COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1855-CR **Cir. Ct. No. 2003CF526**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONCHELLO C. LOUIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Monchello C. Louis, *pro se*, appeals from an order denying a motion for sentence modification. The circuit court denied the motion as procedurally barred. We affirm.

¶2 In 2003, Louis pled guilty to first-degree reckless injury, while using a dangerous weapon, as a party to a crime. *See* WIS. STATS. §§ 940.23(1)(a), 939.63 and 939.05 (1999-2000).[1] The circuit court imposed a bifurcated sentence of sixteen years, comprised of eleven years of initial confinement and five years of extended supervision, to be served concurrently with a previously imposed sentence.

¶3 Louis appealed and his appointed counsel filed a no-merit report. *See* WIS. STAT. RULE 809.32. Louis did not file a response to counsel's report. This court considered the report and independently reviewed the record. Upon that review, this court concluded there were no arguably meritorious appellate issues and summarily affirmed Louis's judgment of conviction. Among the issues expressly considered by this court was whether the circuit court erroneously exercised its sentencing discretion. We concluded that it did not.[2] *See* ***State v. Louis***, No. 2007AP2138-CRNM, unpublished slip op. at 2-3 (WI App Feb. 22, 2005).

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We stated as follows:

> Louis expected the trial court to fashion a sentence, which would result in his serving no additional time in confinement once he completed the sentence he was serving for a different crime. The trial court explained why it rejected the sentencing recommendations in favor of the sentence it imposed. Although appellate counsel did not expressly address the trial court's exercise of sentencing discretion, his description and analysis of the potential plea withdrawal issue, which was inextricably related to the sentencing, demonstrates why challenging the trial court's exercise of sentencing discretion would lack arguable merit.

¶4 On February 15, 2007, Louis filed a "Motion to Correct Sentence" in which he claimed that the imposed sentence exceeded the maximum penalty. The circuit court denied the motion.[3] Louis did not appeal.

¶5 On July 10, 2008, Louis filed the "Motion for Modification of Defendant's Sentence" that gives rise to this appeal. In his motion, Louis sought a decrease of the length of his initial confinement from eleven years to seven years. Louis argued that the circuit court "erroneously viewed" his cooperation with police as "payment" that "denigrated" his remorsefulness. Louis also contended that the circuit court "preconceived" that the maximum concurrent sentence was an appropriate disposition and that the court's consideration of the gravity of the offense was improper. Although Louis included the phrase "new factor" twice in the motion, Louis did not make a "new factor" argument. The circuit court denied the motion as procedurally barred.

¶6 Louis appeals, and on appeal he continues to argue that the sentencing court did not properly consider that he cooperated with police in a homicide prosecution and that the sentencing court placed too much weight on the gravity of the offense. For the following reasons, Louis's arguments are barred.

¶7 A motion for sentence modification must be brought within ninety days of sentencing under WIS. STAT. § 973.19(1)(a) or within the appellate time limits set forth in WIS. STAT. RULE 809.30. *See* ***State v. Norwood***, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991). Louis's motion, filed nearly five years after sentencing, was not timely filed under § 973.19(1)(a). Further, the

[3] In its order, the circuit court noted that the "while armed" penalty enhancer added five years to the potential sentence.

appellate time limits of WIS. STAT. § 974.02(1) and RULE 809.30 have long since expired and, therefore, Louis's motion was also untimely under those statutes.[4]

¶8 In an apparent attempt to circumvent those time limitations, Louis included the phrase "new factor" in his postconviction motion. *See* ***State v. Noll***, 2002 WI App 273, ¶11, 258 Wis. 2d 573, 653 N.W.2d 895 (A motion to modify a sentence based on new factors is not governed by a time limitation and may be made at any time.). Louis did not, however, develop a "new factor" argument, so we need not consider that matter further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (Arguments unsupported by legal authority will not be considered.).

¶9 Recognizing that Louis did not make a "new factor" argument, the circuit court reviewed Louis's postconviction motion as one brought under WIS. STAT. § 974.06. However, as the circuit court noted, a challenge to sentencing discretion cannot be raised in a § 974.06 postconviction motion. *See* ***Cresci v. State***, 89 Wis. 2d 495, 505, 278 N.W.2d 850 (1979) (Postconviction review under § 974.06 applies "only to jurisdictional or constitutional matters or to errors that go directly to the issue of the defendant's guilt."). Because none of Louis's arguments are "jurisdictional or constitutional," they cannot be raised in a § 974.06 motion.

¶10 Finally, we note that Louis's arguments are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The

[4] As we note elsewhere, Louis did have a direct appeal—the no-merit review under WIS. STAT. RULE 809.32. He did not raise a challenge to his sentence in response to counsel's no-merit report.

procedural bar of ***Escalona-Naranjo*** may be applied when the defendant's prior appeal was a no-merit appeal under WIS. STAT. RULE 809.32. *See* ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574; *see also* ***State v. Fortier***, 2006 WI App 11, ¶19, 289 Wis. 2d 179, 709 N.W.2d 893 (recognizing that when applying ***Escalona-Naranjo*** in a no-merit context, courts must make sure that no-merit procedures were followed, and that the procedures carried sufficient degrees of confidence to conclude that the outcome was correct). In this case, the no-merit procedures were followed, and this court expressly considered whether the court properly exercised its sentencing discretion, concluding that it did. Louis cannot relitigate that issue. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

By the Court.—Order affirmed.

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