COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP845-CR **Cir. Ct. No. 1998CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. STORZER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Storzer, pro se, appeals an order denying his motion for sentence modification. Storzer argues there is a new factor justifying sentence modification, he was sentenced on the basis of inaccurate information and the court erroneously exercised its discretion by denying his

motion without a hearing. Storzer alternatively argues he is entitled to a new trial in the interests of justice. We reject these arguments and affirm the order.

BACKGROUND

¶2 In March 1999, Storzer was sentenced to twenty years in prison for repeated sexual assault of a child in violation of WIS. STAT. § 948.025(1) (1997-98). Storzer moved for sentence modification, arguing the sentence was unduly harsh and unconscionable, and placement in a facility other than that recommended by the sentencing court constituted a new factor justifying sentence modification. The circuit court denied the motion and this court affirmed both the judgment of conviction and the order denying sentence modification. *See* ***State v. Storzer***, No. 2000AP716-CR, unpublished slip op. (Wis. Ct. App. Jan. 9, 2001).

¶3 In February 2001, Storzer filed a second motion for sentence modification on grounds the length of his sentence made him ineligible for sex offender treatment despite the sentencing court's stated belief that he needed such treatment. The court denied the motion, concluding that the availability of treatment was not the basis of his sentence. In September 2002, Storzer filed a pro se motion for sentence modification, again repeating his need for treatment. Storzer also cited a post-sentencing letter he wrote about his background and childhood as a new factor justifying sentence modification. The court denied the motion, concluding the letter did not constitute a new factor because it did not include any information that was unavailable to the court at the time of sentencing.

¶4 In September 2003, Storzer filed a motion for postconviction relief claiming his trial counsel had been ineffective. The circuit court denied the motion and Storzer's subsequent appeal was dismissed for his failure to pay the filing fee.

¶5 In May 2004, Storzer filed a motion for a new trial on grounds the State failed to satisfy its burden of proof at trial. The court denied the motion. In February 2005, Storzer filed another postconviction motion. Because the court could not discern the nature of the relief requested nor the grounds for granting relief, it took no action on the motion.

¶6 Finally, in January 2009, Storzer filed the underlying motion for sentence modification. Storzer argued that a new factor existed to justify modification. He also claimed the court relied on inaccurate information at sentencing. The court denied the motion without a hearing and this appeal follows.

DISCUSSION

¶7 The purpose of sentence modification is to correct an unjust sentence. ***State v. Koeppen***, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. "Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying the court's reconsideration." ***Id.*** 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 in existence, it was unknowingly overlooked by all of the parties." *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be an event or development that frustrates the purpose of the original sentencing. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). This court reviews without deference the question of law of whether the facts constitute a new factor. ***Id.*** If a new factor is established, the question of sentence modification is addressed to the circuit court's discretion. ***Id.*** at 96-97.

¶8 Here, the new factor cited to justify Storzer's motion for sentence modification is that he did not sexually assault his sister. We are not persuaded that this is a new factor. Storzer's motion included affidavits from both his sister and his father averring that allegations he assaulted his sister when she was four and six years old were untrue. Even assuming Storzer did not sexually assault his sister, he would have known the allegations were false at the time of sentencing. Therefore, he must necessarily be alleging that the parties unknowingly overlooked it. As the circuit court noted, however, Storzer acknowledged sexually assaulting his sister to the writer of the presentence investigation report. To the extent Storzer now alleges that he did not know his sister was being manipulated into lying, the analysis is the same. Ultimately, Storzer would have known the allegations were false at the time of sentencing, but rather than denying his sister's claims, Storzer admitted the assaults to the PSI writer.

¶9 Even if we were to assume this information constituted a new factor, Storzer fails to establish that it is highly relevant or otherwise frustrates the purpose of his original sentence. Among the many factors considered by the court when imposing Storzer's sentence were his record of past inappropriate and sometimes violent sexual behavior. Although the court noted Storzer's sexual contact with his sister, she was one of "two younger children" with whom Storzer had sexual contact or intercourse.

¶10 The court noted Storzer could not control his sexual urges despite intensive sexual treatment and therapy, and had committed at least one inappropriate sexual act since appearing in court on the present charge. The court further considered Storzer's numerous municipal ordinance violations, expressing particular concern about an adjudication for cruelty to animals. The court, noting Storzer was "highly dangerous in a sexual and violent way," determined that "the

indicia of dangerousness is so clear in this case and extensive and long-lasting that a prison sentence is compelled." In its order denying Storzer's motion for sentence modification, the court ultimately concluded that its concerns were justified regardless of the accuracy of the claims about Storzer's sister. Because Storzer failed to establish that a new factor exists to justify sentence modification, we conclude the circuit court properly denied his new factor argument.

¶11 Storzer also claimed he was sentenced on the basis of inaccurate information—specifically, the sexual assaults of his sister. We conclude this claim is barred by WIS. STAT. § 974.06(4) (2007-08)[1] and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In ***Escalona-Naranjo***, 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. As noted above, Storzer would have known the allegations regarding his sister were false at the time of sentencing and he fails to provide a sufficient reason for failing to raise this claim in his earlier motions. His inaccurate information claim is therefore procedurally barred.

¶12 Storzer alternatively argues he is entitled to a new trial in the interests of justice. We are not persuaded. Our discretionary reversal power under WIS. STAT. § 752.35 is formidable and should be exercised sparingly and with

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

great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We are reluctant to grant new trials in the interest of justice and exercise our discretion to do so "only in exceptional cases." *See* ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98. Here, Storzer intimates that a factual dispute regarding whether he sexually assaulted his sister warrants reversal of his conviction and remand "to set the record straight." Because we conclude that Storzer's arguments arising from the allegations regarding his sister are either procedurally barred or meritless, his claim for a new trial fails. This is simply not one of those "exceptional" cases compelling reversal.

¶13 Finally, Storzer argues the circuit court erred by denying his motion without holding an evidentiary hearing. A defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. If the motion alleges facts that entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.*** at 310. Because the court examined the record and properly concluded Storzer was not entitled to relief, we conclude the court properly exercised its discretion by denying the motion without a hearing.

By the Court.—Order affirmed.

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