COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3056-CR **Cir. Ct. No. 1996CF963606**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN F. FANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. John F. Fant appeals *pro se* from an order denying his sentence modification motion. We conclude that Fant's statutory claims are barred and his common law claims are meritless. We affirm.

BACKGROUND

¶2 In 1996, police found approximately seventy-one grams of cocaine powder during a search of Fant's apartment. The police then searched the basement of the apartment building, where they found approximately 1370 grams of cocaine base (commonly referred to as "crack" cocaine). Fant admitted that the cocaine belonged to him. The State charged Fant with possession of more than 100 grams of cocaine with intent to deliver. *See* WIS. STAT. §§ 161.16(2)(b)1, 161.41(1m)(cm)5. (1993-94).[1] A jury found him guilty of the crime, and the circuit court imposed the maximum sentence of thirty years in prison. With the assistance of appellate counsel, Fant filed two postconviction motions. The circuit court denied the motions and Fant appealed, challenging the search of the apartment building, the jury selection, and the effectiveness of his trial counsel. This court affirmed. *See* ***State v. Fant***, No. 1997AP2952-CR, unpublished slip op. (Wis. Ct. App. Apr. 6, 1999) (***Fant I***).

¶3 In 2008, Fant filed a petition for a writ of *habeas corpus* in this court pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He asserted that the evidence at trial was insufficient for conviction and that appellate counsel was ineffective for failing to raise that claim on appeal. We disagreed and denied the petition. *See* ***State ex rel. Fant v. Jenkins***, 2008AP2388-W, unpublished slip op. (WI App Oct. 27, 2008) (***Fant II***).

¶4 Within a few weeks of our decision in ***Fant II***, Fant filed the postconviction motion underlying this appeal. He asserted that the circuit court

[1] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erroneously exercised its sentencing discretion and that a new factor warrants sentence modification. The circuit court denied the motion without a hearing, and this appeal followed.

DISCUSSION

¶5 Fant claims that the circuit court erroneously exercised its sentencing discretion and violated his constitutional rights by taking into account factors that Fant believes are improper, namely, Fant's refusal to cooperate with law enforcement, Fant's decision to pursue a trial rather than to enter a guilty plea, and the community's need for protection from Fant and other drug offenders. Fant relies on WIS. STAT. § 973.19 as the authority permitting his claim. That statute allows a defendant to move for sentence modification within ninety days after the sentence is entered. ***Id.*** The circuit court imposed sentence in this matter in 1997. Therefore, Fant's motion under § 973.19 is time barred.

¶6 A defendant who is in custody under sentence of a court may challenge that sentence at any time on constitutional or jurisdictional grounds pursuant to WIS. STAT. § 974.06(1). Fant's sentence modification motion did not reference § 974.06, but courts follow a liberal policy when reviewing prisoners' *pro se* pleadings. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). Accordingly, we look beyond the label that the prisoner applies to determine if he or she is entitled to relief. ***Id.*** at 521. Here, Fant asserts that the circuit court's erroneous exercise of discretion violated his constitutional rights, and we assume without deciding that Fant's challenge to his sentence is cognizable under § 974.06. Nonetheless, the challenge is barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶7 We need finality in our litigation. ***Id.*** at 185. Therefore, a defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Id.***

> If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶8 Fant offers no reason, much less a sufficient reason, for failing to challenge his sentence in his prior postconviction motions and direct appeal. Therefore, the challenge cannot be brought under WIS. STAT. § 974.06. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

¶9 Fant also asserts that he is entitled to a sentence modification pursuant to two United States Supreme Court cases, ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and ***Blakely v. Washington***, 542 U.S. 296 (2004). He describes these cases as holding that "a judge cannot impose a sentence unless each fact necessary to justify the sentence has been found to be true by a jury, beyond a reasonable doubt." Fant misconstrues the holdings of his cited authorities.

¶10 "[A]ny fact that *increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490 (emphasis added). "[T]he 'statutory maximum' for ***Apprendi*** purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." ***Blakely***, 542 U.S. at 303 (emphasis omitted).

¶11 In this case, a jury found Fant guilty beyond a reasonable doubt of possessing more than 100 grams of cocaine with intent to deliver. Upon conviction, Fant faced a statutory maximum sentence of thirty years. *See* WIS. STAT. §§ 161.16(2)(b)1, 161.41(1m)(cm)5 (1993-94). The circuit court imposed a thirty-year sentence, a term that did not exceed the prescribed statutory maximum. Nothing in ***Apprendi*** or ***Blakely*** renders Fant's sentence improper in any way.

¶12 Finally, Fant points to recent changes in the federal sentencing guidelines as a basis for relief. He states that the changes reduce the sentence ranges for federal offenses involving cocaine base. The changes, he asserts, alleviate disparities that have led to harsher sentences under the guidelines for offenses involving "crack" cocaine than for offenses involving cocaine powder. Fant argues that changes to the federal sentencing guidelines constitute a new factor entitling him to a sentence modification. We are not persuaded.

¶13 A new sentencing factor is a fact or set of facts highly relevant to the sentencing determination but not known to the circuit court at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Nothing suggests that the federal sentencing guidelines were "highly relevant" to the sentencing determination in Fant's case. The circuit court never referred to the federal sentencing guidelines, nor did the court distinguish between the cocaine base and the cocaine powder that Fant possessed. Rather, the circuit court focused on the "extremely large amount of cocaine" at issue. The court discussed the harm that drugs cause in the community and compared the quantity of cocaine in this case to "a time bomb waiting to go off to destroy we don't know how many lives."

¶14 The federal sentencing guidelines were not a factor in the sentencing determination at all. Because the federal sentencing guidelines were irrelevant to the original sentencing decision, a change in those guidelines cannot constitute a new factor justifying sentence modification. *Cf.* ***id.*** at 14 (change in parole policy not a new factor when parole policy was not considered during the original sentencing decision).

By the Court.—Order affirmed.

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