea in [his] case." Therefore, this court is unclear as to the basis for this argument, and we will not develop one for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

B. ***Exercise of Sentencing Discretion***

Insofar as Pender generally asserts that the circuit court erroneously exercised its sentencing discretion, his claim is barred. First, counsel's no-merit report addressed the circuit court's exercise of sentencing discretion. We held that the issue lacked arguable merit for appeal. Consequently, the ***Tillman*** bar applies here as well. *See* ***id.***, 281 Wis. 2d 157, ¶27. Second, "a [WIS. STAT.] § 974.06 motion is limited to constitutional and jurisdictional challenges. It cannot be used to challenge a sentence based on an erroneous exercise of discretion 'when a sentence is within the statutory maximum or otherwise within the statutory power of the court.'" *See* ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765 (citation omitted). As detailed below, the circuit court's sentence was proper.

We independently review whether a circuit court correctly applied a penalty enhancer. *See* ***State v. Murdock***, 2000 WI App 170, ¶18, 238 Wis. 2d 301, 617 N.W.2d 175 ("The interpretation and application of statutes present questions of law that we review de novo.").

In his reply brief Pender submits that in order for his sentence to be legal, the circuit court was required to sentence him to the maximum time available on the second-degree reckless homicide count (i.e., a thirty year sentence comprised of twenty years of initial confinement and ten years of extended supervision). Pender is incorrect.

In ***State v. Lasanske***, 2014 WI App 26, 353 Wis. 2d 280, 844 N.W.2d 417, we explained the proper approach for applying penalty enhancers in felony cases:

> With felonies, the sentencing court starts under WIS. STAT. § 973.01(2)(a) with the applicable maximum term of imprisonment for the felony in question under the state statutes, setting aside the penalty enhancement, to determine the confinement portion of the bifurcated sentence under § 973.01(2)(b) and extended supervision under § 973.01(2)(d). The term of confinement in prison may not be less than one year, and, except as provided in para. (c) (the penalty enhancement paragraph), the confinement portion is subject to a set maximum, set forth in para. (b), for each classified felony. Sec. 973.01(2)(b) 1–9…. Similarly, the maximum extended supervision depends upon whether a felony is classified or unclassified, § 973.01(2)(d), and for each classified felony the extended supervision portion is subject to a set maximum. Sec. 973.01(2)(d) 1-6. Finally, all bifurcated sentences are subject to the requirement that the extended supervision portion "may not be less than 25% of the length of the term of confinement in prison imposed under par. (b)." Sec. 973.01(2)(d).
>
> Only after determining an appropriate bifurcated sentence in compliance with the limits imposed by WIS. STAT. § 973.01(2)(b) and (d) does the court add a penalty enhancer to a felony sentence. *See* § 973.01(2)(c)1. Under subd. (2)(c)1., the court adds the enhancer to the confinement portion, which increases the total length of the bifurcated sentence by the same amount.

Lasanske, 353 Wis. 2d 280, ¶¶6-7.

Pender was convicted of second-degree reckless homicide while armed. Second-degree reckless homicide is a Class D felony. *See* WIS. STAT. § 940.06. The maximum term of initial confinement for a Class D felony is fifteen years of initial confinement. WIS. STAT.

§ 973.01(2)(b)4. The maximum term of extended supervision for a Class D felony is ten years. Sec. 973.01(2)(d)3. The "use of a dangerous weapon" is appropriate where "a person commits a crime while possessing, using or threatening to use a dangerous weapon." S*ee* WIS. STAT. § 939.63(1). The circuit court adds the enhancer to the confinement portion of the sentence. *See* WIS. STAT. § 973.01(2)(c)1.

Pender, therefore, faced a maximum sentence of twenty years of initial confinement (fifteen years for the underlying second-degree reckless homicide plus five years for the while armed enhancer) and ten years of extended supervision. When it imposed the sentence on this count, the circuit court did not expressly delineate the period of initial confinement and the added enhancer time. Instead, the circuit court stated: "On count one, [t]he [c]ourt will impose based upon his rehabilitative needs and his substantial risks to the community a total, until those needs are addressed he raises a substantial risk, of 25 years in the Wisconsin state prison system, 20 years of initial confinement." The twenty years of initial confinement implicitly reflects the statutory maximum of fifteen years of initial confinement and the five additional years for the while armed penalty enhancer.

Given that the sentence was proper and did not exceed the maximum penalty authorized by law, Pender has no basis for seeking relief under WIS. STAT. § 973.13. *See* ***id.*** (providing that "[i]n any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings"). Likewise, this proper sentence cannot serve as a new factor warranting sentence modification.

C. *Ineffective Assistance of Counsel*

For the first time on appeal, Pender also argues that he received ineffective assistance of both trial and appellate counsel. Again, we generally do not address issues for the first time on appeal. *See* ***Wirth***, 93 Wis. 2d at 443-44. Moreover, Pender's ineffective assistance argument is premised on his belief that his sentence exceeds the maximum time allowed and that his attorneys performed deficiently for not challenging it. Because Pender's illegal sentence claim is meritless, his attorneys were not ineffective for failing to raise it. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369 (explaining that an attorney's failure to make a meritless argument is neither deficient nor prejudicial).[1]

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

[1] We note that the judgment of conviction contains errors. The sentencing hearing transcript indicates the parties stipulated that Pender would pay $2500 in restitution, and the circuit court ordered him to do so. The judgment of conviction, however, in one section reflects that Pender was ordered to pay $25,000 in restitution and later, in the section addressing the "Conditions of Sentence or Probation" reflects that restitution was ordered in the amount of $250. Because the circuit court's unambiguous oral pronouncement trumps the written judgment of conviction, we direct that the error be corrected upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶15-16, 239 Wis. 2d 244, 618 N.W.2d 857 (When a written judgment of conviction differs from the court's oral pronouncement of sentence, a clerical error exists that may be corrected at any time.).