COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2010AP2757-CR
2010AP2758-CR

Cir. Ct. Nos. 2009CF2943
2009CF3193

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK D. FOWLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Patrick D. Fowler, *pro se*, appeals from circuit court orders denying his "motion to rescind [the] no-contact order[s]" that were

imposed in two criminal cases.[1] (Some capitalization omitted.) He argues that the circuit court erroneously exercised its discretion when it imposed no-contact orders as part of his criminal sentences. Because Fowler failed to establish the existence of a new factor justifying sentence modification, we affirm the orders.

BACKGROUND

¶2 In September 2009, Fowler pled guilty, pursuant to a plea bargain, to failing to comply with sex offender registry reporting requirements, in Milwaukee County Circuit Court Case No. 2009CF3193. *See* WIS. STAT. § 301.45(6)(a)1. (2009-10).[2] He also pled guilty, pursuant to a plea bargain, to intentionally causing bodily harm to a child, contrary to WIS. STAT. § 948.03(2)(b), in Milwaukee County Circuit Court Case No. 2009CF2943. According to the criminal complaint in the bodily harm case, the sixteen-year-old victim was the brother of Fowler's girlfriend. The victim was visiting his sister and an argument occurred. The victim decided to leave and as he started to do so, Fowler "threw his girlfriend … to the floor" and then followed the victim to the alley, where he beat him. The victim suffered a fractured nasal cavity bone.

¶3 On October 15, 2009, the circuit court sentenced Fowler in both cases. Although the transcript of the sentencing hearing has not been provided, the judgments of conviction detail the sentences imposed. On the bodily harm

[1] Fowler filed a single motion that identified both case circuit court case numbers. The circuit court entered identical orders in each criminal case. This court consolidated the appeals of those two orders.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

conviction, the circuit court imposed and stayed a sentence of three years of initial confinement and two years of extended supervision. The circuit court placed Fowler on probation for three years and imposed a year of straight jail time, which it also stayed, as a condition of probation. The circuit court ordered that Fowler have no contact with his girlfriend or the victim "until completion of 10 BIP [Batterer's Intervention Programming] sessions" and that he have "no unsupervised contact with his children until DOC deems it appropriate."

¶4 On the sex offender registry case, the circuit court imposed and stayed a sentence of three years of initial confinement and two years of extended supervision, to be served consecutive to the bodily harm sentence. The circuit court placed Fowler on probation for three years and imposed a year of straight jail time, which it also stayed, as a condition of probation. The circuit court ordered the same no-contact provisions with respect to Fowler's girlfriend, children and the victim as it ordered in the bodily harm case.

¶5 Fowler did not seek postconviction relief from either conviction. He began serving his probation. Five months later, the circuit court lifted the stay on the year of straight jail time in the bodily harm case after Fowler failed to complete the Batterer's Intervention Programming, failed to report to his agent as directed, had contact with his girlfriend and had unsupervised contact with children. Two months later, his probation in that case was revoked and Fowler was sent to prison.

¶6 In October 2010, Fowler filed the motion at issue in these appeals. He moved to "rescind [the] no-contact order[s]" with respect to his girlfriend and

his children.[3] (Some capitalization omitted.) He asserted that the "no-contact order is causing a serious dilemma with Fowler being able to see his children, because the order is regarding his children's mother." He argued that the circuit court "abused its discretion, violating [Fowler's] 8th Amendment right … because due to the circumstances and situation, the no-contact [order] was really unnecessary regarding Fowler's children's mother." He explained that the crime at issue involved his girlfriend's brother, not his girlfriend. He said there "has never been a domestic violence history" with his girlfriend, which he said his girlfriend told the court at sentencing. He said that it was the victim's mother who told the police that Fowler abused his girlfriend, and that the victim's mother subsequently "recanted her accusations." He concludes: "Any reasonable court would have directed and made explicit its order that the no-contact imposition was to 'only' be applied to the victim of the crime and not Fowler's children or their mother."

¶7 The circuit court denied Fowler's motion in a written order. It stated that it "declines to alter anything about the no[-]contact order or to amend the judgment of conviction in any respect." This appeal follows.

[3] The majority of Fowler's motion argued that the no-contact order with his girlfriend should be lifted, but he ultimately asked the circuit court to rescind "its no-contact order regarding the children and/or the children's mother."

DISCUSSION

¶8 Fowler seeks to modify his sentences in both cases to remove the no-contact provisions concerning his girlfriend and his children.[4] Pursuant to WIS. STAT. § 973.19, a defendant may move for sentence modification within ninety days after sentencing. Fowler filed his motion more than eleven months after entry of his judgments of conviction, well outside the time limits imposed under § 973.19. He could have sought postconviction review of his sentences in a direct appeal, *see* WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, but he would have had to file a notice of intent to pursue postconviction relief within twenty days of sentencing. *See* ***State v. Lagundoye***, 2004 WI 4, ¶20 n.13, 268 Wis. 2d 77, 674 N.W.2d 526. Therefore, Fowler's judgments of conviction became final when he did not challenge the convictions or the sentences within the deadlines for doing so. *See* ***id.***, ¶20 (judgment of conviction is final after a direct appeal from that judgment and any right to a direct review of the appellate decision is no longer available).

¶9 Even if it is too late to file a direct appeal or a motion under WIS. STAT. § 973.19, a defendant can seek to modify a sentence by "invoking the 'inherent power' of the circuit court." ***State v. Noll***, 2002 WI App 273, ¶11, 258 Wis. 2d 573, 653 N.W.2d 895. The circuit court may exercise its inherent power to modify a sentence "only if a defendant demonstrates the existence of a 'new factor' justifying sentence modification." ***Id.***; *see also* ***State v. Harbor***, 2011 WI

[4] The State asserts that it is unclear whether the no-contact provisions were intended to apply only as conditions of probation or also to the confinement portions of Fowler's sentences. For purposes of this opinion, we will assume that the no-contact provisions apply to periods of probation and confinement.

28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 ("A court cannot base a sentence modification on reflection and second thoughts alone."). In ***Harbor***, the Wisconsin Supreme Court clarified the analysis used with motions for sentence modification:

> Deciding a motion for sentence modification based on a new factor is a two-step inquiry. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Whether the fact or set of facts put forth by the defendant constitutes a "new factor" is a question of law. The requirement that the defendant demonstrate the existence of a new factor prevents a court from modifying a sentence based on second thoughts and reflection alone.
>
> The existence of a new factor does not automatically entitle the defendant to sentence modification. Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence. In making that determination, the circuit court exercises its discretion.
>
> Thus, to prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. Accordingly, if a court determines that the facts do not constitute a new factor as a matter of law, "it need go no further in its analysis" to decide the defendant's motion. That is, it need not determine whether, in the exercise of its discretion, the sentence should be modified. Alternatively, if the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law.

Id., ¶¶36-38 (citations omitted).

¶10 Applying those standards here, we affirm the circuit court's order denying the motion to modify Fowler's sentences, because Fowler has not

alleged—much less sufficiently demonstrated—the existence of a new factor.[5] *See* ***id.***, ¶36. Fowler's argument is that the trial court should not have imposed no-contact orders with respect to anyone except his girlfriend's brother. Fowler is attacking the originally imposed sentences, not alleging that a new factor justifies sentence modification. Therefore, his motion fails, *see* ***id.***, and we affirm the circuit court's orders denying his motion.

By the Court.—Orders affirmed.

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

[5] Fowler included affidavits from his girlfriend and her mother in the appendix of his appellate brief. These affidavits, dated February 7, 2011, are not part of the appellate record and will not be considered. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981) (court will not consider affidavits that are not part of the record).