COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1391-CR **Cir. Ct. No. 1999CF6351**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK L. GUMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark L. Guman appeals from an order summarily denying his sentence modification motion. The issue is whether the trial court misconstrued Guman's sentence modification motion based on a new factor, as one challenging the trial court's discretion, rendering it untimely. We conclude

that Guman's bipolar disorder is not a new factor; consequently, he is not entitled to sentence modification. Therefore, we affirm.

¶2 Guman pled guilty to two counts of second-degree sexual assault by the use of force, two counts of second-degree sexual assault of a child, and one count of kidnapping. The trial court imposed an eighty-year aggregate sentence, and imposed and stayed a twenty-five-year sentence in favor of a twenty-five-year consecutive probationary term.[1] Guman moved for postconviction relief, pursuant to WIS. STAT. § 974.06 (2005-06), alleging among other things the ineffective assistance of trial counsel for failing to pursue a not guilty plea by reason of mental disease or defect, and for failing to pursue an intoxication defense.[2] The trial court denied the motion following a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court affirmed, absolving trial counsel predicated on his postconviction testimony that, although he was aware of Guman's mental health issues, the facts did not support a special plea or an intoxication defense.[3] *See* ***State v. Guman***, No. 2007AP1205, unpublished slip op. ¶¶14-15 (WI App May 6, 2008).

¶3 Guman's current postconviction motion seeks sentence modification based on a new factor, that at the time he committed these offenses he was suffering from bipolar disorder. The trial court summarily denied the motion,

[1] Guman committed these offenses on December 10, 1999 before the advent of Truth-in-Sentencing. Consequently, the trial court imposed four consecutive twenty-year indeterminate sentences for the four sexual assaults, and imposed and stayed a twenty-five-year sentence in favor of a probationary term of that same duration for the kidnapping.

[2] All further references to the Wisconsin Statutes are to the 2007-08 version.

[3] The trial court summarily denied the motion in part, on issues not relevant to this appeal, and scheduled a ***Machner*** hearing on the ineffective assistance issues.

ruling that: (1) his new factor claim was actually an untimely erroneous exercise of discretion challenge; and (2) insofar as he was contending that his trial counsel was ineffective for failing to alert the trial court to his bipolar disorder at sentencing, his motion was procedurally barred because Guman could have raised that claim in his first postconviction motion. Guman appeals, contending that the trial court mischaracterized his new sentencing factor as an erroneous exercise of discretion claim.

¶4 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."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (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). The defendant must prove the existence of a new factor by clear and convincing evidence. *See* ***Franklin***, 148 Wis. 2d at 8-9. We use a two-part standard of review:

> Whether a new factor exists is a question of law, which we review de novo. The existence of a new factor does not, however, automatically entitle the defendant to relief. The question of whether the sentence warrants modification is left to the discretion of the [trial] court.

State v. Trujillo, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933 (quotation marks and citations omitted).

¶5 Guman alleged that the new factor entitling him to sentence modification is that when he committed these offenses he was suffering from bipolar disorder, and had the trial court realized his condition, it "may have pronounced a shorter sentence." Guman's signed plea questionnaire and waiver of rights form ("plea questionnaire") indicated that he was "currently receiving treatment for a mental illness or disorder," and next to that typed inquiry, he added in his own handwriting "[t]reatment for Bipolar disorder[,] I am taking several medications, but am able to understand."

¶6 First, we are not convinced that the trial court was unaware of Guman's condition. It was indicated on his plea questionnaire. During the guilty plea colloquy, Guman explained to the trial court that he was taking "[p]sychiatric medications," and agreed with the trial court that that medication "actually helps keep [Guman] on more of an even keel so [he is] in a position to make the decision." Second, even if the trial court was unaware of Guman's mental condition, which is doubtful for the foregoing reasons, his condition was not "not then in existence," nor was it "unknowingly overlooked by all of the parties," alternative requisites underlying the existence of a new factor. *See* ***Rosado***, 70 Wis. 2d at 288. Guman has already litigated trial counsel's effectiveness for allegedly failing to investigate a special plea or an intoxication defense because of Guman's mental illness, which at that time Guman described as disabling. *See* ***Guman***, No. 2007AP1205, unpublished slip op. ¶¶14-15. We affirmed the trial court, which determined that trial counsel was not ineffective for rejecting the special plea and intoxication defense after having considered them in the context of Guman's medical and psychiatric history. *See* ***id.***, ¶15. Trial counsel testified that he was aware of Guman's psychiatric condition. For these reasons, Guman has not clearly and convincingly established that his bipolar condition is a new

sentencing factor.[4] Consequently, we do not even reach the determination of whether his bipolarity "frustrate[d] the purpose of the original sentence." ***Michels***, 150 Wis. 2d at 99.

¶7 On appeal, Guman also contends that he seeks reinstatement of his direct appeal rights to pursue this issue, or the related issue of ineffective assistance of appellate counsel for presumably failing to pursue the issue of his bipolar condition on direct appeal. By failing to raise these issues in his postconviction motion, he has waived his right to pursue them on appeal because the trial court never had the opportunity to rule on these issues in the first instance. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. Moreover, our discussion of trial counsel's and most probably the trial court's awareness of Guman's medical and psychiatric conditions when Guman committed these crimes negate the threshold determinations for an ineffective assistance of appellate counsel claim, and also fail to meet even the "good cause" requirement to extend the deadline for reinstating Guman's direct appeal rights. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); WIS. STAT. RULE 809.82(2).

By the Court.—Order affirmed.

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

[4] Guman devotes considerable argument to the trial court's alleged mischaracterization of his claimed new factor. It is that analysis that afforded Guman the benefit of the doubt to which he claims he is entitled as a *pro se* inmate pursuant to ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983).