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May 19, 2020

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

2018AP1933-CR State of Wisconsin v. Willie S. Davis (L.C. # 2005CF2801)

Before Brash, P.J., Dugan and Donald, 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).

Willis S. Davis, *pro se*, appeals a circuit court order denying his motion for sentence modification. He also appeals an order denying reconsideration. He claims that a new factor warrants relief, that he was sentenced based on inaccurate information, and that he was not competent during the plea and sentencing proceedings. Based upon our review of the briefs and

record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

In 2005, the State filed a criminal complaint alleging that in July 2002, Davis committed first-degree sexual assault while armed. Davis resolved the charge with a plea agreement. Pursuant to its terms, he pled guilty to a reduced charge of second-degree sexual assault, and the State moved to read in an additional uncharged count of sexual assault to which he was connected by DNA evidence. The State also agreed to recommend a thirty-year term of imprisonment bifurcated as twenty years of initial confinement and ten years of extended supervision. The circuit court accepted Davis's guilty plea and imposed the sentence that the State recommended.

Davis, by counsel, pursued a no-merit appeal. *See* WIS. STAT. RULE 809.32 (2005-06). Upon review of the record, the no-merit report, and Davis's response, we summarily affirmed his conviction. *See* ***State v. Davis*** (***Davis I***), No. 2006AP850-CRNM, unpublished op. and order (WI App Apr. 25, 2007). Proceeding *pro se*, Davis next filed a postconviction motion in December 2007. *See* WIS. STAT. § 974.06 (2007-08). He sought plea withdrawal on various grounds including, as relevant here, his alleged lack of competency and his trial counsel's alleged ineffectiveness for failing to challenge his competency. The circuit court rejected his claims, and we affirmed. *See* ***State v. Davis*** (***Davis II***), No. 2008AP88, unpublished slip op. (WI App Aug. 18, 2009). In 2009, Davis filed a petition for a writ of habeas corpus, alleging that his appellate counsel was ineffective. As grounds he asserted, *inter alia*, that his appellate counsel

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

should have pursued claims that his trial counsel was ineffective for failing to raise a competency challenge. We denied the petition. *See* ***State ex rel. Davis v. Huibregtse*** (***Davis III***), No. 2009AP3159-W, unpublished op. and order (WI App Dec. 29, 2010).

Davis next filed a motion for relief from his sentence. He sought sentence modification based on an alleged new factor, namely, information about his mental health. Alternatively, he sought resentencing on the ground that the circuit court sentenced him based on allegedly inaccurate information about his mental health. The circuit court denied the claims. Davis moved to reconsider, and he also suggested a third basis for sentencing relief, specifically, that he was not competent at the time of his guilty plea and sentencing. The circuit court denied the motion to reconsider in its entirety. Davis appeals.

We begin by considering Davis's claim for sentence modification based on an alleged new factor. A new factor for purposes of sentence modification is "a fact or set of 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 ... it was unknowingly overlooked by all of the parties." *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, however, the defendant must satisfy a two-prong test. *See* ***id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents a question of law, which we review *de novo*. *See* ***id.***, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** If a defendant fails to satisfy one prong of the test, a court need not address the other. *See* ***id.***, ¶38.

Davis rests his new-factor claim on his allegations that at the time of sentencing, the circuit court "did not have all the information concerning Davis'[s] mental health history" and was not "aware that Davis ha[d] been diagnosed with several mental health diseases." His claim does not satisfy the first prong of the new-factor analysis because he fails to show that at sentencing he personally "unknowingly overlooked" information about his mental health. *See* ***id.***, ¶40. Although the sentencing court may not have been aware of some of the mental health information that Davis filed in support of his postconviction motion, Davis himself knew about his own diagnostic and treatment history. Indeed, his motion includes documentation showing that he told the detective who questioned him following his arrest that he took medication for a mental health condition. Therefore, his mental health history does not amount to a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (explaining that information known to the defendant at the time of sentencing is not a new factor).

Davis next claims that he was sentenced on the basis of inaccurate information because, he alleges, the circuit court was misinformed about the diagnoses he carried and the medications prescribed for him. A defendant has a due process right to be sentenced upon accurate information, and an allegation of inaccurate information at sentencing therefore presents a constitutional claim for relief. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. WISCONSIN STAT. § 974.06 is the mechanism for a defendant to bring constitutional claims after exhausting the right to a direct appeal. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to bring claims under § 974.06 is limited, however, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a person may not bring claims under § 974.06 if the person could have raised the claims in a previous postconviction motion or on

direct appeal unless the person states a sufficient reason for failing to raise those claims in the earlier litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

Davis, as we have seen, pursued a no-merit appeal, and such an appeal provides an opportunity for a convicted person to raise constitutional challenges to the conviction and sentence. *See* ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124 ("A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)."). Before we apply a procedural bar to a claim that could have been raised in a no-merit appeal, however, we "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." *See* ***Allen***, 328 Wis. 2d 1, ¶62. Davis contends here that his no-merit appeal did not provide an adequate opportunity to raise a constitutional challenge to his sentence, but his appellate brief does not include any basis for that conclusion beyond his assertion that the procedural bar should be ignored in the interests of justice. Moreover, were we to assume for the sake of argument that ***Davis I*** did not afford Davis an opportunity to raise his due process claim, we would nonetheless bar him from raising that claim now. Davis litigated a postconviction motion in 2007, and he offers no explanation, much less a sufficient reason, why the 2007 proceeding did not provide an adequate opportunity to litigate a due process challenge to his sentence. Accordingly, the claim is procedurally barred.

Finally, Davis suggests that he is entitled to postconviction relief because he lacked competency during the plea and sentencing proceedings. The rule is well-settled, however, that a person may not repeatedly present the same claim in serial postconviction litigation. *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."). In both ***Davis II*** and ***Davis III***, Davis litigated his alleged

lack of competency to proceed. We resolved the issue in ***Davis II*** with our conclusion that "[t]he record lends no support to Davis's claim of incompetence," *see* ***id.***, No. 2008AP88, ¶11, and in ***Davis III***, we explained that "[t]his court has already made a determination that nothing in the record supports Davis's claim of incompetency.... [T]here is no merit to such a claim," *see* ***id.***, No. 2009AP3159-W at 5. Because Davis has fully litigated his claim that he was not competent during the circuit court proceedings, he may not raise this claim again. *See* ***Witkowski***, 163 Wis. 2d at 990. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court's orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals