

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2013

Diane M. Fremgen
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 No. 2012AP2498-CR

Cir. Ct. No. 2011CM6987

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN J. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Shawn J. Robinson, *pro se*, appeals from orders denying his motion to modify sentence and his motion for postconviction relief.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We affirm.

BACKGROUND

¶2 On November 22, 2011, Robinson was charged with intimidation of a witness and three counts of violation of a domestic abuse injunction. The State invoked the repeater allegation under WIS. STAT. § 939.62(1)(a) as to each count, alleging that Robinson had been convicted of three misdemeanor offenses in the five years preceding the incidents. The trial court set bail, ordered Robinson not to have contact with the alleged victim, and rescinded multiple other privileges while he remained in custody. Robinson remained in custody while his case was pending.

¶3 On January 18, 2012, Robinson's counsel filed a motion to modify the conditions of Robinson's confinement. Robinson was not produced at the hearing on the motion. The trial court denied the motion and, at the same hearing, defense counsel entered a speedy trial demand. Because defense counsel could not accommodate the initial date offered by the trial court, defense counsel agreed to waive the speedy trial time limits until April 2, 2012. The trial court directed defense counsel to obtain Robinson's written consent waiving the speedy trial time limits.

¶4 By April 2, 2012, the parties reached a resolution. Robinson pled guilty to intimidation of a witness, habitual criminality, and violation of a domestic abuse injunction, habitual criminality. Other pending charges were dismissed and read in. On the two repeater charges, the State recommended a global sentence to the Wisconsin State Prison System bifurcated as 18-24 months of initial confinement and 24 months of extended supervision. The trial court

sentenced Robinson to two consecutive prison terms, both bifurcated as one year of initial confinement and one year of extended supervision.

¶5 On October 8, 2012, Robinson filed a *pro se* motion for sentence modification, arguing that his bifurcated sentence conflicted with our unpublished opinion, *State v. Gerondale*, Nos., 2009AP1237-CR and 2009AP1238-CR, unpublished slip op. (WI App Nov. 3, 2009). Robinson argued that pursuant to *Gerondale*, the term of his extended supervision could not be bifurcated and that no extended supervision could be imposed. As such, Robinson argued, his sentences should have been two consecutive nine month terms, followed by three months of extended supervision. The trial court denied the motion, declining to apply *Gerondale* because it “compromis[ed] the court’s authority to impose a maximum sentence.”

¶6 On October 25, 2012, Robinson filed a *pro se* motion for postconviction relief, pursuant to WIS. STAT. § 974.06. Robinson again argued that his sentence was illegal and argued that his defense counsel was ineffective for: (1) failing to inform him about case law and statutes concerning bifurcated sentences; and (2) failing to insist on a trial date within the speedy trial time frame. Robinson also sought an order to provide him with transcripts from the hearings pertaining to the speedy trial issue and defense counsel’s motion to modify the terms of Robinson’s confinement. The trial court denied the motion, again finding that its sentence was not barred by controlling case law, and that Robinson was procedurally barred from raising his ineffective assistance of counsel claims. This appeal follows.

DISCUSSION

¶7 Robinson contends that he was illegally sentenced and that the trial court erroneously denied his WIS. STAT. § 974.06 motion. We disagree.

Motion to Modify Sentence.

¶8 “Within certain constraints, Wisconsin [trial] courts have inherent authority to modify criminal sentences.” *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. “A court cannot base a sentence modification on reflection and second thoughts alone.” *Id.* “However, it may base a sentence modification upon the defendant’s showing of a ‘new factor.’” *Id.* (citation and one set of quotation marks omitted). Under other circumstances, a trial court has the authority to modify a sentence even though no new factor is presented, such as when the court determines that the sentence is illegal or void, or when the court determines that the sentence is unduly harsh or unconscionable. *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by Harbor*, 333 Wis. 2d 53.

¶9 Robinson concedes that he has not raised a new factor, but argues that under *Gerondale*, the two consecutive sentences he received, both bifurcated as one year initial confinement and one year extended supervision, should have been bifurcated as nine months of confinement and three months of extended supervision on each of the charges to comply with WIS. STAT. § 973.01. We conclude that the trial court was not precluded from bifurcating Robinson’s sentence the way that it did.

¶10 In *Gerondale*, we were asked to reconcile our decision in *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, with the post-*Volk*

statutory amendment to WIS. STAT. § 973.01. In *Volk* we held that penalty enhancers apply only to the confinement portions of a bifurcated sentence. *Id.*, 258 Wis. 2d 584, ¶2. However, after *Volk*, § 973.01 was amended, in relevant part, to read as follows:

(1) BIFURCATED SENTENCE REQUIRED. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for ... a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.

