COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1189-CR **Cir. Ct. No. 1995CF955190A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR L. CRUZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Victor L. Cruz, *pro se*, appeals an order denying his motion for sentence modification. The circuit court ruled that Cruz's challenge

to a penalty enhancer was both meritless and a WIS. STAT. § 974.06 (2007-08)[1] claim barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The circuit court also determined that a change in parole policy did not constitute a "new factor" justifying modification. We agree and we affirm the order.

¶2 In October 1995, Cruz was charged with one count of first-degree reckless homicide, while armed, as party to a crime, and one count of first-degree recklessly endangering safety, while armed, as a party to a crime. According to the criminal complaint, Cruz killed victim Robert Bruce in a gang-related confrontation. In March 1996, Cruz pled guilty to the reckless homicide count as charged. The endangering safety count was dismissed and read in. In May 1996, Cruz was sentenced to the maximum of forty-five years' imprisonment: forty years for the homicide plus an additional five years for the "while armed" penalty enhancer. In September 1999, Cruz filed a *pro se* motion seeking plea withdrawal. That motion was denied in October 1999.

¶3 In March 2009, Cruz brought the underlying motion to modify his sentence. He alleged the increased penalty for use of a dangerous weapon was imposed erroneously and that a secret policy change by the parole board frustrated the court's original sentencing intent. The circuit court rejected these challenges. It noted that the challenge to the increased penalty could have been brought in the 1999 motion and lacked merit in any event because, contrary to Cruz's assertion, being armed is not an essential element of first-degree reckless homicide. The

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

court rejected the challenge to the parole board's alleged policy change because, under ***State v. Franklin***, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1989), that change could not constitute a new factor. Cruz appeals.

¶4 We decline to apply ***Escalona*** to the penalty enhancer challenge. Cruz appears to be alleging that his sentence is "a maximum penalty in excess of that authorized by law[.]" *See* WIS. STAT. § 973.13. A faulty sentence, void as a matter of law under § 973.13, may be challenged at any time, notwithstanding ordinary procedural bars. *See* ***State v. Flowers***, 221 Wis. 2d 20, 22-23, 586 N.W.2d 175 (Ct. App. 1998).

¶5 As the circuit court recognized, however, Cruz's challenge to the penalty enhancer is simply meritless. WISCONSIN STAT. § 939.63(1)(a) (1993-94) provides for enhanced penalties if a person "commits a crime while possessing, using or threatening to use a dangerous weapon[.]" However, the increased penalty "does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged." WIS. STAT. § 939.63(1)(b) (1993-94).

¶6 The elements of first-degree reckless homicide are that the defendant: (1) caused the victim's death, (2) by criminally reckless conduct, (3) under circumstances showing utter disregard for human life. *See* WIS JI—CRIMINAL 1020. Cruz appears to believe that because his reckless conduct and utter disregard for human life involved a gun, use of that gun is "the exact essential element alleged by the State." However, the mere existence of factual overlap does not convert shared facts to essential elements. Application of the penalty enhancer was appropriate; use of a dangerous weapon is not an essential element of first-degree reckless homicide.

¶7 Cruz also argues that a change in parole policy constituted a new factor that would permit resentencing. A "new factor" is a fact or set of facts highly relevant to imposition of sentence, but not known to the trial judge at the time of the original sentencing either because it was not then in existence or, if it was in existence, it was unknowingly overlooked by all of the parties. ***Franklin***, 148 Wis. 2d at 8. A new factor must frustrate the purpose of the original sentencing. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶8 Cruz alleges, as a new factor, a supposed policy change wherein offenders would not be paroled until having served two-thirds of their sentences, even though they are statutorily eligible for release after having completed twenty-five percent of a sentence. To demonstrate this alleged new factor, Cruz refers to an April 28, 1994 letter written by then-Governor Tommy Thompson. However, as we explained in ***State v. Delaney***, 2006 WI App 37, ¶¶10-21, 289 Wis. 2d 714, 712 N.W.2d 368, that letter does not give rise to a new factor.

¶9 As in ***Delaney***, the governor's letter was in existence prior to Cruz's sentencing, raising the prospect that the sentencing court was well aware of it at the time of sentencing. *See* ***id.***, ¶10. If the court had been aware of it, it could not now be called a new factor. ***Franklin***, 148 Wis. 2d at 8.

¶10 Cruz contends, as did Delaney, that because of other expectations of a sentencing court, his sentence must have been imposed with parole eligibility in mind, and the original sentence must have been calculated under the assumption that Cruz could be released after serving twenty-five percent of the sentence. *See* ***Delaney***, 289 Wis. 2d 714, ¶¶11, 14. Thus, Cruz suggests, his sentence would have been frustrated by the policy change based on the governor's letter.

¶11 We do not speculate about the sentencing court's intent, or whether it knew of the governor's letter, but instead review the court's actual words. ***Id.***, ¶12. Here, the court was disturbed by the severity of Cruz's crime, noting that the maximum sentence was appropriate and intimating that, had the second charge not been dismissed, Cruz's penalty would have been steeper. Nothing in the court's remarks suggests the court fashioned Cruz's sentence by working backwards from a calculated parole eligibility date.

¶12 Simply put, Cruz fails to establish the existence of any new factor. *See* ***id.***, ¶21. Further, it is evident that the possibility of parole, or lack thereof, played no role in the court's fashioning of the original sentence. ***Id.*** Thus, even if the governor's letter and parole policy changes did constitute a new factor, Cruz does not demonstrate that this new factor frustrated the sentencing court's original intent that Cruz serve a maximum sentence. *See* ***id.***; *see also* ***Michels***, 150 Wis. 2d at 97; ***Franklin***, 148 Wis. 2d at 8.

By the Court.—Order affirmed.

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