COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1703-CR **Cir. Ct. No. 1997CF1919**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS A. GENTRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Marcus Gentry appeals from an order that denied his sentence modification motion without a hearing. We affirm for the reasons discussed below.

BACKGROUND

¶2 Gentry entered no contest pleas to two counts of armed robbery in 1998. The parties presented a joint sentencing recommendation to the court for a twenty-year prison term on one of the counts, which included a concealed identity penalty enhancer, and a thirty-year term of probation on the other count. After discussing factors such as the gravity of the offense, its impact on the victims, Gentry's drug and alcohol usage, his limited employment history aside from selling drugs, and his leading role in the offenses, the court deviated upward from the parties' recommendation. It imposed a thirty-five year prison term on the enhanced count and a concurrent forty-five year probation term on the other count.

¶3 Gentry filed a direct appeal seeking to challenge the court's exercise of its sentencing discretion, but this court concluded that he had waived that issue by not first filing a postconviction motion. Gentry then filed a postconviction motion claiming that his sentence was unduly harsh because it gave too much consideration to some factors and not enough to others, and further alleging that counsel had provided ineffective assistance for failing to preserve the issue in the prior proceeding. The circuit court denied that motion following an evidentiary hearing.

¶4 Over eight years later, Gentry filed the sentence modification motion at issue in this case. In the present motion, Gentry claims that his thirty-five year sentence for armed robbery was unduly harsh and/or represented an erroneous exercise of discretion because: (1) the court failed to make findings of fact regarding the availability of institutional and community resources before rejecting probation; (2) the court failed to consider whether conditions of probation would have been sufficient to meet the objectives of the sentence; and

(3) the court failed to take the defendant's cooperation into account. The court denied the motion without a hearing, concluding that the sentence was not unduly harsh because it was well within the maximum available term, and that the record demonstrated a proper exercise of discretion in considering relevant factors. Gentry appeals.

STANDARD OF REVIEW

¶5 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion de novo, based on the four corners of the motion. ***Id.***, ¶¶9, 27.

DISCUSSION

¶6 As a threshold matter, the parties dispute how Gentry's sentence modification motion should be characterized, and what if any deadline applied to it. To place this dispute in context, we begin our discussion with a broad overview of sentence modification caselaw before reaching the specific issue raised in this case.

¶7 The courts of this state have the inherent power to modify an unjust sentence.[1] ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524.

[1] This inherent power is separate from the court's statutory power under WIS. STAT. § 973.195 (2007-08) to adjust a sentence in certain limited circumstances. ***State v. Stenklyft***, 2005 WI 71, ¶¶39-48, 59, 281 Wis. 2d 484, 697 N.W.2d 769.

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

There must, however, be some reason for the modification other than further reflection by the court. ***Id.***, ¶12. There are several different mechanisms or "defined parameters" by which a defendant can seek sentence modification, depending on the reason being offered and the amount of time which has passed since the sentence was imposed. ***Id.*** While a single sentence modification motion may invoke multiple theories of relief relying on different mechanisms, each invocation of the court's power must be evaluated under the constraints and legal standards pertinent to that power. ***State v. Stenklyft***, 2005 WI 71, ¶61, 281 Wis. 2d 484, 697 N.W.2d 769.

¶8 First, a defendant may use WIS. STAT. § 973.19 to challenge his sentence immediately after its imposition, either under the deadlines set forth in WIS. STAT. RULE 809.30, or within ninety days after the sentence was imposed if no other relief will be sought under RULE 809.30. This mechanism affords review of the court's exercise of discretion, including whether proper factors were considered or the sentence was unduly harsh. ***State v. Macemon***, 113 Wis. 2d 662, 666 n.2, 668 n.3, 670, 335 N.W.2d 402 (1983); ***State v. Noll***, 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895. Review of discretionary determinations must be focused on whether the court acted properly based on the information before it, not on events that occurred after sentencing. ***State v. Klubertanz***, 2006 WI App 71, ¶40, 291 Wis. 2d 751, 713 N.W.2d 116.

