COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3114

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MONTE L. JACKSON,

DEFENDANT-APPELLANT,

TERRANCE M. REAVES,

DEFENDANT.

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

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

PER CURIAM. Monte L. Jackson appeals *pro se* from an order denying his postconviction motion to modify the sentence he received after the

trial court found him guilty of possession of cocaine with intent to deliver, while possessing a dangerous weapon, *see* §§ 161.16(2)(b)(1), 161.41(1m)(cm)(3), and 939.63, STATS., 1993-94, possession of marijuana with intent to deliver, while possessing a dangerous weapon, *see* §§ 161.14(4)(t), 161.41(1m)(h)(1), and 939.63, STATS., 1993-94, and possession of a firearm subsequent to a felony conviction, *see* § 941.29(2), STATS.[1] Jackson argues that the trial court erred in denying his motion for sentence modification because: (1) his parole eligibility date was changed subsequent to his sentencing; (2) the trial court sentenced him based on allegedly inaccurate information; and (3) the trial court allegedly improperly sentenced him for possession of cocaine and marijuana with intent to deliver, while possessing a dangerous weapon, because, he claims, the evidence is insufficient to establish a nexus between the possession of a weapon and the underlying drug crimes. We affirm.

I. BACKGROUND

On May 11, 1995, Milwaukee police officers executed a search warrant at the home of Jackson's girlfriend. At the time of the search, Jackson and his girlfriend were in bed in a bedroom that contained various personal items belonging to Jackson. In the closet of that bedroom, the officers found a jacket, the pockets of which contained eight small bags of marijuana, a bag of cocaine, about sixty small bags of cocaine base, and $1,800. The officers also found two digital pagers on the dresser in that bedroom.

[1] Effective July 9, 1996, §§ 161.16(2)(b)(1), 161.41(1m)(cm)(3), 161.14(4)(t), and 161.41(1m)(h)(1), STATS., 1993-94 were recodified in chapter 961, STATS., 1995-96. *See* 1995 Wis. Act 448, §§ 162, 173, 245, 515.

In the kitchen, the officers found a cellular phone, a charger for that phone, and several plastic sandwich bags with the corners cut off. On the top shelf of an upper kitchen cabinet, the officers found two scales with a white residue on them, and a loaded gun, wrapped in a towel, immediately adjacent to the scales.

After the officers executed the search, Jackson told them that his downstairs neighbor had given him the gun, that a friend had left the scales at the home, and that Jackson had put both the scales and gun in the cabinet on the day before the search. Subsequently, Jackson said that the gun had been in the cabinet for two months. He also admitted that the marijuana and some of the cocaine belonged to him, and that he intended to sell drugs out of the home. At trial, however, Jackson testified that he had placed the scales in the cabinet, but that he did not know the gun was in the cabinet. Jackson further testified that he intended to sell marijuana, but that he was holding the cocaine and the scales for a friend.

Jackson was convicted and sentenced for possession of both cocaine and marijuana, with intent to deliver, while possessing a dangerous weapon. He was also convicted and sentenced for possession of a firearm subsequent to a felony conviction, and for two counts of failing to pay the controlled substance tax. The two controlled substance tax violations, however, were vacated, as required by ***State v. Hall***, 207 Wis.2d 54, 557 N.W.2d 778 (1997), in response to Jackson's first motion for postconviction relief. Subsequently, Jackson filed a second postconviction motion, pursuant to § 974.06, STATS., requesting sentence modification. The trial court denied Jackson's motion.

II. DISCUSSION

As noted, Jackson appeals from the trial court's denial of his second postconviction motion, pursuant to § 974.06, STATS. Under § 974.06(4), STATS.,

however, Jackson was required to raise all grounds for relief in his original, supplemental, or amended motion. *See* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181, 517 N.W.2d 157, 162 (1994). If the defendant's grounds for relief have been finally adjudicated, waived, or not raised in a prior postconviction motion, they may not become the basis for a § 974.06 motion "*unless* the court ascertains that a 'sufficient reason' exists for either the failure to allege or to adequately raise the issue in the original, supplemental or amended motion." ***Id.***, 185 Wis.2d at 181–182, 517 N.W.2d at 162.

Jackson did not allege the present grounds for relief in his original motion for postconviction relief, and he does not assert any reason for his failure to do so. We therefore conclude that no sufficient reason exists for Jackson's failure to raise the present grounds for relief in his original motion, and Jackson is precluded from asserting those grounds as the basis of his subsequent postconviction motion under § 974.06, STATS. We further reject Jackson's arguments on the grounds set forth below.

