COURT OF APPEALS
DECISION
DATED AND RELEASED

January 28, 1997

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

NOTICE

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

No. 95-3540-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

J.B. FRANKLIN, JR.,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

PER CURIAM. J.B. Franklin, Jr., appeals after a jury trial from a judgment of conviction for burglary. He also appeals from two orders denying his motions for postconviction relief. He raises two issues for review: (1) whether the trial court erred when it determined that he failed to allege sufficient facts in order to justify a hearing on his postconviction motion to modify his sentence based on a new factor; and (2) whether the trial court

erroneously exercised its discretion in denying his postconviction motion for an examination of his competency both at his sentencing and at the time he committed the burglary. We reject his arguments and affirm.

I. BACKGROUND.

On September 29, 1994, a residence on the north side of the City of Milwaukee was broken into and several items of personal property were stolen. Police arrested Franklin after they matched latent fingerprints recovered from the crime scene with his fingerprint samples in a computer databank. He pleaded guilty to the burglary and was sentenced to nine years incarceration.

In November 1995, Franklin's subsequent counsel filed a postconviction motion to modify his sentence based on an alleged new factor. The alleged new factor was that Franklin's counsel had found evaluations from 1977 and 1983 that had diagnosed Franklin as being "mildly mentally retarded." The postconviction motion alleged that these evaluations were not known to the trial court at the time of Franklin's sentencing. In conjunction with this postconviction motion, Franklin's counsel also filed a motion requesting an updated mental examination of Franklin in order to determine whether Franklin was competent both at the time he committed the robbery and at the time he was sentenced.

Without a hearing, the trial court denied the motion, concluding that Franklin's submissions were insufficient to support a conclusion that he "was incompetent or lacked the substantial capacity for judgment due to a mental impairment at the time" of his sentencing. Further, the trial court concluded that Franklin had not raised an "issue of fact with respect to his ability to understand" the court proceedings and his sentencing and, therefore, the trial court denied the motion for a mental examination. Franklin then filed a motion for the trial court to reconsider its earlier order denying his postconviction motions. The trial court denied the motion, reiterating its earlier rulings. This appeal follows.

II. ANALYSIS.

Both issues raised by Franklin hinge on whether he presented sufficient submissions in his postconviction motions to require the trial court to hold an evidentiary hearing to resolve any questions of fact raised in those submissions. Our standard of review on this issue was recently stated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). Further, if "`the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id***. at 309-10, 548 N.W.2d at 53 (citation omitted).

Section 971.14, STATS., requires a court to order a competency hearing "whenever there is reason to doubt a defendant's competency to proceed." ***State v. Weber***, 146 Wis.2d 817, 823, 433 N.W.2d 583, 585 (Ct. App. 1988). "Before competency proceedings are required, evidence giving rise to a reason to doubt competency must be presented to the trial court." ***Id***. at 823, 433 N.W.2d at 585. A trial court's finding of whether there is a reason to doubt a defendant's competency under § 971.14 is a finding of fact that we will not overturn on appeal unless it is clearly erroneous. ***State v. Haskins***, 139 Wis.2d 257, 264-65, 407 N.W.2d 309, 312 (Ct. App. 1987).

Franklin presented the following information in support of his postconviction motion for a competency examination. He alleged that subsequent to his conviction, his counsel discovered that Franklin had been

examined in 1983 by a psychologist and was diagnosed as suffering from "mild mental retardation" and "[c]onduct disorder, socialized aggressive." Franklin also alleged that Franklin had been examined in 1977 by a Milwaukee Public School System psychologist and was found to be "mildly retarded." Franklin argues that his alleged "condition of mental retardation was unknown to the [trial] court at the time of sentencing and that it therefore constitute[d] a `new factor.'"

The trial court denied his motion for a competency examination, concluding that the reports from 1977 and 1983 "predating the proceedings by twelve and eighteen years do not provide the necessary support for demonstrating that it was probable the defendant was incompetent or lacked the substantial capacity for judgment due to a mental impairment at the time of the proceedings." The trial court also stated that Franklin's motion "is without a sufficient factual basis" to require a hearing on his examination request. Finally, the trial court found that "[t]he record as it exists conclusively establishes that the defendant understood the proceedings in which he participated."

Under the ***Bentley*** standard, we conclude that the trial court could properly deny Franklin's request without a hearing. The trial court could properly conclude that the record was "without a sufficient factual basis" to require a mental competency examination. Further, the trial court found that Franklin had presented nothing in the postconviction submissions that provided a reason to doubt Franklin's competency to proceed in his prosecution and sentencing for the 1994 burglary. Franklin has presented nothing to this court from which we conclude that the trial court's finding of fact on this point was "clearly erroneous." ***Haskins***, 139 Wis.2d at 264-65, 407 N.W.2d at 312.

The trial court also concluded that the mental evaluations from 1977 and 1983 did not provide sufficient reason to doubt the competency at the time of his prosecution in this case. The trial court bolstered its conclusion on this point by detailing the plea colloquy the trial court conducted with Franklin at the time he pleaded guilty to the burglary. Based on the above analysis, the trial court could properly deny Franklin's request for a competency examination without a hearing—thus, the court properly exercised its discretion. ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53.

In his alternative argument, Franklin argues that the trial court improperly denied his motion to modify his sentence without a hearing. He argues, at a minimum, the information presented in the earlier evaluations was a "new factor" that should have been considered in his sentencing.

A sentence can be modified to reflect a consideration of a new factor. ***State v. Macemon***, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). "A new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it." ***State v. Toliver***, 187 Wis.2d 346, 361, 523 N.W.2d 113, 119 (Ct. App. 1994). There must, however, be a nexus between the new factor and the sentence—that is, "the new factor must operate to frustrate the sentencing court's original intent when imposing sentence." ***Id***. at 362, 523 N.W.2d at 119. Further, "[w]hether a new factor exists presents a question of law which this court reviews *de novo*. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification." ***Id***. (citation omitted).

The trial court properly denied the motion to modify Franklin's sentence. The allegations in Franklin's motion and postconviction submissions do not present a new factor because they do not operate to frustrate the sentencing court's original intent when sentencing Franklin. The sentencing court applied the proper factors when sentencing Franklin, *see* ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971) (discussing appropriate factors a court must use when sentencing a defendant), and nothing presented in Franklin's postconviction motions subverted the court's intent in the original sentence. As such, the trial court could properly deny the motions without a hearing because the record conclusively demonstrated that Franklin was not entitled to the relief he was seeking. ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53 (citation omitted).

In sum, we reject Franklin's arguments and affirm both the judgment of conviction and the orders denying postconviction relief.

By the Court.—Judgment and orders affirmed.

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