

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1227-CR

Cir. Ct. No. 2002CF5997

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

**DEXTER SALLIS
A/K/A DERRICK SALLIS,**

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer¹ and Kessler, JJ.

¶1 PER CURIAM. Dexter Sallis, also known as Derrick Sallis, appeals from an order denying his sentence modification motion as procedurally

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

barred. The issue is whether the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), applies to motions for sentence modification that raise new factors. We conclude that *Escalona* applies to sentence modification motions that raise issues that were or could have been litigated previously, such as those now raised by Sallis. Therefore, we affirm.

¶2 A jury found Sallis guilty of burglary as a party to the crime, and for operating a motor vehicle without the owner's consent. For the burglary, the trial court imposed a fifteen-year sentence, comprised of eight- and seven-year respective periods of initial confinement and extended supervision. For the operating conviction, the trial court imposed a five-year concurrent sentence, comprised of two- and three-year respective periods of initial confinement and extended supervision. Sallis moved for a new trial or resentencing, which the trial court denied. On direct appeal, this court affirmed the judgment of conviction and the postconviction order. *See State v. Sallis*, No. 2004AP1423-CR, unpublished slip op. at 9 (WI App Jan. 31, 2006).

¶3 Following his direct appeal, Sallis moved for "reconsideration" of his sentence, which the trial court denied. Shortly thereafter, Sallis sought reconsideration from the trial court's recent denial (of his prior reconsideration motion). That motion challenged the trial court's exercise of sentencing discretion and alleged that there were new factors warranting sentence modification. The trial court denied the motion, ruling that it was too late to raise the former issue, and that the factors Sallis raised incident to the latter issue were not "new."

¶4 Sallis then moved for sentence modification, alleging new factors and that the sentence imposed for the burglary exceeded the maximum penalty permitted by law. The trial court denied the motion, ruling that the alleged new

factors could have been raised in a previous sentence modification motion, and explained why Sallis's illegal sentence argument was "frivolous." Sallis appeals.

¶5 In his current motion, Sallis alleged as new factors, that he was sentenced on inaccurate information, and that the trial court erred when it imposed a disparate sentence on him, as compared to his co-defendant. He also alleged that the maximum potential penalty for burglary was ten years, and the trial court imposed a fifteen-year burglary sentence. Sallis's principal contention on appeal is that *Escalona* does not apply to sentence modification motions raising new factors.

¶6 To avoid *Escalona*'s procedural bar in a subsequent postconviction motion, a defendant must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his or her original postconviction motion. *See id.*, 185 Wis. 2d at 185-86. 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.”

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). By definition, a new factor that was “not then in existence” could not be subject to *Escalona*. *See Franklin*, 148 Wis. 2d at 8 (quoting *Rosado*, 70 Wis. 2d at 288).

¶7 The new factors alleged by Sallis are the inaccurate sentencing information, and the imposition of a disparate sentence. Insofar as the underlying factual information was inaccurate, those alleged inaccuracies were known to Sallis at the time of the prosecutor's sentencing remarks and when sentence was

imposed. Sallis heard those remarks at sentencing, and was or should have been aware of them at that time, or shortly thereafter. Insofar as Sallis has previously challenged his sentence on the basis of inaccurate information and as disparate to that of his co-defendant, he has offered no reason why he seeks to relitigate these same factors.² Under these circumstances, where the defendant knew or should have known of these challenges previously, particularly where he has previously sought sentence modification (and in these instances has raised some of these issues previously), *Escalona* constitutes a procedural bar to (re-)raising these issues now. See *Escalona*, 185 Wis. 2d at 185-86. Insofar as some aspects of these same issues have already been raised, they are also barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues).

¶8 Insofar as *Escalona*'s procedural bar does not preclude Sallis's second issue, that the fifteen-year burglary sentence exceeds the maximum potential penalty for that offense, which Sallis claims is ten years, we address it. Sallis committed this burglary on October 20, 2002. At that time burglary was a Class C felony, carrying a fifteen-year maximum potential penalty. See WIS. STAT. §§ 943.10(1)(a) (2001-02); 939.50(3)(c) (2001-02).³ Consequently, the trial court did not exceed the maximum potential penalty for burglary when it imposed a fifteen-year sentence.

² Sallis did not allege a reason for failing to previously raise these issues because he contends that the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), does not apply to motions for sentence modification based on new factors.

³ Sallis may have confused the period of initial confinement with the maximum term of imprisonment. Imprisonment is the bifurcated sentence comprised of an initial term of confinement followed by a term of extended supervision. See *State v. Cole*, 2003 WI 59, ¶16, 262 Wis. 2d 167, 663 N.W.2d 700 (citing and quoting WIS. STAT. § 973.01(1) (1999-2000)).

By the Court.—Order affirmed.

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