Jackson argues that the trial court erred in denying his motion for sentence modification because, after he was sentenced, the parole commission changed its policy regarding parole of convicted drug dealers. Specifically, he asserts that he is entitled to sentence modification because, at the time he was sentenced, he was eligible for parole after serving twenty-five percent of his sentence, but the parole commission later adopted a policy "not to parole anyone convicted of dealing drugs prior to their mandatory release date." In his postconviction motion, Jackson argued that the policy change was a new factor that justified sentence modification. On appeal, Jackson also argues that the change increases his punishment for past crimes and thereby violates the prohibition against ex post facto laws. We do not address Jackson's ex post facto

argument because he raises it for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (appellate court generally will not review an issue that is raised for the first time on appeal). We reject Jackson's new-factor argument on the merits.

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. Michels, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989) (quoted source omitted). If a defendant establishes the existence of a new factor by clear and convincing evidence, the trial court has discretion to modify the defendant's sentence. *See* ***id.***, 150 Wis.2d at 97, 441 N.W.2d at 279. Whether a particular fact or set of facts constitutes a new factor is a question of law, subject to *de novo* review. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor must be an event or development which frustrates the purpose of the original sentence. *See* ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279. Thus, a change in parole policy is not a new factor unless the trial court actually considered parole policy at sentencing. *See* ***Franklin***, 148 Wis.2d at 14, 434 N.W.2d at 613.

The record reveals that the change in Jackson's parole eligibility did not frustrate the purpose of Jackson's original sentence. At sentencing, the trial court did not consider Jackson's parole eligibility, but, rather, noted the seriousness of Jackson's offenses, his character and prior record, and the need to protect the public. Specifically, the trial court noted that Jackson possessed a large amount of drugs, that he possessed two different drugs, that he had a prior record

that included convictions for carrying a concealed weapon and for possession with intent to deliver, and that he had performed dismally on prior probation and parole. Because the trial court did not consider Jackson's parole eligibility at sentencing, the alleged change in policy regarding Jackson's parole is not a new factor.

Further, Jackson's new factor argument has not been properly raised because Jackson presented it in a postconviction motion under § 974.06, STATS.

> Postconviction review under sec. 974.06, Stats., is limited to jurisdictional or constitutional matters or to errors that go directly to guilt. The possible existence of "new factors" justifying a modification of sentence does not fall within the definition of either jurisdictional or constitutional matters. The motion to modify [on the basis of "new factors"] subsumes the defendant's guilt; therefore, it cannot address errors that go directly to guilt.

State v. Flores, 158 Wis.2d 636, 646, 462 N.W.2d 899, 903 (Ct. App. 1990) (citation omitted), *overruled on other grounds by* ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

Jackson next argues that the trial court sentenced him based on inaccurate information. Specifically, Jackson argues that the trial court erroneously relied on four weapons charges that are not a part of his criminal record. Jackson raises this argument for the first time on appeal. We therefore decline to address the issue. *See* ***Wirth***, 93 Wis.2d at 443–444, 287 N.W.2d at 145–146 (appellate court generally will not review an issue that is raised for the first time on appeal).

Jackson's final argument is that the trial court improperly sentenced him for possession of cocaine and marijuana with intent to deliver, while possessing a dangerous weapon, because the evidence is allegedly insufficient to

establish a nexus between the possession of a weapon and the underlying drug crimes.

When a defendant is charged with committing a crime while possessing a dangerous weapon, under § 939.63, STATS., the State must prove "that the defendant possessed the weapon to facilitate commission of the predicate offense." ***State v. Peete***, 185 Wis.2d 4, 17–18, 517 N.W.2d 149, 154 (1994). A defendant's use of the weapon to put the crime victim in fear, protect the defendant, and protect any contraband in the defendant's possession is sufficient to establish a nexus between the possession of the dangerous weapon and the predicate offense. *See* ***id.***, 185 Wis.2d at 18, 517 N.W.2d at 154.

The trial court, as the finder of fact, concluded that the State had established a sufficient nexus between Jackson's possession of the gun and the predicate drug offenses. We agree.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted).

The record reveals that Jackson possessed eight bags of marijuana, a bag of cocaine, and about sixty small bags of cocaine base. In the kitchen, officers discovered several plastic sandwich bags with their corners cut off, a cellular

phone and charger, two scales with a white residue on them, and a loaded gun. Jackson admitted to the officers that he had placed the loaded gun in the kitchen cabinet immediately adjacent to the scales, and that he intended to sell drugs from the home. The placement of the gun along with the other instruments used to prepare the drugs for sale is sufficient to establish that Jackson possessed the gun to facilitate his possession and sale of the drugs; the trier of fact could reasonably conclude that Jackson possessed the gun to protect himself from those seeking to interfere with his drug sales, and to retain his possession of the drugs.

By the Court.—Order affirmed.

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