COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP343 **Cir. Ct. No. 2006CF199**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DELOND MARQUE BLUNT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded*.

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

¶1 PER CURIAM. Delond Marque Blunt, *pro se*, appeals the order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief and

the order for reconsideration that followed.[1] He argues that the postconviction court erred when it concluded that his motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We agree. Accordingly, we reverse and remand for proceedings consistent with this opinion.

BACKGROUND

¶2 In 2008, Blunt pled guilty to second-degree sexual assault of a child. The circuit court imposed a fourteen-year sentence.[2] Blunt did not pursue a direct appeal.

¶3 More than a year and a half after he was sentenced, in March 2010, Blunt filed a motion to modify his sentence based upon an alleged new factor.[3] The circuit court denied the motion.

¶4 In January 2013, Blunt, *pro se*, filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06. He argued that his counsel was ineffective and his plea colloquy was deficient. The postconviction court denied the motion without a hearing after concluding that the motion was barred by ***Escalona-Naranjo*** based on Blunt's March 2010 motion for sentence modification. According to the postconviction court, there was no reason why the issues raised in Blunt's § 974.06 motion could not have been raised in his March 2010 motion.

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

[2] The Honorable Patricia D. McMahon presided over Blunt's plea and sentencing hearings, entered the judgment of conviction, and issued the order denying Blunt's motion to modify his sentence based upon an alleged new factor.

[3] The caption of the motion indicated that it was filed pursuant to WIS. STAT. § 973.19; however, it was filed outside the ninety-day window provided by the statute.

¶5 Blunt filed a motion for reconsideration. He challenged the postconviction court's application of ***Escalona-Naranjo***'s bar to his motion. He argued that his March 2010 motion for sentence modification was not subject to the procedural bar. He asked the postconviction court to reconsider its decision denying his WIS. STAT. § 974.06 motion and to review the motion on its merits. The postconviction court denied Blunt's motion for reconsideration.[4]

DISCUSSION

¶6 Because Blunt referenced only the order denying his motion for reconsideration in his notice of appeal, the State initially argues that this court lacks jurisdiction over Blunt's appeal. The State submits that Blunt has no right to appeal from the order denying his motion to reconsider because it presents the same issues that were resolved in the order denying his postconviction motion pursuant to WIS. STAT. § 974.06. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988) ("No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered."). We conclude that this characterization is inaccurate. Blunt's reconsideration motion presents a new issue; namely, whether he is procedurally barred from filing a § 974.06 motion because he filed an earlier sentence modification motion based on an alleged new factor. *See* ***State v. Edwards***, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136 (Whether a party's motion for reconsideration raised a new issue presents a question of law that is subject to *de novo* review.); *see also* ***Harris v.***

[4] The Honorable Jeffrey A. Wagner issued the orders denying Blunt's postconviction motion and the motion for reconsideration that followed.

Reivitz, 142 Wis. 2d 82, 88, 417 N.W.2d 50 (Ct. App. 1987) (Court of appeals has liberally applied the "new issues" test for determining whether an order denying reconsideration is appealable.). Moreover, Blunt's notice of appeal was timely filed as to *both* the denial of his WIS. STAT. § 974.06 motion and the motion for reconsideration that followed. The fact that he only referenced the order denying reconsideration is not somehow dispositive of his appeal. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (explaining that courts follow a liberal policy when reviewing prisoners' *pro s*e submissions).

¶7 The State goes on to assert if we conclude that we have jurisdiction over this appeal—and we do—that the postconviction court properly applied ***Escalona-Naranjo*** to Blunt's WIS. STAT. § 974.06 motion.

¶8 Blunt argues that his March 2010 motion for sentence modification based upon a new factor does not bar his WIS. STAT. § 974.06 motion. The State after setting forth a lengthy background on § 974.06(4) and ***Escalona-Naranjo*** generally, offers only a limited analysis of the distinction raised by Blunt. This analysis consists of the following:

> Blunt's arguments that a motion to modify sentence based upon a new factor is not subject to ***Escalona[-Naranjo]*** is misplaced. Blunt is correct that multiple postconviction motions for sentence modification may be permissible. *See* ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. It does not follow from that principle, though, that a defendant may file a WIS. STAT. § 974.06 motion after he has previously moved the court for postconviction relief in the form of sentence modification. Without any sufficient reason to excuse his failure to include his present claims in his first postconviction motion, Blunt's claims are barred from review.

¶9 Whether Blunt's claims are procedurally barred is an issue that is subject to our independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). "[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 for why the claims were not raised on direct appeal or in a previous § 974.06 motion." ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

¶10 Blunt did not directly appeal his conviction and has not previously filed a postconviction motion under WIS. STAT. § 974.06 prior to the present motion. His March 2010 sentence modification motion based on a new factor invoked the postconviction court's inherent authority to modify a sentence. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895. In that motion, Blunt argued that his character was unduly overlooked during sentencing; such a claim is not cognizable under § 974.06.[5] *See* ***State v. Balliette***, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334 (Motions under § 974.06 are limited to issues of constitutional or jurisdictional dimension.). Accordingly, a new factor sentence modification motion, standing alone, does not bar a defendant from later filing a § 974.06 motion. *Cf*. ***State v. Starks***, 2013 WI 69, ¶46, 349

[5] In his March 2010 sentence modification motion, Blunt included a three-sentence argument that he was denied his due process right to be sentenced based on accurate information, which is a cognizable claim under WIS. STAT. § 974.06. He did not, however, develop his argument on this point by explaining what was inaccurate. Instead, the crux of Blunt's argument was that the sentencing court did not have *complete* information relating to his character. Consequently, in denying Blunt's March 2010 motion, the postconviction court treated it solely as a motion for sentence modification. Moreover, the postconviction court's subsequent order denying Blunt's § 974.06 motion referenced Blunt's March 2010 motion as one seeking sentence modification.

Wis. 2d 274, 833 N.W.2d 146 (explaining in the context of a motion to vacate a DNA surcharge filed prior to a § 974.06 motion, that "sentence modification and postconviction relief under … § 974.06 are separate proceedings such that filing one does not result in a waiver of the other").

¶11 Because we conclude that the postconviction court erred when it concluded Blunt's motion was procedurally barred, we remand this matter to afford the postconviction court the opportunity to consider the merits of Blunt's WIS. STAT. § 974.06 motion.

By the Court.—Orders reversed and cause remanded.

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