COURT OF APPEALS
DECISION
DATED AND FILED

January 08, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2561
2006AP2562

Cir. Ct. No. 1999CF2393
1999CF3774

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK L. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Frederick L. Martin, *pro se*, appeals from an order denying his motion for postconviction relief and from an order denying his motion for reconsideration. He claims that the circuit court erred when it refused to

modify his sentences in two consolidated cases based on an alleged new factor.[1] We conclude that Martin failed to present a new factor warranting resentencing. We affirm.

Background

¶2 Martin entered a guilty plea to burglary as party to the crime and as a habitual criminal, in violation of WIS. STAT. §§ 943.10(1)(a), 939.05, and 939.62 (1999-2000).[2] The circuit court imposed a ten-year indeterminate sentence for this offense. In a separate proceeding, Martin entered a guilty plea to attempted robbery by use of force, in violation of §§ 943.32(1)(a) and 939.32 (1999-2000), and an ***Alford*** plea to robbery by use of force, as party to the crime, in violation of WIS. STAT. §§ 943.32(1)(a) and 939.05 (1999-2000).[3] *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970) (defendant may maintain innocence while waiving trial and consenting to imposition of sentence). The circuit court imposed indeterminate sentences of ten years for the robbery and two years for the attempted robbery, to run concurrent with each other but consecutive to the sentence for burglary. Martin appealed his robbery and attempted robbery convictions. His appellate attorney filed a no-merit report and we summarily affirmed. ***State v. Martin***, No. 01-1116, unpublished slip op. (WI App Oct. 7, 2003).

[1] The Honorable Kitty K. Brennan presided over Martin's sentencing in both consolidated cases. The Honorable Joseph R. Wall presided over Martin's postconviction motion and motion for reconsideration.

[2] ***State v. Martin***, L.C. No. 99-CF-002393 (Wis. Cir. Ct. Milwaukee County Jan. 10, 2000).

[3] ***State v. Martin***, L.C. No. 99-CF-003774 (Wis. Cir. Ct. Milwaukee County Mar. 15, 2000).

¶3 In September 2006, Martin, represented by new counsel, moved to vacate all three of his sentences on the grounds that the circuit court failed in both sentencing proceedings to consider the primary sentencing factors. The court determined that Martin's motion was brought pursuant to WIS. STAT. § 974.06 (2005-06).[4] It then concluded that Martin's claim was barred because a § 974.06 motion cannot be used to challenge an erroneous exercise of sentencing discretion. *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Martin moved to reconsider. He asserted that he was not seeking relief pursuant to § 974.06, but was relying on case law authorizing relief from illegal sentences and allowing sentence modification when a new factor is presented. The court denied this motion as well, deeming Martin's cited authority inapposite. This *pro se* appeal followed.

Discussion

¶4 Martin asserts that the circuit court repeatedly misconstrued his motion. He argues that his claim is for sentence modification based on a new factor and, as such, it is not subject to WIS. STAT. § 974.06. *See* ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. We accept Martin's characterization of his claim because Martin never cited § 974.06 in the circuit court proceeding; rather, he asserted that the authority for his postconviction motion included ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). ***Rosado*** discusses the showing a defendant must make in order to qualify for sentence modification on the basis of a new factor. ***Id.*** at 288-89. We

[4] All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

nevertheless affirm the circuit court's orders because we conclude that Martin failed to show a new factor. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (we will uphold the circuit court's order if the record supports the result irrespective of the court's rationale).

¶5 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.

Rosado, 70 Wis. 2d at 288. Whether a new factor exists is a question of law that we review *de novo*. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983).

¶6 Martin claims as a new factor the alleged failure of the circuit court to consider the primary sentencing factors during either of his sentencing proceedings. "The primary [sentencing] factors are the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). In fact, the circuit court considered these factors in both cases.

¶7 As to the burglary, the court considered the offense particularly grave, noting that "a residential burglary of a little old lady in the middle of the night goes way at the high end of burglaries." It considered Martin's character, acknowledging his honesty on one hand, but noting his numerous adult convictions on the other. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (a substantial criminal record is evidence of character). The court considered the need to protect the public, observing that Martin was an

absconder from parole at the time of the offense, and specifically noting Martin's "inability to conform [his] behavior" when at liberty.

¶8 As to the robbery and attempted robbery, the court placed substantial emphasis on Martin's character. The court viewed as positive Martin's remorsefulness and the wisdom he displayed in his courtroom remarks, but against these positive characteristics it balanced Martin's "horrible record." The court discussed the gravity of the offenses, noting that the victims were "scared to death" and that Martin's actions had completely changed their lives. As to protection of the public, the court discussed the critical fact that Martin repeatedly incurred new charges while on parole.

¶9 Circuit courts are not required to use any "magic words" in order to properly exercise their sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the court's remarks at each proceeding reflect full consideration of the three primary sentencing factors. *See* ***State v. Odom***, 2006 WI App 145, ¶25, 294 Wis. 2d 844, 720 N.W.2d 695 (court may discuss the three primary factors without explicitly identifying them). Therefore, Martin failed to present a new factor that would warrant sentence modification.

By the Court.—Orders affirmed.

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