COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2015

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. 2014AP1979 **Cir. Ct. No. 2003CF6628**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT T. GRADY,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Vincent T. Grady, *pro se*, appeals trial court orders denying his motions for sentence modification and for reconsideration. We affirm.

BACKGROUND

¶2 Grady, along with Darren Denson, Christopher Bunch, and Maurice Calhoun, robbed two restaurants at gun point. Grady pled guilty to two counts of armed robbery with use of force as a party to a crime. The trial court sentenced Grady to an aggregate twenty-nine-year term of imprisonment: eight years of initial confinement and six years of extended supervision for one armed robbery; and a consecutive sentence of nine years of initial confinement and six years of extended supervision for the second armed robbery.[1]

¶3 Grady pursued a direct appeal under the procedures set forth in WIS. STAT. RULE 809.32 (2009-10).[2] His appellate counsel filed a no-merit report that examined the trial court's exercise of sentencing discretion. Grady filed a response raising additional sentencing issues. We summarily affirmed, concluding that Grady's sentences constituted a proper exercise of sentencing discretion and no basis existed to disturb them. ***State v. Grady***, No. 2010AP2608-CRNM, unpublished op. and order (WI App June 8, 2011) (***Grady I***). We denied Grady's motion to reconsider, and the supreme court denied his petition for review.

¶4 Grady next filed the postconviction motion that underlies this appeal, seeking sentence modification on a variety of grounds. The trial court denied the claims as untimely and procedurally barred, and it denied Grady's motion for reconsideration. He appeals.

[1] Grady received his sentences after he successfully challenged earlier-imposed sentences in this matter.

[2] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

ANALYSIS

¶5 WISCONSIN STAT. § 974.06 is the mechanism for a defendant to bring constitutional and jurisdictional claims after exhausting statutory direct appeal proceedings. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to bring such claims is limited, however, because "[w]e need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a convicted defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the issues in a previous postconviction motion or on direct appeal unless the defendant states a "sufficient reason" for failing to raise those issues. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Additionally, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Whether a defendant's claims are procedurally barred in any particular case presents a question of law that this court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 "A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Nonetheless, when we consider the preclusive effect of no-merit proceedings, our review includes an assessment of whether appellate counsel and this court followed the no-merit procedures and whether those procedures warrant confidence in their outcome. *See* ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶7 We have conducted an assessment of the no-merit proceedings underlying ***Grady I***. Our review reveals that appellate counsel's no-merit report explained why a challenge to the trial court's exercise of sentencing discretion would lack arguable merit. Grady responded to the no-merit report with numerous reasons that he should be afforded relief from his sentences. Our summary affirmance reflects that we considered the no-merit report and Grady's submission, and that we independently examined the record. *See* ***id.***, unpublished op. and order at 1-2. We concluded that neither the issues discussed by Grady and his counsel, nor any other issues, constituted a basis for an arguably meritorious appeal. ***Id.*** at 2-4. Appellate counsel and this court thus followed the no-merit procedures precisely. *See* WIS. STAT. RULE 809.32.

¶8 Grady disagrees. He asserts that we should have restated and then re-examined the claims that he raised in ***Grady I*** using multiple analyses. He misunderstands the no-merit procedure. As ***Tillman*** makes clear, this court is not required to reformulate issues under every theory that the convicted person might someday think of and believe applicable. *See* ***id.***, 281 Wis. 2d 157, ¶23. We are required to examine the record and determine whether it presents issues of arguable merit. *See* ***id.***, ¶¶24-25. We did so here. We have confidence in the proceedings underlying ***Grady I***.[3]

[3] In the reply brief, Grady alleges his appellate counsel failed to follow the no-merit procedures because, he says, counsel did not give him sufficient information. In support of that allegation, Grady attaches a copy of a letter that appellate counsel purportedly wrote to him. Grady does not show that this letter is in the trial court record, and therefore Grady cannot rely on the letter here. *See* ***State v. Riley***, 175 Wis. 2d 214, 220 & n.2, 498 N.W.2d 884 (Ct. App. 1993) ("We are bound by the record as it comes to us."). Moreover, we do not consider matters presented to us for the first time in a reply brief. *See* ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878.

¶9 In light of that conclusion, we turn to the arguments Grady offers in the instant litigation. His primary assertion is that he has a disparate sentencing claim based on a comparison of his sentences with those that a different judge imposed on Denson and Bunch.[4] A motion for sentence modification based on disparate sentencing among co-actors is governed by WIS. STAT. § 974.06 because the claim implicates equal protection, a constitutional issue. *See* ***Drinkwater v. State***, 73 Wis. 2d 674, 678-79, 245 N.W.2d 664 (1976).

