COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1137-CR **Cir. Ct. No. 2002CF1569**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Maurice Simmons appeals from a circuit court order denying his motion to modify the sentence he received after he pled no contest to second-degree reckless homicide. Simmons, who had already pursued a direct appeal, argued that the circuit court had based its sentencing decision on

improper factors. The circuit court concluded that Simmons' motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings). Although we affirm the circuit court's order, we employ a slightly different legal analysis. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (reviewing court will affirm if trial court reaches the right result, but for the wrong reason).

¶2 Pursuant to a plea bargain, Simmons pled no contest to a charge of second-degree reckless homicide by use of a dangerous weapon in the shooting death of Terrill Metcalf. He was sentenced in 2003 to the maximum twenty-year sentence, of which he was to serve a minimum of fifteen years in initial confinement and a maximum of five years on extended supervision.

¶3 The public defender appointed counsel to represent Simmons in postconviction and appellate proceedings. Simmons ultimately discharged counsel, however, and sought appellate relief in this court *pro se*, challenging the circuit court's decision to deny his postconviction motion to withdraw his plea. This court affirmed the circuit court's order and the supreme court denied Simmons' petition for review.

¶4 Simmons then filed the postconviction motion that is the subject of this appeal. In the motion, he argued that his sentence should be modified because the circuit court at sentencing "based its decision on a degree of offense which he was not convicted of." Although Simmons stated that he would submit a

memorandum to support his motion, no such memorandum was ever filed.[1] Two months after Simmons' motion was filed, the circuit court denied the motion without holding a hearing, reasoning that Simmons' motion was procedurally barred because he could have raised the sentencing issue in WIS. STAT. RULE 809.30 direct appeal proceedings and had failed to provide a sufficient reason for his failure to do so. *See* ***Escalona-Naranjo***, *supra*.

¶5 On appeal, Simmons argues that ***Escalona-Naranjo*** does not apply to motions to modify a sentence "based upon an abuse of [the circuit] court's discretion at time of sentencing." In support of this proposition, he cites ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507, which he argues held "that motions for sentence modification are not subject to the successive motion bar under WIS. STAT. § 974.06(4) and ***Escalona-Naranjo*** when based on a new factor or challenges of the sentencing court's discretion." Simmons' reliance on ***Grindemann*** is misplaced, however. First, the authority we relied on in the ***Grindemann*** footnote on which Simmons relies specifically states that a § 974.06 motion "cannot be used to challenge a sentence because of an alleged abuse of discretion." ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Second, ***Grindemann*** specifically did not "address the State's 'successive motion'" argument that ***Escalona-Naranjo*** should apply to challenges to sentencing alleging a new factor or the circuit court's exercise of sentencing

[1] Simmons has attached to his brief a copy of a document entitled "Memorandum in support of defendant's motion to modify sentence." The document was never filed with the clerk of circuit court. Although the document is not properly before the court, we note that the crux of Simmons' claim is that the circuit court stated at sentencing that, although it understood the plea bargain and the charging decision, it considered Simmons' crime to be particularly aggravated nonetheless. Simmons argues that the circuit court did not sentence him in a manner consistent with the plea bargain and the crime, thereby erroneously exercising its discretion.

discretion because Grindemann's motion raised an issue cognizable under § 974.06. ***Grindemann***, 255 Wis. 2d 632, ¶19 n.4.

¶6 In an apparent attempt to avoid the time deadlines for filing a sentence-modification motion under WIS. STAT. § 973.19 and to avoid the application of ***Escalona-Naranjo***, Simmons argues for the first time on appeal that his sentence-modification motion was, in fact, filed under WIS. STAT. § 974.06. Simmons' motion alleges, however, that the circuit court erroneously exercised its sentencing discretion by considering the character of his crime independent of the actual charge to which he pled. This sort of claim is not, however, cognizable under § 974.06 because it does not raise "jurisdictional or constitutional matters or … errors that go directly to the issue of the defendant's guilt." ***Smith***, 85 Wis. 2d at 661. Consequently, Simmons' motion is not permitted under § 974.06.

¶7 Neither is such a claim allowed as a serial postconviction motion. Although ***Escalona-Naranjo*** does not apply to a legitimate new-factor claim for sentence modification, it was designed to prevent exactly the kind of serial litigation in which Simmons is engaging. Simmons argues that he "could not" have filed his sentence-modification claim in the context of his WIS. STAT. RULE 809.30 appeal because such a claim requires first seeking relief by postconviction motion. He circuitously argues that because he failed to file such a motion, he could not argue for sentence modification in his appeal of right. Simmons' claims to the contrary notwithstanding, his failure to follow the appropriate procedure and file a postconviction motion challenging the circuit court's exercise of sentencing discretion prior to his direct appeal is not a "sufficient reason" to overcome the ***Escalona-Naranjo*** bar.

¶8 Finally, we return to our initial observation regarding Simmons' failure to file a memorandum in support of his motion. Simmons' motion as filed was completely inadequate to warrant relief. Under ***State v. Bentley***, 201 Wis. 2d 303, 309–10, 548, N.W.2d 50 (1996), a circuit court may deny a postconviction motion without a hearing: (1) if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; (2) if one or more of the key factual allegations are conclusory; or (3) if the record conclusively demonstrates that the movant is not entitled to relief.[2] Here, as we noted above, Simmons filed a bare-bones postconviction motion in the circuit court, which did not set forth any specific factual allegations that would have supported relief. Although Simmons promised that he would file a supporting memorandum on the heels of his motion, he never did. After waiting approximately sixty days for the memorandum, the circuit court denied the motion without a hearing. Although the circuit court cited ***Escalona-Naranjo*** as the basis for the denial, it could just as easily have used the ***Bentley*** standard.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).

[2] Although the standards for a postconviction motion adequate to warrant an evidentiary hearing have been used primarily to assess postconviction claims of ineffective assistance of counsel, the supreme court has stressed that those standards apply "to other postconviction motions in which an evidentiary hearing is requested." ***State v. Allen***, 2004 WI 106, ¶13, 274 Wis. 2d 568, 682 N.W.2d 433.