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DISTRICT II

July 19, 2023

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Christine A. Remington
Electronic Notice

Bobby F. Mayberry Jr., #195895
Redgranite Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1263-CR State of Wisconsin v. Bobby F. Mayberry, Jr. (L.C. #2007CF707)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Bobby F. Mayberry, Jr. appeals, pro se, from an order denying his WIS. STAT. § 974.06 (2021-22)¹ postconviction motion seeking sentence modification based on an alleged new factor. Mayberry's sentence was imposed in 2008 following his guilty pleas to two counts of sexual assault of a child as a repeater. Mayberry alleges that he was misdiagnosed with depression at the time of sentencing. He claims he was actually suffering from schizophrenia that had not been diagnosed, and that this information constitutes a new factor. Mayberry also argues that his trial counsel was ineffective in failing to have him evaluated for schizophrenia. Based upon our

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2007, the State charged Mayberry with seven counts of sexual assault of a child under the age of sixteen and five counts of sexual assault of a child under the age of thirteen. Mayberry pled guilty to one count each of first- and second-degree sexual assault of a child, both as repeaters, contrary to WIS. STAT. §§ 948.02(1), 948.02(2). The remaining counts were dismissed and read in. Mayberry admitted committing the assaults, explaining he had stopped taking his depression medication and engaged in the assaults as a way of self-medicating. In 2008, the circuit court² sentenced Mayberry to a total of forty-five years consisting of thirty years of initial confinement and fifteen years of extended supervision. The court made the sentence consecutive to the other sentences Mayberry was serving. The court based its sentence on the severity of the crime and the need to protect the public.

In 2022, Mayberry filed a postconviction motion asking for sentence modification based on a new factor. Mayberry alleged that the circuit court did not know “the full [e]xtent of [his] mental health[.]” Specifically, Mayberry argued that since sentencing, he has suffered from schizophrenia which had been misdiagnosed as depression. He was also diagnosed with post-traumatic stress disorder (PTSD) while in prison. He says this new information about his mental health should cause a reduction in his sentence. In support of his motion, Mayberry included a psychiatric report from Dr. Leslie Gombus, who diagnosed Mayberry with a major depressive disorder, alcohol and cocaine dependence, and hypertension. Mayberry also included psychiatric

² The Honorable Linda M. Van De Water imposed Mayberry’s sentence.

reports from Dr. Donald Stonefeld, who diagnosed him with the same disorders as Dr. Gombus, but also included additional diagnoses of PTSD and an unspecified personality disorder. Finally, Mayberry submitted a report from Jenney Caylor, a licensed professional counselor, that included a diagnosis of an “[u]nspecified schizophrenia spectrum and other psychotic disorder[.]” He says Caylor diagnosed him with schizophrenia. In response, the State submitted a report from Caylor, which stated that “[d]ue to him currently not meeting the full criteria for Schizophrenia, the diagnosis of Other Specified Schizophrenia Spectrum Disorder and Other Psychotic Condition will be given.”

In July 2022, the circuit court³ held a hearing on Mayberry’s postconviction motion. Mayberry argued that because he was not diagnosed with schizophrenia and PTSD at the time of his sentencing, these diagnoses were new factors that justified sentence modification. The circuit court ultimately denied Mayberry’s motion because it explained that even if Mayberry’s psychological condition had changed, he failed to show that a new factor justified sentence modification. Mayberry now appeals.

Mayberry’s claim that the circuit court erred when it rejected his new factor claim

Mayberry argues that the circuit court erred in concluding the information he submitted about his misdiagnosis at the time of sentencing did not meet the definition of a new factor. We reject Mayberry’s claim because he failed to prove that this information was highly relevant to his sentence. Therefore it was not a new factor.

³ The Honorable J. Arthur Melvin, III presided over the 2022 postconviction motion hearing.

