

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2004

Cornelia G. Clark
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. 03-2197-CR

Cir. Ct. No. 91CF000233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

QUINN JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Quinn Johnson, pro se, appeals an order denying his motion to vacate or modify his sentence. Johnson argues his due process rights were violated. Specifically, Johnson claims that the imposition of a harsher sentence after a trial following his success in vacating his guilty plea and initial conviction is presumptively vindictive. Although the circuit court erred by

concluding that Johnson's claim had previously been raised and rejected, we nevertheless conclude that Johnson's claim is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We therefore affirm the order.

BACKGROUND

¶2 In May 1991, the State charged Johnson with possession of more than twenty-five grams of cocaine with intent to deliver, as a repeat offender. The maximum sentence for this offense was fifteen years and the repeater allegation expanded the maximum sentence to thirty years. In exchange for his no contest plea to the possession charge, the State agreed to dismiss the repeater allegation. Johnson was convicted upon his no contest plea and sentenced to the maximum term of fifteen years in prison. Johnson's subsequent motion to withdraw his plea was denied and Johnson appealed. In that appeal, this court concluded the plea colloquy did not establish that Johnson was informed of all elements of the charge. We consequently reversed the order denying Johnson's plea withdrawal motion and remanded the matter to the circuit court to determine whether other evidence could show that Johnson's plea had been knowingly entered. *See State v. Johnson*, No. 92-2460-CR, unpublished slip op. (Wis. Ct. App. Feb. 2, 1993).

¶3 On remand, the circuit court granted Johnson's motion to withdraw his plea, thus leaving Johnson to face the original charge of possessing cocaine with intent to deliver, as a repeater. After a trial, Johnson was convicted upon a jury's verdict and sentenced to twenty-two and one-half years' imprisonment, consecutive to any previous sentence. On direct appeal, this court affirmed the judgment of conviction and the Wisconsin Supreme Court denied Johnson's

petition for review. Notably, in that appeal, Johnson did not raise any issues regarding his sentence.

¶4 Johnson then filed a pro se habeas corpus petition that challenged the effectiveness of his appellate counsel, though not with respect to his sentence. That petition was denied by order dated July 30, 1997. In April 1998, Johnson filed a pro se WIS. STAT. § 974.06¹ motion in circuit court alleging, in relevant part, that his trial counsel was ineffective for failing to challenge the repeater-enhanced portion of his sentence or otherwise file a motion for sentence credit. Specifically, Johnson contended that although he withdrew his plea, he was still entitled to the benefit of the plea bargain's dismissal of the repeater charge. This court affirmed the circuit court's order denying Johnson's motion, concluding that Johnson's decision to withdraw from the plea agreement nullified the State's agreement to drop the repeater allegation. *See State v. Johnson*, No. 98-1520, unpublished slip op. (Wis. Ct. App. April 13, 1999).

¶5 In May 1999, Johnson filed a motion for sentence credit pursuant to WIS. STAT. § 973.155, seeking credit for the time served in prison under his original post-guilty plea sentence. The circuit court denied Johnson's motion and on appeal, this court reversed that order, concluding that Johnson was entitled under WIS. STAT. § 973.04 to have his ultimate sentence credited with the time served under his original sentence. On remand, the circuit court granted Johnson the sentence credit sought.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶6 Johnson also filed a motion for sentence modification arguing (1) the court's alleged lack of knowledge about the length of the parole revocation sentence was a "new factor"; (2) the sentence was unduly harsh; and (3) Johnson's rehabilitative activities and alleged changes in parole policies rendered his sentence unjust. The circuit court denied the sentence modification motion and this court affirmed that denial on appeal, concluding that Johnson's excessiveness or harshness challenge to his sentence was barred under *Escalona*, the sentence was not excessive and Johnson's postconviction behavior and asserted parole policy changes did not constitute new factors justifying sentence modification. *See State v. Johnson*, No. 00-2392-CR, unpublished slip op. (Wis. Ct. App. June 19, 2001). The denial of a July 2002 motion for sentence credit was likewise affirmed by this court. *See State v. Johnson*, No. 02-2110, unpublished slip op. (Wis. Ct. App. May 13, 2003).

¶7 In July 2003, Johnson filed a motion to vacate or modify sentence arguing: (1) the circuit court misused its sentencing discretion by imposing a sentence greater than was initially imposed in alleged reliance upon information that Johnson contends was no longer appropriate for consideration in light of our supreme court's decision in *State v. Church*, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141; and (2) the sentence imposed violated Johnson's due process rights because it reflected an unrebutted presumption of vindictiveness for Johnson's success in vacating his guilty plea and initial conviction. The circuit court summarily denied Johnson's motion indicating that "[a]ll of [Johnson's] issues were dismissed either in prior motion decisions or appellate proceedings." Johnson moved for reconsideration, contending that his issues had not previously been raised or decided. The circuit court denied the reconsideration motion stating that "[a]ll of [Johnson's] issues were dismissed either in prior motion decisions,

appellate proceedings or failed to state a claim upon which relief can be granted.” This appeal follows.

DISCUSSION

¶8 On appeal, Johnson argues that his due process rights were violated when the circuit court imposed a harsher sentence after a trial that followed his success in overturning the initial guilty-plea-based conviction. Specifically, Johnson claims (1) that the circuit court erred by concluding that his due process claim had been previously raised and rejected; (2) a sufficient reason exists for his failure to raise this claim in his earlier direct appeal or prior postconviction motions and appeals; and (3) he states a constitutional claim upon which relief should be granted.

¶9 The State concedes that the circuit court erred by ruling that Johnson’s due process claim had been previously raised and rejected. We nevertheless conclude that Johnson’s claim is procedurally barred by *Escalona*. In *Escalona*, our supreme court held that “a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Id.* at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184.

¶10 Although Johnson acknowledges that an *Escalona* bar to his claim was implied by the circuit court, Johnson argues he has satisfied *Escalona*’s “sufficient reason” exception. We are not persuaded. Citing *State v. Howard*, 211 Wis. 2d 269, 286-87, 564 N.W.2d 753 (1997), Johnson contends that the announcement of a new rule of law after a defendant’s earlier postconviction

motions and appeal can provide a sufficient reason under *Escalona* for a defendant's earlier failure to raise a claim based upon the new rule. Johnson thus argues that his due process claim could not have been anticipated or used to challenge his 1994 sentence until after our supreme court's decision in *Church*. This argument, however, necessarily relies on the supposition that *Church* created the rule that when a defendant's conviction and sentence are reversed after appeal and the defendant is convicted again after a new trial, due process requires that the defendant's second sentence not be imposed with the purpose of vindictively punishing the defendant for successfully appealing the first conviction. The *Church* court, however, did not create the rule. Rather, the court discussed and applied a rule that had been articulated more than thirty years ago in *North Carolina v. Pearce*, 395 U.S. 711 (1969). Moreover, the *Pearce* presumption of vindictiveness "does not apply to a longer sentence imposed after a trial where the defendant had first been convicted and sentenced on a negotiated guilty plea that was later reversed on appeal." *Church*, 262 Wis. 2d 678, ¶38. Because Johnson has failed to establish a sufficient reason for not raising his claim earlier, the circuit court properly denied the motion.

By the Court.—Order affirmed.

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