¶10 A disparate sentencing claim turns on the requirement that sentences should be substantially the same for persons with substantially the same histories. ***State v. Jackson***, 69 Wis. 2d 266, 276-77, 230 N.W.2d 832 (1975). Grady's premise, however, is that his history is substantially *different* from that of Denson and Bunch.[5] Relying on that premise, Grady argues that his sentences should be substantially more lenient than the sentences imposed on those co-defendants because, Grady believes, he is less culpable than those men and his history reflects more mitigating factors. This is a claim that the sentencing court erroneously exercised its discretion when sentencing Grady. We thoroughly considered this claim when we resolved ***Grady I***, and we concluded that any such claim lacks merit. ***Id.***, unpublished op and order at 2-3. Grady may not relitigate the issue. *See* ***Witkowski***, 163 Wis. 2d at 990.

[4] According to Grady, his co-defendants Denson and Bunch each received an aggregate twenty years of initial confinement for the two armed robberies. As to extended supervision, Grady asserts that Bunch must serve eight years, and Grady does not state the period of extended supervision imposed on Denson. Grady, as we have seen, received an aggregate sentence of seventeen years of initial confinement and twelve years of extended supervision for his participation in the two armed robberies.

[5] Grady states, *e.g.*, "the differences between Grady's and Bunch's/Denson's situations are vast," and "Grady did not have substantially the same case history as either Bunch or Denson."

¶11 Grady next asserts that the trial court sentenced him without knowing the extent of Denson's and Bunch's criminal histories, so those criminal histories are new factors that warrant modifying Grady's sentences. 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 ... it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts constitutes a new factor is a question of law. ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

¶12 We considered Grady's new factor claim in ***Grady I***. There, Grady directed our attention to a criminal charge Denson faced in another state and argued that this information, if known to the sentencing court, would have distinguished Grady from Denson and led that court to find Grady less culpable in the armed robberies. We rejected the argument, explaining that Denson's "other troubles are not 'highly relevant' to the imposition of Grady's sentence so as to be a new factor." ***Id.***, unpublished op. and order at 4 (citation omitted). In the instant litigation, Grady alleges that both Denson and Bunch had more extensive criminal histories than were presented to the court that sentenced Grady. This is the same claim we rejected in ***Grady I***, notwithstanding Grady's efforts to expand the claim to include a second co-defendant. We will not revisit the matter. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶13 Next, Grady asserts that the sentencing court erroneously exercised its discretion when it compared the actions of the third co-defendant, Calhoun, with Grady's actions. This claim too repeats contentions Grady presented in his response to the no-merit report. There, Grady asserted that Calhoun's "role [wa]s much more serious and should have factored into the court's rationale." Grady

went on to discuss Calhoun's actions and compare them unfavorably with Grady's actions. We concluded that Grady's assertions failed to reveal an arguably meritorious appellate issue, explaining: "we have determined that Grady's sentencing was the product of a proper exercise of discretion." ***Grady I***, unpublished op. and order at 3. In the instant proceeding, Grady repeats—at some points nearly word for word—the comparison of his actions with Calhoun's actions and reasserts that the sentencing court's decision "constitutes an abuse of discretion." We will not consider this question anew. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶14 Grady next asserts that his sentences are unduly harsh. "A sentence is unduly harsh or unconscionable 'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Cummings***, 2014 WI 88, ¶72, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted). Moreover, "[a] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶15 We determined in ***Grady I*** that Grady's sentences are not unduly harsh. We first explained that the trial court sentenced Grady to twenty-nine years of the eighty years he faced, so the sentence was unlikely to be unduly harsh or unconscionable. *See* ***id.***, unpublished op. and order at 3. We then determined that the trial court weighed proper sentencing factors and applied them in a reasonable manner, and we concluded that no basis existed to challenge the sentences. *See* ***id.***; *see also* ***Cummings***, 357 Wis. 2d 1, ¶75 (appellate court will not disturb a

sentence where trial court applied proper legal standard to facts and reached a result that a reasonable judge could reach). We will not again consider whether the sentences are unduly harsh. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶16 Finally, Grady complains that the trial court erroneously exercised its discretion by ordering him to pay a DNA surcharge pursuant to WIS. STAT. §973.046(1g) (2009-10). We previously concluded that the trial court properly exercised its discretion in this regard. *See* ***Grady I***, unpublished op. and order at 4. Grady cannot relitigate the issue.[6] *See* ***Witkowski***, 163 Wis. 2d at 990.

By the Court.—Orders affirmed.

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

[6] For the sake of completeness, we add that, even had we not previously resolved the DNA surcharge issue Grady raises now, we could not address it in this appeal. A convicted person cannot challenge a DNA surcharge imposed under WIS. STAT. § 973.046(1g) (2009-10) after the time for a direct appeal has passed. *See* ***State v. Nickel***, 2010 WI App 161, ¶¶5-8, 330 Wis. 2d 750, 794 N.W.2d 765.