“Deciding a motion for sentence modification based on a new factor is a two-step inquiry.” *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a “fact or set of facts” “constitutes a ‘new factor’ is a question of law.” *Id.* A “new factor” is a fact “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). The defendant bears the burden of establishing the existence of a new factor “by clear and convincing evidence[.]” *Harbor*, 333 Wis. 2d 53, ¶36.

If a new factor exists, the defendant is not automatically entitled to sentence modification. *Id.*, ¶37. “Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.* Whether a new factor justifies sentence modification is within the circuit court’s discretion. *Id.* When the circuit court concludes as a matter of law that there is no new factor, it is unnecessary to “determine whether, in the exercise of its discretion, the sentence should be modified.” *Id.*, ¶38. “[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification,” it is unnecessary for the court to “determine whether the facts asserted by the defendant constitute a new factor as a matter of law.” *Id.*

A new factor is defined as a fact not known at the time of sentencing either because it was not in existence or because it was unknowingly overlooked. In either case, the new factor must be highly relevant to the imposition of the sentence to meet the new factor definition. Mayberry failed to prove by clear and convincing evidence that his mental health condition was highly relevant to his sentence. The information Mayberry submitted about his “misdiagnosis” does not actually support his contention that he suffers from schizophrenia. As noted above, the

Record establishes that Mayberry does “not meet[] the full criteria for Schizophrenia[.]” Second, even if his mental health condition has changed since sentencing, which the circuit court recognized,⁴ he failed to prove by clear and convincing evidence that this information was highly relevant to his sentence.

The sentencing court based its sentence on the seriousness of Mayberry’s offense, the need to protect the public, and Mayberry’s lengthy record. Specifically, the sentencing court stated, “Probation in this case would severely unduly depreciate the seriousness of all of these offenses and your behavior and the criminal record. It would not be appropriate. It would not protect the community. You’re a danger to the community and to the system.” The salient point here is that Mayberry’s mental health state was not highly relevant to his sentence. Therefore, the circuit court properly concluded that Mayberry failed to present a new factor.

Mayberry’s claim for ineffective assistance of counsel

Mayberry next argues that his trial counsel should have raised the issue of competency and was ineffective for failing to do so. He alleges that he informed his trial counsel that “he was hearing voices and hallucinating[.]” This argument fails at the outset because this is the first time he has raised this issue. Generally, we do not consider new issues raised for the first time on appeal. *See State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983) (“Generally, issues not raised or considered by the trial court will not be considered for the first time on appeal.”). We also could not consider this issue given that there was no *Machner*

⁴ The postconviction court noted that there appeared to be a “change in [Mayberry’s] psychological condition,” but the new information was not a “new factor that would justify a new sentence[.]”

hearing held in the circuit court prior to this appeal. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *State v. Sholar*, 2018 WI 53, ¶53, 381 Wis. 2d 560, 912 N.W.2d 89. In 2008, Mayberry's appellate counsel filed a no-merit appeal. Mayberry failed to raise an ineffective assistance of trial counsel claim during that appeal, and therefore, he is procedurally barred from raising it in this appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).⁵ To be clear, “a defendant may not raise issues in a subsequent [Wis. STAT.] § 974.06 motion that he could have raised in response to a no-merit report, absent a ‘sufficient reason’ for failing to raise the issues earlier in the no-merit appeal.” *State v. Allen*, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124. Mayberry fails to establish that he had a sufficient reason for failing to raise his ineffective assistance of trial counsel claim in his no-merit direct appeal. Therefore, his claim is procedurally barred by *Escalona-Naranjo*.

Because Mayberry fails to establish that a change in his mental health constitutes a new factor and fails to overcome the *Escalona-Naranjo* bar, we affirm the circuit court's decision denying his motion for sentence modification.

Therefore,

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

⁵ *See State v. Tillman*, 2005 WI App 71, ¶2, 281 Wis. 2d 157, 696 N.W.2d 574 (concluding that the *Escalona-Naranjo* procedural bar applies to no-merit appeals).

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

*Samuel A. Christensen
Clerk of Court of Appeals*