**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 15, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP1393-CR** **Cir. Ct. No. 1994CF943992**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GARLAND H. HAMPTON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Garland H. Hampton, *pro se*, appeals from an order denying his postconviction motion for resentencing based on a new factor. The circuit court denied the motion, concluding that there was no new factor and

that the motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

## BACKGROUND

¶2 In 1995, then sixteen-year-old Hampton was convicted of first-degree intentional homicide while armed as party to a crime. He was sentenced to life imprisonment with parole eligibility beginning in 2015. His conviction was upheld on appeal. *See* ***State v. Hampton***, 207 Wis. 2d 367, 558 N.W.2d 884 (Ct. App. 1996). Hampton has since made several other attempts at relief, including a 2010 motion filed pursuant to WIS. STAT. § 974.06 (2009-10).[1] The circuit court denied the motion, we affirmed, and the supreme court denied the petition for review on May 24, 2011.

¶3 On May 3, 2011, Hampton filed in the circuit court the motion for sentence modification underlying this appeal. That motion was based on an alleged new factor, though on appeal, Hampton's main brief does not identify what he argued the new factor to be. We have, however, reviewed the postconviction motion itself and, in short, Hampton contended that there is "new [scientific] evidence regarding adolescent brain development that bears on distinctly diminished culpability" of children and adolescents. He further asserted that such evidence would demonstrate that his "adolescent culpability … is far less than what could justify a sentence of life imprisonment."

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The circuit court denied the motion, noting that the same factor could have been raised in the 2010 motion—Hampton was relying, in part, on ***Roper v. Simmons***, 543 U.S. 551 (2005), a case available well before either motion.[2] Therefore, the circuit court reasoned, Hampton had not shown a *new* factor and the motion was procedurally barred because Hampton offered no reason for failing to raise the issue in his prior motion. Hampton moved for reconsideration, but the circuit court also denied that motion. Hampton appeals.

## DISCUSSION

¶5 Despite other procedural bars that may exist, a circuit court may modify a sentence if the defendant shows a new factor that warrants modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" is a fact or 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, even though it was then in existence, it was unknowingly overlooked by all the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (reaffirmed by ***Harbor***, 333 Wis. 2d 53, ¶¶40, 52).

[2] In rejecting the motion, the circuit court noted that the case record was still with this court following the appeal of the denial of the 2010 motion. When the record for a case is transmitted to the court of appeals, a circuit court may act only as provided by statute. *See* WIS. STAT. § 808.075(1)-(4). Hampton points out that under § 808.075(4)(g)6., the circuit court was permitted to act on a sentence modification request even if the record was with this court.

WISCONSIN STAT. § 808.075(4)(g)6. merely provides that the circuit court *may* act on a sentence modification motion while an appeal is pending; it does not require the circuit court to do so. Indeed, in some instances, the lack of the record may hamper a circuit court's ability to decide a matter, the permissions of § 808.075 notwithstanding. We need not address this part of the circuit court's order any further.

¶6 "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Harbor***, 333 Wis. 2d 53, ¶36. Whether facts constitute a new factor is a question of law that this court reviews *de novo*. *See* ***id.*** If the defendant demonstrates that there is a new factor, the question of whether that new factor warrants sentence modification is committed to the circuit court's discretion. *See* ***id.***, ¶37.

¶7 It is not wholly clear whether the circuit court concluded that there was no new factor *because* the motion was barred by ***Escalona*** or whether it concluded that there was no new factor *and* the motion was barred by ***Escalona***. Nevertheless, we affirm the circuit court because Hampton's particular theory that certain scientific evidence about juvenile brain development constitutes a "new factor" has been rejected by both this court and the supreme court. *See* ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451; ***State v. McDermott***, 2012 WI App 14, 339 Wis. 2d 316, 810 N.W.2d 237; *see also* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on different grounds than those relied upon by circuit court).

¶8 Ninham argued that he was entitled to sentence modification "on the grounds that new scientific research regarding adolescent brain development constitutes a new factor[.]" ***Ninham***, 333 Wis. 2d 335, ¶87. He was relying in part on magnetic resonance imaging (MRI) studies, *see* ***id.***, just as Hampton did in his postconviction motion. According to Ninham, the studies demonstrated "that the brain is not fully developed early in childhood and that making impulsive decisions and engaging in risky behavior is an inevitable part of adolescence." ***Id.*** Ninham asserted that this research "undermines the circuit court's findings regarding … culpability[.]" ***Id.***

¶9 The supreme court rejected this evidence as a new factor "because the conclusions reached by the studies were already in existence and well reported by the time Ninham was sentenced in 2000." ***Id.***, ¶91. Indeed, United States Supreme Court jurisprudence from 1988 had relied on studies from 1978, meaning "the 'new' scientific research regarding adolescent brain development … only confirms the conclusions about juvenile offenders that the Supreme Court had 'already endorsed' as of 1988." ***Id.***, ¶92 (citing ***Thompson v. Oklahoma***, 487 U.S. 815, 835 (1988)).[3]

¶10 Likewise, McDermott argued that "the recent realization in the scientific community that adolescents are generally impulsive and often have trouble making wise choices" was a new factor. ***McDermott***, 339 Wis. 2d 316, ¶16. We rejected McDermott's assertion in light of ***Ninham***. *See* ***McDermott***, 339 Wis. 2d 316, ¶18.

¶11 In short, then, the notion that juveniles' brains function differently than the brains of adults is not a new factor. For that reason, it was not error for the circuit court to deny Hampton's motion for sentence modification.

¶12 That Hampton's evidence was not a new factor would not necessarily be fatal to his motion but for the fact that Hampton has pursued prior postconviction motions and appeals. Thus, the circuit court had also invoked the procedural bar of ***Escalona***, noting that the scientific-evidence claim could have been raised in the 2010 motion. We agree: to the extent that Hampton's current

[3] ***Roper v. Simmons***, 543 U.S. 551 (2005), the case on which Hampton heavily relied in his postconviction motion, discussed and adopted the reasoning of ***Thompson v. Oklahoma***, 487 U.S. 815 (1988). *See* ***Roper***, 543 U.S. at 570-72.

claim for relief does not satisfy the "new factor" test, he offers no sufficient explanation to the circuit court or this court for his failure to raise the claim in a prior motion or appeal. *See* WIS. STAT. § 974.06(4); ***Escalona***, 185 Wis. 2d at 181-82. Thus, the claim is now barred.

*By the Court.*—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.