COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1180-CR **Cir. Ct. No. 2003CF3863**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY ANTHONY HRENAK,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Kelly Anthony Hrenak appeals from the order denying his motions for postconviction relief. He raises various arguments, none of which have merit. Because we conclude that the circuit court properly denied his motions, we affirm.

¶2 In February 2004, Hrenak was convicted of six counts of burglary as a party to a crime and a repeat offender. The court sentenced him to consecutive sentences on each count of eighteen months' initial confinement and eighteen months' extended supervision. The State Public Defender appointed appellate counsel to represent Hrenak. Hrenak subsequently filed, *pro se*, a motion to modify his sentence under WIS. STAT. § 973.19 (2001-02).[1] The circuit court denied the motion because Hrenak was represented by counsel. Hrenak's appointed counsel filed a no-merit report and a supplemental no-merit report, and Hrenak filed a response and a supplemental response. We affirmed Hrenak's conviction in an opinion dated June 14, 2006.

¶3 After we affirmed, Hrenak filed many motions in the circuit court, including a motion to modify sentence credit, motions to amend the judgment to reflect the intent of the sentencing court, a motion to grant earned release after three years, and a motion to modify criminal sentence. The circuit court denied all of the motions, concluding that they were either time-barred or the issues should have been raised in a prior motion.

¶4 In March 2007, Hrenak filed a motion seeking sentence modification on the basis of a new factor, and a motion to correct an excessive sentence. In the first motion, he argued that the State failed to prove that he was a repeat offender, that the sentencing court erroneously exercised its discretion by imposing different sentences on him and his co-defendant, and that the sentencing court did not know that he has a damaged heart that has been diagnosed as ischemia. In the second

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

motion, he alleged that the circuit court erroneously exercised its discretion by imposing consecutive sentences, and that it did not establish his status as a repeat offender.

¶5 The circuit court denied the motions. The court noted that in August 2006, it had denied the defendant's previous motion to modify his sentence. The court concluded that most of the issues the defendant raised in these motions were barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The court concluded that the defendant's claims about disparate and consecutive sentences were untimely, and the latter had been addressed in the prior motion. The court further concluded that the Department of Corrections was not bound by the sentencing court's recommendation as to his eligibility for the Earned Release Program, that the State had properly proved that Hrenak was a repeat offender, and that his damaged heart condition was not a new factor that frustrated the purpose of the original sentence.

¶6 Hrenak's brief to this court is difficult to comprehend. He identifies six issues: (1) the sentencing court did not properly articulate its reasons for the sentence it imposed on each count; (2) the court only vaguely explained why it imposed consecutive sentences; (3) the court "may have" exceeded the "guideline parameters"; (4) the State failed to prove his status as a repeat offender; (5) the State charged him in violation of his right to be free from double jeopardy; and (6) he presented five new factors that entitled him to a modification of his sentence.

¶7 We conclude that the issues raised by Hrenak are either barred under ***Escalona***, are untimely, or lack merit. First, to the extent that Hrenak is seeking sentence modification under WIS. STAT. § 973.19 or WIS. STAT. RULE 809.30, on

the grounds that the circuit court erroneously exercised its discretion when it sentenced him, we conclude that the motion was untimely. A defendant who has not ordered transcripts may move to modify his sentence under § 973.19(1)(a) within ninety days of sentencing. A defendant who has ordered transcripts may move to modify his or her sentence under RULE 809.30(2)(h). *See* § 973.19(1)(b). That motion must be made within sixty days of the service of the last transcript. RULE 809.30(2)(h). Hrenak's motion was made three years after he was sentenced. Further, we already concluded in Hrenak's direct appeal under RULE 809.32 that the circuit court did not erroneously exercise its discretion when it sentenced him. Hrenak is not entitled to sentence modification on the basis that the court erroneously exercised its discretion when it sentenced him.

¶8 Hrenak also argues that he established the existence of five new factors that entitled him to sentence modification. The phrase a "new factor" refers to:

> 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). There must also be a nexus between the new factor and the sentence, i.e., the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a new factor exists presents a question of law which this court reviews independently of the circuit court's conclusion. ***Id.*** at 97. Whether a new factor warrants a modification of sentence rests within the circuit court's discretion. ***Id.***

¶9 Hrenak argues that he presented five new factors to the circuit court that entitled him to sentence modification: (1) two "arresting charges" were vacated for cause; (2) his co-defendant received a lesser sentence; (3) the Department of Corrections is not allowing him access to the Earned Release Program; (4) the State failed to prove his status as a repeat offender; and (5) he has been diagnosed with a heart condition. We conclude that none of these constitute new factors.

¶10 Hrenak asserts that when the circuit court sentenced him, it considered separate charges against him that were subsequently dismissed, and that the subsequent dismissal constitutes a new factor. The record, however, belies his assertion that the circuit court considered these other charges. When imposing sentence, the circuit court noted Hrenak's considerable record but stated that it sentenced him only on the charges considered by the jury. This is not a new factor.

¶11 Hrenak also contends that the lesser sentence his co-defendant received is a new factor. A disparity between the sentences of two co-defendants is not improper "if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). The record demonstrates that the circuit court considered Hrenak's culpability and rehabilitative needs when it imposed the sentence. The disparate sentences do not create a new factor in this case.

¶12 Although his next argument is particularly difficult to follow, Hrenak appears to be arguing that the Department of Corrections is limiting his access to the Earned Release Program. This allegation concerns post-sentencing programming by the Department of Corrections, and is not a new factor. Hrenak

also argues that the State did not prove his status as a repeat offender. The record shows, however, that the State established Hrenak's criminal record by filing a certified copy of a judgment of conviction with the criminal complaint. There is no merit to Hrenak's argument.

¶13 Hrenak also argues that he has been diagnosed with a heart condition. The circuit court found that the record was inconclusive about the extent of Hrenak's physical limitations. The circuit court noted that one document stated he had symptoms suggestive of ischemia and a later document said that he was "physically fit to perform any type of work or recreation." In any event, the circuit court found that this was not a new factor that frustrated the original purpose of the sentence. We agree.

¶14 Hrenak also argues that the court did not properly establish his status as a repeat offender. The court, however, did not extend his sentence as a result of his repeat offender status. Because the court did not increase his sentence based on his status, if there was an error, it was harmless. *See* ***State v. Kourtidias***, 206 Wis. 2d 574, 590, 557 N.W.2d 858 (Ct. App. 1996).

¶15 Hrenak's last argument is that the charges against him were multiplicitous. Hrenak has not offered any explanation for why he did not raise this argument in his direct appeal or previous motions, and we conclude that it is barred under ***Escalona***. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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