COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3148-CR **Cir. Ct. No. 1996CF961748**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON HENRIQUE WALKER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Vernon Henrique Walker,[1] *pro se*, appeals from an order denying his "motion for sentencing modification." Walker contends that

[1] Walker is frequently referred to in the record as Verlin. In his brief, he refers to himself as Vernon, though he refers to himself as Verlin in recent circuit court submissions. Our caption identifies him as Vernon and, because we have not been asked to change the caption, we continue to refer to him as such.

sentencing disparity between him and three accomplices constituted a new factor and that the circuit court originally sentenced him on inaccurate information. The circuit court ruled that there was no new factor because the disparity issue could have been raised previously, so the motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We agree that the motion is procedurally barred and affirm.

¶2 In March 1996, Walker was charged with one count of armed robbery, while concealing his identity, as party to a crime, as an habitual offender. Gregory Gooch and Marlon Powell were similarly charged in the same complaint. Powell was charged with three additional counts and a third man, Michael Tatum, had three charges filed against him.[2]

¶3 The three "co-defendants" entered pleas. Walker represents that the other men were sentenced as follows. Gooch received twenty years' imprisonment out of a maximum possible fifty years' imprisonment. Tatum received twenty years' imprisonment on each of two counts, to be served consecutively, with the third count dismissed and read in. Powell received twenty years' imprisonment on one count, twenty years' probation on another count, and the other two counts were dismissed and read in. Walker, who exercised his right to a jury trial, was ultimately convicted and sentenced to thirty-five years' imprisonment out of a maximum possible fifty years' imprisonment.

¶4 Walker had a direct appeal in which counsel filed a no-merit report. We affirmed. *See* ***State v. Walker***, No. 1998AP502-CRNM, unpublished slip op.

[2] It is not clear how Powell's additional charges, or Tatum, relate to the underlying matter here, though for purposes of the appeal, the nature of the connection is irrelevant.

& order (Ct. App. July 9, 1998). Walker subsequently filed three *pro se* postconviction motions that were denied. Walker appealed from each, in appeal Nos. 2001AP3255, 2004AP2823, and 2007AP1021.

¶5 Walker's current postconviction motion alleged a new factor in the guise of "sentencing disparity" between his sentence and the co-defendants' sentences. He also alleged that he was sentenced on inaccurate information because the district attorney had represented at sentencing that there was a possibility that additional charges might be brought against Walker, though no additional charges were filed.[3]

¶6 "[A]ll claims of error that a criminal defendant can bring should be consolidated into one motion or appeal[.]" ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756 (reaffirming holding of ***Escalona***); *see also* WIS. STAT. § 974.06(4) (2009-10).[4] "[C]laims that could have been raised on direct appeal or in a previous [WIS. STAT. §] 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason" why the claims were not previously raised. ***Lo***, 264 Wis. 2d 1, ¶44; *see also* ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574 (***Escalona*** bar may apply even though prior appeal was a no-merit appeal).

[3] Walker also alleged that his positive performance in prison was a new factor. Walker has abandoned this argument on appeal and we need not address it further, though we note that it is well established that post-sentencing rehabilitative adjustment does not constitute a new factor warranting sentence modification. *See* ***State v. Ambrose***, 181 Wis. 2d 234, 239-42, 510 N.W.2d 758 (Ct. App. 1993).

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

Whether ***Escalona*** bars a claim is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 A claim for sentence modification based on disparity among co-actors implicates equal protection, a constitutional issue. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 186-87, 233 N.W.2d 457 (1975). As grounds for not raising the sentencing disparity issue earlier, Walker asserts that the sentencing transcripts from his co-defendants' cases were never made part of his earlier appellate records, thereby prohibiting him from citing to facts therein. *See* WIS. STAT. RULE 809.19(1)(d).

¶8 Walker does not explain how rules of appellate procedure applicable to briefing limited his ability to allege errors through postconviction motions in the circuit court.[5] Further, Walker's co-defendants were sentenced in July 1996, well ahead of both Walker's December 1996 trial and his April 1997 sentencing. Two of his co-defendants' sentences were expressly referred to at Walker's sentencing hearing. Thus, not only is the sentencing disparity not a new factor,[6] but we also conclude that Walker's proffered reason for not raising the issue sooner is insufficient to overcome the ***Escalona*** bar. The circuit court's ruling was proper.

¶9 Walker additionally complains that the circuit court failed to address his argument that he was sentenced on inaccurate information. The right to be

[5] Walker also fails to explain how WIS. STAT. RULE 809.19 limited his ability to raise issues in a response to counsel's no-merit report in his first appeal.

[6] 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

sentenced on accurate information implicates due process, *see* ***State v. Tiepelman***, 2006 WI 66, ¶11, 291 Wis. 2d 179, 717 N.W.2d 1, so this issue also had to be raised previously unless Walker had a sufficient reason for not doing so.

¶10 Walker states that he was waiting for the statute of limitations to expire on the "additional" charges the district attorney suggested could be brought. The State counters that any statute of limitations would have expired in 2003. It observes that Walker filed at least two postconviction motions subsequent to that expiration but does not explain why he could not have raised the inaccurate information claim in the previous 2004 or 2007 motions. Walker has not filed a reply brief, so we deem the point conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).[7]

By the Court.—Order affirmed.

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

[7] We additionally note two points. First, a sentencing court may consider uncharged and unproven offenses. ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Second, Walker has not fully explained why he needed to wait for the statute of limitations to expire. He may have believed that if the State never charged him, the passage of time would turn the district attorney's prior representation into an inaccuracy, ***Leitner*** notwithstanding. However, WIS. STAT. § 974.06 "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Here, Walker seems to have done exactly that.