COURT OF APPEALS
DECISION
DATED AND FILED

August 07, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3151-CR **Cir. Ct. No. 1992CF924162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH LEE MOORE,

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. Joseph Lee Moore appeals *pro se* from an order denying his motion to modify sentence. We conclude that Moore's challenge to the sentencing court's discretion is procedurally barred. Therefore, we affirm.

Background

¶2 A jury found Moore guilty of armed robbery, armed burglary and false imprisonment, all as party to a crime. *See* WIS. STAT. §§ 943.32(1)(a), 943.32(2), 939.10(1)(a), 943.10(2), 940.30, 939.05 (1991-92). In January 1995, the circuit court imposed maximum consecutive sentences for these offenses: a two-year sentence for the false imprisonment, and consecutive twenty-year sentences for each of the other two crimes. Moore's appellate counsel filed a notice of appeal, followed by a no-merit report. Moore filed a response. This court summarily affirmed the convictions in 1996.

¶3 Moore, acting *pro se*, then brought a series of unsuccessful postconviction motions. In 1998, pursuant to WIS. STAT. § 974.06 (1997-98), he filed a motion "to dismiss the … case or modify his consecutive (present sentence) to run concurrent with time served." The circuit court denied the motion on the grounds that it was procedurally barred. This court affirmed and the supreme court denied review. In 2002, pursuant to WIS. STAT. § 973.155 (2001-02) and Tenn. Code Ann. § 41-21-236, he filed a "motion for sentence credit reduction."[1] The circuit court denied the motion on the grounds that it lacked authority to grant credit for post-sentence incarceration. This court affirmed. In 2004, pursuant to WIS. STAT. §§ 974.06 and 973.13 (2003-04), Moore filed a "motion to vacate sentence." The circuit court denied the motion on the grounds that it was procedurally barred. This court affirmed and the supreme court denied review.

[1] Moore sought sentence credit for time spent incarcerated in Tennessee.

¶4 In 2006, Moore initiated the instant litigation, filing a motion to modify his sentence grounded on "common law authority." He alleged for the first time that: (1) the circuit court erroneously exercised its discretion by failing to state specific reasons for imposing consecutive rather than concurrent sentences; and (2) a 1994 change in parole policy constitutes a new factor requiring resentencing. The circuit court denied the motion. It ruled that the challenge to the circuit court's exercise of discretion was untimely, and that the change in parole policy was not a new factor. This appeal followed.

Motion Challenging Sentencing Discretion

¶5 WISCONSIN STAT. § 973.19 (2005-06)[2] sets a time limit of ninety days after sentencing within which to bring a sentence modification motion that is outside of the direct appeal procedure of WIS. STAT. § 809.30. Relying on the statutory framework, the circuit court held that Moore's motion was untimely. Moore disagrees, contending that his motion, brought eleven years after sentencing, was grounded in the circuit court's inherent authority to modify its sentences.

¶6 The State in its appellate brief concedes that the circuit court has inherent authority to modify a sentence that is unduly harsh, unconscionable, or excessive, citing ***State v. Crochiere***, 2004 WI 78, ¶¶11-12, 273 Wis. 2d 57, 681 N.W.2d 524. We need not decide whether Moore's motion is governed by statutory time limits or by ***Crochiere*** because it is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

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

¶7 We need finality in our litigation. ***Id.***, 185 Wis. 2d at 185. A defendant is therefore barred from pursuing claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not raising the claims previously. ***Id.*** at 181-82. "[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error ...." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). The bar applies with equal force where the direct appeal was conducted pursuant to the no-merit procedure of WIS. STAT. § 809.32. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶8 Moore claims that the circuit court erroneously exercised its discretion by failing to explain its reasons for imposing consecutive sentences. He could have raised this claim on direct appeal in 1995. The circuit court's obligations to state both the reasons for the sentences imposed and the factors considered when imposing those sentences were well-settled principles of Wisconsin law at that time. *See* ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971); *see also* ***Harris v. State***, 75 Wis. 2d 513, 250 N.W.2d 7 (1977).

