COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2271-CR **Cir. Ct. No. 2002CF522**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. KLINKNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and TIMOTHY M. WITKOWIAK, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Joseph P. Klinkner appeals *pro se* from a judgment of conviction for possessing cocaine with intent to deliver, and from a postconviction order denying his motion to quash the DNA surcharge imposed as

a condition of his sentence.[1] The issue is whether the trial court's alleged failure to exercise its discretion when it imposed a DNA surcharge, or this court's recent decision in ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, entitle Klinkner to sentence modification. We conclude that the trial court's previous order denying Klinkner's challenge to the DNA surcharge decided the matter, and that ***Cherry*** does not constitute a new factor to compel reconsideration of that previous order or modification of the judgment. Therefore, we affirm.

¶2 In 2002, Klinkner entered an ***Alford*** plea to possessing between five and fifteen grams of cocaine with intent to deliver.[2] The trial court imposed a sixty-month sentence, comprised of thirty-two- and twenty-eight-month respective periods of initial confinement and extended supervision. Less than ninety days after the judgment of conviction was entered, Klinkner moved *pro se* to vacate the DNA surcharge, contending that he had previously provided a DNA sample in connection with his involvement in a 1998 case. *See* WIS. STAT. § 973.19(1)(a) (2007-08) (allows a defendant to move to modify a sentence or the amount of a fine within ninety days). The trial court denied the motion, explaining that regardless of whether Klinkner had in fact provided a sample previously, he had never been ordered to pay the surcharge in connection with testing that sample. Klinkner did not appeal from that order, or challenge the judgment of conviction in any other respect.

[1] The judgment of conviction was entered by the Honorable John A. Franke. The postconviction order that Klinkner has now challenged on appeal was decided by the Honorable Timothy M. Witkowiak.

[2] An ***Alford*** plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970); *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

¶3 In 2008, this court decided ***Cherry***, in which we reversed and remanded the matter to the trial court for its failure to exercise discretion when it imposed the DNA surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶9-11. Six years after the judgment was entered imposing the DNA surcharge, and six years after the trial court had denied Klinkner's 2002 motion challenging that surcharge, Klinkner again moved to quash the DNA surcharge, contending that the trial court erroneously exercised its discretion and that our recent ***Cherry*** decision was a new factor entitling him to sentence modification, namely to vacate the previously imposed surcharge. The trial court disagreed and denied the motion as untimely. Klinkner appeals from that order.

¶4 Klinkner raised this issue in 2002, albeit without the recent authority provided in ***Cherry***, challenging the imposition of this surcharge as an erroneous exercise of discretion because he had already provided a sample incident to a prior conviction. The trial court denied the motion on its merits, explaining that regardless of whether the sample had been previously provided, the DNA surcharge to pay for the testing of the DNA sample had never been previously imposed. Klinkner did not appeal from or otherwise challenge that order until his 2008 motion, six years later. This issue has been decided on its merits, and Klinkner waived any timely challenge to that decision.

¶5 If we construed Klinkner's motion as seeking sentence modification on the basis of a new factor, it would also fail. A sentence may be modified if the defendant shows the existence of a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). 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."

Id. (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶6 Although our decision in ***Cherry*** was relatively recent, our reversal was because the trial court's expressed reasons for imposing the DNA surcharge were insufficient to demonstrate an actual exercise of discretion. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶6-7. The obligation to apply the law to the facts and provide reasons and reasoning to explain the basis of a decision is not "new," and does not constitute a new factor warranting sentence modification.

¶7 There are many bases on which to affirm the trial court's order. Our principal reason for affirming the order is that a previous order denying Klinkner's prior motion to vacate the DNA surcharge was denied on its merits in 2002. The trial court will not again decide an issue it has already decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (the court will not revisit previously rejected issues).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).