¶9 After the time to appeal as a matter of right has expired, a defendant still in custody may use the postconviction procedure set forth in WIS. STAT. § 974.06 to seek review of any of the enumerated types of claims for which relief

is available under that statute.[2] This mechanism would encompass claims that a defendant was afforded ineffective assistance of counsel or was denied due process by being sentenced on inaccurate information. *See, e.g.*, ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶10 Next, a court may at any time set aside as void a sentence which exceeded the maximum penalty authorized by law, or correct a clerical error in a judgment which does not reflect the actual sentence imposed by the court. WIS. STAT. § 973.13; ***Crochiere***, 273 Wis. 2d 57, ¶12 (citing ***Hayes v. State***, 46 Wis. 2d 93, 101-02, 175 N.W.2d 625 (1970)).

¶11 Finally, a court has ongoing inherent authority to modify a previously imposed sentence based upon a new factor. ***Cochiere***, 273 Wis. 2d 57, ¶12. A new sentencing 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 … it was unknowingly overlooked by all of the parties." ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). In order to warrant sentence modification, the new factor must be shown to frustrate the purpose of the original sentence. ***Id.***

¶12 Here, Gentry essentially contends that the deadlines set forth in WIS. STAT. § 973.19 do not apply to any motion which cites inherent power as the source of the court's authority to act—which his claim to set aside his sentence as

[2] Available grounds for relief under WIS. STAT. § 974.06(1) are "that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack."

unduly harsh does. Gentry relies upon the following passage from ***Cresci v. State***, 89 Wis. 2d 495, 503, 278 N.W.2d 850 (1979) to support his proposition:

> ***Hayes v. State***, 46 Wis. 2d 93, 102, 175 N.W.2d 625 (1970), recognized the inherent power of a trial court to "amend, modify and correct a judgment of sentencing," and established a period of ninety days from sentencing to bring a motion for modification. As this court has stated repeatedly, the ninety day period is regulatory, not jurisdictional, and the trial court may entertain a motion made after ninety days in the exercise of its discretion.

We note, however, that the ninety-day deadline the court was referring to in ***Cresci*** was one imposed only by caselaw at that time. The ***Cresci*** decision predated the enactment of § 973.19 by order of the Wisconsin Supreme Court in 1985, which formalized the alternative methods of seeking sentence modification in the circuit court within ninety days or according to the deadlines established in RULE 809.30. *See* 123 Wis. 2d xiv-xv. Gentry has not cited any post-1985 cases which state that the deadlines set forth in § 973.19 may be disregarded in the discretion of the circuit court.[3]

¶13 It is true that there are several more recent cases which make statements along the lines that a court may use its inherent power to reduce a sentence either on the basis of a new factor or when it concludes that the sentence was unduly harsh or unconscionable. *See*, *e.g.*, ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507; ***Crochiere***, 273 Wis. 2d 57, ¶12. However, the mere fact that a court's authority to set aside an unduly harsh sentence derives from its inherent power, just as does a court's authority to consider new factors, does not answer the question of what time constraints might

[3] In fact, we note that WIS. STAT. RULE 809.82(2) explicitly vests the authority to extend deadlines under WIS. STAT. RULE 809.30 with this court, rather than the circuit court.

apply to the court's consideration of whether a sentence was unduly harsh. As ***Stenklyft*** instructs us, each invocation of the court's power to modify a sentence must be evaluated under the constraints pertinent to that power. ***Stenklyft***, 281 Wis. 2d 484, ¶61.

¶14 An evaluation of whether a sentence is unduly harsh calls into question the circuit court's exercise of discretion. Gentry does not contend that his challenge to the court's exercise of its sentencing discretion is a type of claim for which relief would be available under WIS. STAT. § 974.06. Nor does his challenge to the court's exercise of its sentencing discretion raise a claim that the sentence imposed was in excess of that authorized by law, which could be raised at any time. Gentry also concedes that his motion did not claim any new factor, which by necessity could not have been raised before the new factor was discovered. We can only conclude that Gentry's claim that his sentence was unduly harsh as the result of an erroneous exercise of discretion is subject to the "defined parameters" of WIS. STAT. § 973.19, including the deadlines established therein.

¶15 In sum, Gentry has not asserted any ground for relief other than an erroneous exercise of sentencing discretion, and has not provided any authority establishing that any mechanism other than WIS. STAT. § 973.19 is available to review such claims. Gentry does not dispute that his present sentence modification motion was filed years after the § 973.19 deadlines had expired, and has also not provided any authority which persuades this court that the circuit court had the discretion to extend those deadlines, much less that there would have been any grounds to do so here if the circuit court had such discretion. Therefore, the trial court properly dismissed Gentry's sentence modification motion without a hearing.

By the Court.—Order affirmed.

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