COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2921-CR **Cir. Ct. No. 1995CF953566A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. In 1996, Corey Griffin was convicted of first-degree reckless homicide as a party to a crime. The circuit court imposed a forty-year prison sentence. Since that time, Griffin has repeatedly and unsuccessfully pursued postconviction relief. He now appeals *pro se* from a 2006 circuit court

order denying his motion seeking sentence modification ostensibly based on "new factors." On appeal, Griffin argues that the circuit court improperly denied his motion, which presented information that Griffin claims established that he could not have fired the fatal shot. We conclude that Griffin's appeal is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (claims that the defendant could have raised in a direct appeal or in a previous WIS. STAT. § 974.06 (2005-06)[1] motion are barred from being raised in a subsequent § 974.06 motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion). We also conclude that Griffin's argument is meritless because he did not present the circuit court with any "new factors" that warranted sentence modification.

¶2 Griffin was charged with first-degree reckless homicide, party to a crime, in the shooting death of Lamont Richardson. Richardson's death occurred during a gunfight that erupted after Griffin and two other men accused Richardson of stealing tire rims. It is undisputed that Griffin had been given a loaded shotgun before the fight and that he fired the shotgun twice during the incident. It also appears undisputed that Griffin was the only person armed with a shotgun, but did not know how the gun was loaded. Other weapons were also fired during the incident, and police recovered numerous shell casings from the scene, including a Winchester Super X-00 shotgun shell casing and a shotgun wad inconsistent with those normally loaded in that particular Winchester shell. A number of pieces of copper-plated lead shot were recovered from Richardson's head.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Since 1997, Griffin has sought postconviction relief by attempting to demonstrate that he could not have fired the fatal shot. Griffin's attempts have been based on research that he claims demonstrates Winchester never manufactured its Super X-00 shotgun shells with copper-plated lead shot. In a prior postconviction motion and appeal, Griffin sought plea withdrawal based on a claim of ineffective assistance of counsel on the ground that trial counsel should have discovered that information, which Griffin claimed was exculpatory. In an opinion released July 15, 2002, this court affirmed the circuit court's denial of that motion, reasoning that Griffin had not demonstrated a manifest injustice warranting plea withdrawal. We noted:

> [T]he possibility that another shotgun was fired during the incident was raised by Griffin before sentencing. A pre-sentencing memorandum filed with the court by Griffin pointed to the different type of shotgun wad found at the scene and suggested that the fatal shot was not fired by Griffin but rather from an unknown passing car. In light of that suggestion, the court asked Griffin's trial counsel whether Griffin intended to challenge the factual basis for the plea. Counsel replied that [Griffin] was not doing so, and specifically noted that "you can shoot two different wads out of the same gun" and that "Corey didn't load the gun."

¶4 On the basis of this information, the court rejected Griffin's argument because: (1) the difference between the recovered casing and the recovered wad did not prove that two shotguns had been used because: (a) Griffin did not load his weapon, and (b) two different types of ammunition could have been used in the gun; and (2) there was no evidence that the recovered casing had held the pellets retrieved from Richardson's body. Consequently, this court reasoned that "further detail about the kind of ammunition manufactured by Winchester does nothing to dilute Griffin's admission, arising from his plea, that he fired the shot that killed Richardson."

¶5 Despite this ruling, Griffin filed the postconviction motion that is the subject of this appeal, claiming that the same information regarding the casing and the copper-plated pellets constituted a "new factor" warranting sentence modification. In essence, he argued that because the "evidence" comprised of his correspondence with Winchester and other shell manufacturers demonstrated that he could not have fired the fatal shot, he should be resentenced on the basis of this new and correct information.

¶6 The circuit court denied Griffin's motion, reasoning that the evidence provided by Griffin, which had been considered in his prior postconviction motion, was neither a "new factor" for sentence modification purposes nor "newly-discovered evidence" warranting plea withdrawal. The court noted that to the extent Griffin was providing new arguments from the same evidence, he was barred from doing so by ***Escalona-Naranjo***. Griffin appeals.

¶7 In order to obtain sentence modification based on a new factor, a defendant must show that a new factor exists and that the new factor warrants sentence modification. ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524. A new factor is a fact or set of facts highly relevant to sentencing, but not known to the sentencing judge either because it was not then in existence or because it was in existence, but was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). To be a new factor, the information or development must also "frustrate[] the purpose of the original sentence." ***Crochiere***, 273 Wis. 2d 57, ¶14 (citation omitted).

¶8 As the State notes, the crux of Griffin's argument is that the Winchester letters demonstrate that he did not fire the shot that killed Richardson and that he should not have been sentenced as if he had been the shooter. As this

court noted in Griffin's prior appeal, however, the Winchester letters do not undercut his admission at the plea hearing that he fired the fatal shot. We reiterate: Griffin did not load the weapon; the weapon could fire different types of ammunition and therefore could have been loaded with different types of ammunition; Griffin fired a shotgun twice; and there is no evidence that the fatal pellets came from the recovered shell casing.

¶9 With the exception of the Winchester letters, the evidence on which Griffin establishes his "new factor" claim was known prior to sentencing. Even if the court were to concede—which we do not—that the Winchester letters represented a fact or set of facts highly relevant to sentencing, but unknown at that time, they would not warrant sentence modification. The letters do not demonstrate that Griffin could not have fired the shot that killed Richardson. In addition, Griffin was charged as a party to a crime and was culpable for Richardson's death even if he could demonstrate that he did not fire the fatal shot. Finally, we agree with the circuit court that Griffin's motion is susceptible to the ***Escalona-Naranjo*** bar because Griffin has demonstrated no reason, much less a sufficient reason, for his failure to raise his "new" claims in his prior postconviction motion.

By the Court.—Order affirmed.

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