COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP536-CR **Cir. Ct. No. 2001CF4716**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN M. HILLS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Glenn M. Hills, *pro se*, appeals from an order of the circuit court that denied a motion which, according to its title, sought sentence modification based on a new factor. Hills claims that new information about the victim's character warrants resentencing. We affirm the circuit court.

BACKGROUND

¶2 In March 2001, Hills and three others went to a home on North 38th Street in Milwaukee. Co-actor Michael Shackleford's mother had been recently evicted from the home, and Shackleford wanted to "shoot up" the home to scare the landlord. Contrary to their belief that the home was empty, there was at least one person inside. After the shooting began, Efrain Diaz was killed by a bullet that perforated his aorta. Hills was charged with one count of first-degree reckless homicide, while armed with a dangerous weapon, as party to a crime. He agreed to plead guilty, and the circuit court sentenced him to seventeen years' initial confinement and thirteen years' extended supervision.[1]

¶3 Hills filed a postconviction motion seeking sentence modification. That motion was denied, and this court summarily affirmed. *See* ***State v. Hills***, No. 2002AP2446-CR, unpublished slip op. and order (WI App May 6, 2003). In 2004, Hills filed a petition under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which we denied as conclusory. *See* ***State ex rel. Hills v. Circuit Court***, No. 2004AP335-W, unpublished slip op. and order (WI App Apr. 30, 2004). In 2008, Hills filed a motion, pursuant to WIS. STAT. § 974.06, seeking to withdraw his guilty plea. The circuit court denied the motion. Hills appealed, and we affirmed. *See* ***State v. Hills***, No. 2008AP2349, unpublished slip op. (WI App Jun. 23, 2009).

¶4 In February 2013, Hills filed a "motion for sentence modification based on new factors." He complained that the sentencing court had considered

[1] Hills was originally sentenced by the Honorable John A. DiMotto.

"inaccurate information from the prosecution attorney's comments" that Diaz "was an innocent person." He claims that though the circuit court evidently believed Diaz was "innocent of no wrong doing regarding this crime, contrary evidence can prove different[.]" Hills further asserted "a constitutional due process right to be sentence[d] on the basis of true and correct information" and sought to have his sentence modified to a sentence of ten years' initial confinement and five years' extended supervision.

¶5 At sentencing, the State had commented:

> Mr. Diaz was an innocent person. He had nothing to do with any of this. He just happened to be in the wrong place at the wrong time and was in the house and happened to catch one of the bullets that came into the house that was—that were being fired by these four men.

When it imposed sentence, the circuit court commented that Diaz "was an innocent young man with a bright future, just like you were a young man with a bright future when you woke up that morning. Efrain Diaz, an innocent 16 year old, who lost his life for nothing. Wrong place, wrong time."

¶6 Hills contended that there is evidence that Diaz was not so innocent. It was reported, for instance, that Diaz was dealing drugs out of the supposedly vacant home. There were indications that shots may have been fired from inside the house towards the street; Hills pointed out that, at the time of autopsy, Diaz's hands were swabbed for gunshot residue. A toxicology report also indicated that Diaz had a blood-alcohol level of .06% at the time of his death, despite his father's representation that Diaz had no history of alcohol use.

¶7 The circuit court denied the motion.[2] First, it explained that Hills appeared to actually be claiming he had been sentenced on inaccurate information and, thus, was seeking resentencing, not sentence modification. Then, it set out the framework for inaccurate-information motions. Finally, it explained why there was no inaccurate information and denied the motion.

DISCUSSION

¶8 There are fundamental differences between a new-factor sentence modification motion and an inaccurate-information resentencing motion. With a new-factor motion, a defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 838. 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 the 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."

Id., 2011 WI 28, ¶40, 333 Wis. 2d at 74, 797 N.W.2d at 838 (citation omitted). If a new factor exists, then the circuit court determines whether the new factor justifies sentence modification. ***Id.***, 2011 WI 28, ¶37, 333 Wis. 2d at 73, 797 N.W.2d at 838. Whether a new factor exists is a question of law, but whether a new factor justifies sentence modification is committed to the circuit court's discretion. ***Id.***, 2011 WI 28, ¶¶36–37, 333 Wis. 2d at 72–73, 797 N.W.2d at 838.

[2] Hills's motion was reviewed and denied by the Honorable Jeffrey A. Wagner, as successor to Judge DiMotto's calendar.

