COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

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. 2008AP2738-CR — **Cir. Ct. No. 2002CF1477**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY ELLIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony Ellis, *pro se*, appeals from an order denying a motion for sentence modification, from an order denying a motion for reconsideration, and from an order denying a motion for a psychiatric examination. Ellis's sentence modification motion is premised on an alleged new

factor. Because the facts relied on by Ellis are not a new factor, we affirm the circuit court's denial of Ellis's sentence modification motion. Because Ellis's motion for reconsideration and for a psychiatric examination are procedurally barred, we also affirm those orders.

¶2 Ellis pled guilty to one count of attempted armed robbery and one count of armed robbery. *See* WIS. STAT. §§ 943.32(2) and 939.32 (2001-02).[1] The court sentenced Ellis to concurrent terms of fifteen years of initial confinement and ten years of extended supervision. Ellis appealed his conviction and appointed counsel filed a no-merit report. Ellis filed a response. This court considered counsel's report, Ellis's response, and we conducted the independent review of the record required by ***Anders v. California***, 386 U.S. 738 (1967). We concluded that there were no arguably meritorious appellate issues and affirmed the judgment of conviction. ***State v. Ellis***, No. 2003AP1680-CRNM, unpublished slip op. (WI App June 22, 2005). The supreme court denied Ellis's petition for review.

¶3 On November 15, 2006, Ellis filed his first WIS. STAT. § 974.06 (2005-06) motion for postconviction relief. In that motion, Ellis raised numerous challenges to the effectiveness of his trial counsel, including an argument that his attorney did not adequately investigate the effect that a lower back injury and sciatica had on his relapse into drug use and subsequent commission of the underlying crimes and an argument that trial counsel "fail[ed] to raise the issue of

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

Ellis'[s] mental disease or defect." The circuit court denied Ellis's motion. Ellis failed to file a timely notice of appeal from the circuit court order.[2]

¶4 On September 18, 2007, Ellis filed a second postconviction motion under WIS. STAT. § 974.06. In that motion, Ellis sought to withdraw his guilty plea based on newly discovered evidence, namely police reports that Ellis argued were not timely disclosed to his trial attorney. Because the record showed that Ellis had the police reports when he filed his initial § 974.06 postconviction motion, the circuit court denied the motion as procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).[3] Ellis did not appeal that order.

¶5 Ellis then filed the motion for sentence modification that underlies this appeal. In this motion, Ellis argued that a new factor warranted modification of his sentence. Ellis returns to his lower back injury and sciatica and contends that information about the injury constitutes a new factor. Specifically, Ellis points to statements included in a letter he wrote to the circuit court before sentencing. The letter, however, was not received by the court until after sentencing. When it became apparent that the court did not have the letter, Ellis, in his allocution, orally told the court what the letter included. Ellis said that the letter described his "past history of drug involvement" and the "change in [his] life

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[2] Ellis filed an untimely notice of appeal. The appeal was dismissed for lack of jurisdiction. ***State v. Ellis***, No. 2007AP829, unpublished slip op. (WI App June 19, 2007).

[3] The circuit court also noted that Ellis included a variation of the argument that the police reports supported a lesser charge in his 2006 postconviction motion and that he was barred from raising the argument again. This court's opinion in Ellis's no-merit appeal states that Ellis had included police reports in the appendix to his response, also suggesting that Ellis had the police reports when he filed his 2006 WIS. STAT. § 974.06 postconviction motion. *See* ***State v. Ellis***, No. 2003 AP1680-CRNM, unpublished slip op. p. 5, (WI App June 22, 2005).

in 1993" when he "surrender[ed] [his] life to the Lord." Ellis admitted, however, that he "resorted back … to the drugs again because of certain issues" in his life. Ellis told the court that he "never got the intensive or extensive help and treatment that [he] need[ed], so [he] continued to revert back" to a drug lifestyle. Ellis went on to tell the court about "a very bad medical problem" in his left leg involving "a sciatic nerve" and pain. Ellis said he

> was isolated at home for a week [and] turned to drugs again to just comfort myself or escape the reality of what was going on in my life and it got to the point where I was pretty much diluted [sic], deranged in my mind-set, and I went out and committed the crime that I did.

Ellis stated, "that's pretty much what was contained in [his] letter," and he went on to apologize for his actions and ask the court for "leniency."

¶6 Ellis argues that his allocution "fell short of providing the court with a thorough understanding of his incapacity" caused by his back injury. Ellis states that "the contents of [the] letter add weight to the fact that [he] did indeed suffer from a work-related injury that caused him to experience a state of diminished mental capacity … ultimately leading to the commission of the offense." Ellis contends that if the court had received the letter before sentencing, "it would have had a clearer understanding" of Ellis's allocution.

¶7 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. Ralph, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citations and internal quotation marks omitted). Whether a particular fact or set of facts

constitutes a new factor is a question of law, subject to *de novo* review. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W. 2d 609 (1989).

¶8 The letter is not a new factor. Obviously, the letter was in existence at the time of sentencing. More importantly, because Ellis described the contents of the letter during his allocution, the information in the letter was known by the sentencing court. Although the letter might contain more detail about the injury and its claimed effect on Ellis's emotional state and conduct, the basic information in the letter—that the back injury was so painful that Ellis turned to drug use and robbery—was known to the sentencing court. Ellis cannot complain that his statement to the court was less descriptive than the letter. *See* ***State v. Rosado***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (information known to the defendant but not provided to the sentencing court is not a new factor). Because Ellis has not shown a new factor, the circuit court properly denied his motion for sentence modification.

¶9 After the circuit court denied the new factor sentence modification motion, Ellis moved for reconsideration, arguing that the circuit court "misconstrued" his motion and that the court "fail[ed] to take into consideration the effect of [the] work injury upon [Ellis's] mental and emotional state." Ellis contended that evidence of his "reduced mental capacity" caused by the injury "supports mitigation of punishment for the offense."

¶10 The circuit court denied Ellis's motion for reconsideration. The court noted that it was unclear whether Ellis sought to vacate his conviction or to reduce his sentence, but "[e]ither way, the motion must be denied." To the extent that Ellis was challenging his conviction, the circuit court ruled that the challenge "comes too late." To the extent that Ellis sought to reduce his sentence, the circuit

court held that Ellis had not provided any information that supported a claim that he "was suffering from some condition *at the time of the offense* which undermined his ability to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the law." (Emphasis in original.)

¶11 Not to be deterred, Ellis then filed a motion in which he asked the circuit court to appoint a psychiatrist to conduct an evaluation of his mental state at the time of the crime, presumably as a prelude to a renewed sentence modification motion. Because it believed that there was no evidence that Ellis "had actually lost his wits at the time of the crime," the circuit court denied Ellis's motion.

¶12 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. A defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Id.*** at 185; *see also* WIS. STAT. § 974.06(4) ("[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived … in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason.).

> [A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶13 "[D]ue process for a convicted defendant permits him or her a single appeal of [a] 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). Ellis has already had more than that single opportunity—in both his direct no-merit appeal and in his two previous WIS. STAT. § 974.06 motions. Therefore, he is procedurally barred from challenging his mental capacity at the time of the crime in these latest motions.

¶14 Ellis offers no sufficient reason, and we can discern none from the record, why the issue he raises in his latest motions was not raised previously. As the supreme court has stated, "[w]e need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. The argument raised by Ellis in his motion for reconsideration and motion for the appointment of a psychiatrist was procedurally barred.

By the Court.—Orders affirmed.

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