COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2997-CR **Cir. Ct. No. 1998CF1180**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP M. HUDSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Phillip Hudson appeals from an order denying his motion for sentence modification. Hudson argues that he has identified a new factor that entitles him to be resentenced. Because we conclude that his claim is

barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), we affirm.

¶2 Hudson pled guilty to one count of armed robbery in 2000. His sentence was withheld and he was placed on five years of probation. His probation was revoked in 2002 for drug use, absconding from probation, failure to pay court ordered obligations, punching a person, and subsequent charges of disorderly conduct, battery, and resisting/obstructing an officer. The court sentenced him to ten years in prison out of a possible maximum of forty years.

¶3 In 2004, Hudson filed his first motion for postconviction relief, arguing that a ten-year sentence after a five-year probationary period constituted double jeopardy. The circuit denied the motion. Hudson appealed and we affirmed.

¶4 In November 2006, Hudson filed a second postconviction motion for sentence modification. In this motion, he argued that the Division of Hearings and Appeals lost jurisdiction to revoke his probation because it did not hold his hearing within fifty days. He also argued that this rule violation constituted a new factor that entitled him to be resentenced.

¶5 The circuit court again denied his motion. The circuit court found that the administrative law judge had addressed this issue in the decision on his revocation proceeding. Hudson could have appealed this decision by petitioning the circuit court for a writ of certiorari. He did not, and therefore waived the issue. The court also found that the law on which Hudson relied was in existence at the time he was sentenced after revocation, and consequently was not a new factor. Further, the court found that even if his argument was valid, he could have raised it in his prior postconviction motion.

¶6 Hudson renews his arguments to this court. In ***Escalona-Naranjo***, 185 Wis. 2d at 185, the supreme court stated:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

¶7 A defendant must raise all grounds of relief in his original, supplemental, or amended motion for postconviction relief. ***Id.*** at 181. If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion, unless he or she establishes a sufficient reason for failing to raise the issue in the original motion. ***Id.*** at 181-82.

¶8 We conclude that Hudson could have raised this issue either on appeal from the revocation decision or in his original postconviction motion. His reason for failing to raise it before is that he was not aware of the law at the time he brought the first motion. This is not a sufficient reason for failing to raise it then. Because he did not raise the issue in his original postconviction motion, he is barred by ***Escalona-Naranjo*** from raising it now.

¶9 We also reject his argument that it constitutes a new factor. A new factor 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, 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). Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's

determination. ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). The case on which Hudson relies was in existence at the time his probation was revoked. Even if Hudson's argument is correct on the law, and we are not deciding that it is, he has not established that the circuit court "unknowingly overlooked" this case. Further, the issue was addressed by the administrative law judge in her decision. Hudson has not established the existence of a new factor.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).