¶9 When seeking resentencing because the circuit court allegedly relied on inaccurate information, "a defendant must establish that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 181, 717 N.W.2d 1, 2. If the defendant fulfills that burden, then the burden shifts to the State to show harmless error. *See* ***id.***, 2006 WI 66, ¶3, 291 Wis. 2d at 182, 717 N.W.2d at 2. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information," and whether there has been a violation of such a right is a constitutional question we review *de novo*. *See* ***id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶10 Notably, a new-factor sentence modification motion invokes a circuit court's inherent authority to modify a sentence and, thus, can be brought at any time. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 579–580, 653 N.W.2d 895, 898. A constitutional due process claim, such as an inaccurate-information resentencing motion, falls within the ambit of WIS. STAT. § 974.06 and, thus, may be procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).[3] *See* ***State v. Crockett***, 2001 WI App 235, ¶¶6–10, 248 Wis. 2d 120, 126–128, 635 N.W.2d 673, 676–677.

¶11 Hills, in his main appellate brief, does not appear to discuss these distinctions or address the circuit court's conclusion that he had really filed an inaccurate-information resentencing motion. The State, in its response, contends

[3] A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion or direct appeal unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion or appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994).

that the circuit court correctly construed Hills's motion, and urges us to apply the ***Escalona*** procedural bar in light of Hills's prior litigation. *See* ***Crockett***, 2001 WI App 235, ¶¶9–10, 248 Wis. 2d at 127–128, 635 N.W.2d at 676–677. In his reply, Hills appears to concede that this is an inaccurate-information case, asserting that ***State v. Grindemann***, 2002 WI App 106, 255 Wis. 2d 632, 648 N.W.2d 507, a new-factor sentence modification case, does not apply and claiming that he should have been resentenced like the defendant in ***State v. Woods***, 2007 WI App 190, 305 Wis. 2d 133, 738 N.W.2d 81.[4]

¶12 In any event, we note that courts are not bound by the labels placed on papers by *pro se* prisoners. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983). We agree with the circuit court that Hills's motion seeks resentencing on the basis of inaccurate information. We do not, however, agree with the State that we should apply ***Escalona*** in this particular instance.[5]

[4] The defendant in ***Woods*** had sought sentence modification on the grounds that a 1994 letter from the then-governor to the secretary of the Department of Corrections was a new factor. *See* ***State v. Woods***, 2007 WI App 190, ¶3, 305 Wis. 2d 133, 137–138, 738 N.W.2d 81, 83. The circuit court denied the motion for sentence modification, concluding the letter was not a new factor, then construed the motion—over Woods's objection—to be a resentencing motion, which it granted upon concluding the sentencing court had made a mistake of fact. ***Ibid.*** We, however, ultimately reversed the circuit court's decision and remanded the matter with directions to reinstate the original sentence with proper credit, because the circuit court's inquiry should have ended once it determined there were no new factors. ***Id.***, 2007 WI App 190, ¶17, 315 Wis. 2d at 146–147, 738 N.W.2d at 87.

[5] The ***Escalona*** bar does not apply if a defendant presents a sufficient reason for not raising his issues at a previous opportunity. *See* WIS. STAT. § 974.06(4). To avoid the bar, it appears Hills is claiming that he only recently obtained the materials he relied on to support the present motion. The circuit court did not address the sufficiency of this reason or otherwise apply the procedural bar. Although we may affirm a circuit court on different grounds, *see* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16, 20 (Ct. App. 1995), we conclude it is more appropriate here to address the circuit court's substantive reasoning.

¶13 Turning to the substance of Hills's claim, then, we agree with the circuit court's conclusion that there was no inaccurate information presented at sentencing. The point of calling Diaz an "innocent" victim was not to suggest that he was particularly pure of virtue or even that he led a crime-free life but, rather, to illustrate, as the circuit court explained, that he "was not a party to the decision to shoot up the house and bears no responsibility for that decision or its outcome." This remains true even if Diaz had been drinking, dealing drugs, or shooting back. As the circuit court noted in denying Hills's motion, Diaz "was in fact in the wrong place at the wrong time, exactly as the prosecutor stated during his sentencing argument, and exactly as the court said during its rendition of sentence." There was no inaccurate information before the sentencing court, so Hills has presented no basis for resentencing.

By the Court.—Order affirmed.

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