....

(2) STRUCTURE OF BIFURCATED SENTENCES. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision. An order imposing a bifurcated sentence under this section shall comply with all of the following:

....

(b) *Confinement portion of bifurcated sentence.* The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year and, except as provided in par. (c), is subject to whichever of the following limits is applicable:

....

10. For any crime other than one of the following, the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence:

- a. A felony specified in subds. 1. to 9.
- b. An attempt to commit a classified felony if the attempt is punishable under s. 939.32(1)(intro.).

(c) *Penalty enhancement. 1.* Subject to the minimum period of extended supervision required under par. (d), the maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum term of confinement

in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.

(d) *Minimum and maximum term of extended supervision.* The term of extended supervision may not be less than 25% of the length of the term of confinement in prison imposed under par. (b).

Thus, § 973.01 requires bifurcation of enhanced misdemeanors and necessarily requires that some portion of the penalty enhancer apply to extended supervision. In essence, the statute creates a 75-25 rule, which states that the term of confinement “may not exceed 75% of the total length of the bifurcated sentence,” while the term of extended supervision “may not be less than 25% of the length of the term of confinement.” WIS. STAT. §§ 973.01(2)(b)10. & (2)(d).

¶11 Recognizing the contradiction between *Volk* and WIS. STAT. § 973.01, we held in *Gerondale* that a misdemeanor prison sentence based on a penalty enhancer may be bifurcated no more and no less than necessary to comply with the minimum 25% extended supervision requirement of the statute. *See Gerondale*, Nos. 2009AP1237-CR and 2009AP1238-CR, unpublished slip op. at ¶11. Robinson contends that this holding required the trial court to bifurcate his sentences each as nine months of confinement and three months of extended supervision. Robinson is mistaken because neither *Gerondale* nor *Volk* apply to this case. Relying on § 973.01, we conclude that the trial court did not erroneously exercise its sentencing discretion.

¶12 We note first that our analysis in *Volk* focused on felony sentence bifurcation. *Volk* did not involve a misdemeanor sentence and was decided before the law changed requiring sentencing courts to bifurcate enhanced misdemeanor sentences. *Volk*, therefore, has no bearing on this case. As such, our analysis in *Gerondale*, in which we compared *Volk* with WIS. STAT. § 973.01, also does not

apply. Moreover, because *Gerondale* is an unpublished opinion of this court, the trial court did not erroneously exercise its discretion when it chose not to apply *Gerondale*'s rationale. Rather, the trial court appropriately concluded that its sentence complies with § 973.01—Robinson's term of confinement does not exceed 75% of his sentence and his term of extended supervision is not less than 25% of the length of his confinement. The trial court's sentence complies with the statute.

WISCONSIN STAT. § 974.06.

¶13 Robinson also argues that the trial court erroneously denied his WIS. STAT. § 974.06 motion because he was improperly sentenced and because his defense counsel was ineffective. As we have stated, the trial court did not improperly sentence Robinson. As to Robinson's ineffective assistance of counsel claims, we conclude that his claims are procedurally barred.

¶14 Robinson contends that his trial counsel failed to inform him about the law on bifurcated sentences and failed to request a speedy trial. Robinson's claims are barred because he failed to raise his ineffective assistance of counsel claims in his previous motion. Accordingly, we do not reach the merits of Robinson's claim.

¶15 The supreme court concluded in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), that WIS. STAT. § 974.06(4) precludes a defendant from raising by way of a motion under § 974.06 any grounds for relief that "have been finally adjudicated, waived or not raised in a prior postconviction motion," unless the court finds that a "sufficient reason" exists for either the failure to allege or to adequately raise the issue in" the original motion. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Robinson argues that he was unaware of the

ineffective assistance claim when he filed his motion for sentence modification and that his previous motion did not bar his right to raise a subsequent § 974.06 motion. Robinson has not demonstrated a sufficient reason for failing to previously raise his ineffective assistance of counsel claims. His motion for sentence modification was a previous postconviction motion in which he could have raised all potential grounds for relief.

¶16 Moreover, Robinson's guilty plea waives all of his arguments concerning his speedy trial demand. A guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. This includes allegations that Robinson's right to a speedy trial was violated. *See State v. Asmus*, 2010 WI App 48, ¶5, 324 Wis. 2d 427, 782 N.W.2d 435.

¶17 Because Robinson was not improperly sentenced, and because his ineffective assistance of counsel claims are procedurally barred, we conclude that the trial court did not erroneously exercise its discretion in denying Robinson's motions for sentence modification and postconviction relief.

¶18 For the forgoing reasons, we affirm the trial court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