¶9 Moore offers no reason for failing to raise his current claim in earlier postconviction litigation. He therefore has not met the obligation imposed by ***Escalona-Naranjo*** to show a sufficient reason for the failure. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. His claim is therefore procedurally barred and was properly denied by the circuit court. We may affirm the circuit court's decision on alternative grounds even if the court did not invoke that ground as a basis for its order. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶10 Moreover, the record demonstrates an appropriate exercise of sentencing discretion that a reviewing court should not disturb. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). The circuit court considered the primary factors of the gravity of the offense, the defendant's character and the protection of the public. *See* ***Harris***, 75 Wis. 2d at 519. Noting that Moore tied up, terrorized, and stabbed the victim during a home invasion, the court identified particular needs for punishment and deterrence. The court further determined that it had an obligation to incapacitate Moore for the protection of society because it believed him to be incapable of rehabilitation. Punishment and community protection are appropriate objectives of sentencing. ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197.

¶11 The circuit court specifically considered as relevant factors Moore's lengthy criminal record, his "obnoxious," "belligerent," and "threatening" conduct in court proceedings, his pattern of dangerous and assaultive behavior, his lack of cooperation with the presentence investigation, and the presentence author's recommendation for a maximum sentence. Criminal history, undesirable behavior, court demeanor and the presentence report are appropriate factors for the sentencing court's consideration. *See* ***Harris***, 75 Wis. 2d at 519. In light of these factors the court concluded that Moore was "the wors[t] of the wors[t]" for whom a maximum sentence was mandated.

¶12 Moore contends that the circuit court had an additional obligation to state separately why it chose a consecutive rather than a concurrent sentence. In support, he cites ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41. In ***Hall***, we held that the circuit court erroneously exercised its discretion by providing inadequate reasons for the consecutive sentences imposed, in contravention of ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512(1971). *See*

Hall, 255 Wis. 2d 662, ¶5. We agree with the State that ***Hall*** did not establish a new procedural requirement at sentencing. Rather, ***Hall*** emphasized the well-settled right of defendants to have the relevant and material factors influencing their sentences explained on the record.

¶13 A circuit court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length. *See* ***State v. Hamm***, 146 Wis. 2d 130, 156-57, 430 N.W.2d 584 (Ct. App. 1988). The circuit court here considered relevant factors and in light of those factors imposed maximum consecutive sentences on each count. Moore's dissatisfaction with the sentence and its long-term ramifications does not mean that the court erroneously exercised its sentencing discretion.

Motion to Modify Sentence Based on Alleged "New Factor"

¶14 Moore alternatively contends that a 1994 change in parole policy is a new factor warranting sentence modification. A "new factor" is a fact not known to the judge at the time of the original sentence, either because it was not then in existence or was unknowingly overlooked, and that strikes at the purpose for the sentence selected. ***State v. Michels***, 150 Wis. 2d 94, 96, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶15 Sentence modification motions based on new factors are not governed by a time limitation. ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. Moore argues that such motions are also unrestricted by ***Escalona-Naranjo***'s procedural bar. In support, he cites ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. ***Grindemann*** does not apply, however, because the 1994 change in parole policy on which Moore relies is not "new;" any such policy was in place when Moore was sentenced in

1995. Therefore, the claim could have been brought in earlier proceedings and is now procedurally barred by ***Escalona***.

¶16 Were we to look beyond the procedural bar, Moore's claim of a "new factor" would fail on its merits. A change in parole policy does not constitute a new factor unless the circuit court expressly relied on parole eligibility at sentencing. ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). Moore points to nothing in the record showing that the circuit court expressly relied on parole eligibility as a basis for the sentence it imposed. Any change in parole policy therefore cannot constitute a new factor.

By the Court.—Order affirmed.

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