COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1939 **Cir. Ct. No. 1996CF964865**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES PARRISH HILL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. James Parrish Hill, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification. The circuit court deemed the original motion procedurally barred by ***State v. Escalona-***

Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Hill also appeals from an order denying his motion for reconsideration. We affirm.

BACKGROUND

¶2 In September 1996, Hill was charged with two counts of first-degree sexual assault of a child under thirteen years of age. The criminal complaint alleged that he had committed "sexual intercourse (mouth to vagina)" when on two different occasions, he "placed his tongue against [the victim's] vagina." He agreed to enter an ***Alford***[1] plea to one of the offenses.[2] Hill was sentenced to twenty years' imprisonment. Hill had a direct appeal in this case, as well as an appeal from a prior postconviction motion.[3]

¶3 On July 23, 2015, Hill filed the underlying motion for "sentence modification/postconviction relief," claiming a new factor. Hill alleged that "his ***Alford*** plea count sentence was based on the erroneous gravity and nature of the charge." Specifically, Hill believes that the criminal complaint incorrectly charged him with assault by sexual intercourse when his mouth-to-vagina contact with the victim was actually sexual contact. Consequently, the criminal complaint did not put him on notice of the charge against him, his plea was coerced and not based on the correct offense elements, there was no factual basis for his plea, and

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

[2] This case, Milwaukee County Circuit Court case No. 1996CF964865, was resolved with Milwaukee County Circuit Court case No. 1996CF961223, in which Hill entered guilty pleas to twelve offenses. Although the motion for sentence modification bore both circuit court case numbers, a notice of appeal was filed only in case No. 1996CF964865.

[3] These were appeal Nos. 1998AP1512-CR and 2013AP2021.

the sentencing, based on the circuit court's belief that Hill had committed an act of sexual intercourse, was based on inaccurate information.

¶4 The circuit court determined that Hill was not raising an actual new factor and, consequently, the motion was a WIS. STAT. § 974.06 (2013-14)[4] motion subject to procedural bars. The circuit court additionally concluded that there was no sufficient reason shown for Hill's failure to raise his current issues previously, so it denied the motion. It also denied a motion for reconsideration. Hill appeals.

DISCUSSION

¶5 Claims for relief "that could have been raised in a 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" previously. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756; ***Escalona***, 185 Wis. 2d at 185. Whether claims are procedurally barred is a question of law we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 A motion based on a new factor is not subject to the ***Escalona*** bar, but there must be an actual new factor. A new factor is a fact or set of facts that is "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);

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

see also ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36.

¶7 A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccurate information at sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "A defendant 'cannot show actual reliance on inaccurate information if the information is accurate.'" ***State v. Travis***, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted).

¶8 We do not disagree with the circuit court's conclusion that Hill has not raised an actual new factor. Indeed, at the time he filed his motion, the criminal complaint was nearly nineteen years old. Nor do we disagree that Hill has failed to show a sufficient reason for not raising his current issues previously. In our exercise of discretion, however, we conclude it is prudent to address Hill's claim of error on its merits. *See* ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574 (***Escalona*** "is not an ironclad rule"); ***State v. Crockett***, 2001 WI App 235, ¶¶7-8, 248 Wis. 2d 120, 635 N.W.2d 673; *see also* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied upon by the circuit court).

¶9 Hill's motion for sentence modification is premised on a claim that the criminal complaint was insufficient when it alleged sexual intercourse by mouth-to-vagina contact. By Hill's reading of the statutes, "sexual intercourse" requires penetration of an orifice, but he was merely alleged to have put his tongue against the victim's vagina, which he believes constitutes "sexual contact."

Sexual contact has slightly different elements from sexual intercourse, of which Hill alleges he was not advised during the plea process. Hill believes his plea was thereby rendered infirm.

¶10 "'Sexual intercourse' means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusions, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction." WIS. STAT. § 948.01(6) (1995-96). Hill does not dispute that the mouth-to-vagina contact in this case should be considered cunnilingus, but he insists penetration is required to fulfill the definition of sexual intercourse. Hill is mistaken.

¶11 In rejecting a definition of cunnilingus that would have required stimulation of the victim's clitoris or vulva, we noted with approval definitions from other jurisdictions that "'oral-genital contact, no matter what the intent or result, is sufficient to prove cunnilingus'" and that "any oral-genital contact qualifies as 'cunnilingus[.]'" *See* ***State v. Harvey***, 2006 WI App 26, ¶¶15, 20, 289 Wis. 2d 222, 710 N.W.2d 482 (citations and some internal quotation marks omitted). We thus affirmed Harvey's conviction for third-degree sexual assault, charged "for an act of sexual intercourse by cunnilingus" because there was a sufficient factual basis for the charge stemming from his "placing his mouth on the victim's genital area." ***Id.***, ¶¶ 4, 21. The act underlying Harvey's charge is virtually identical to Hill's act of placing his tongue against the victim's vagina. The criminal complaint in this matter thus contained a sufficient factual basis for an act of sexual intercourse by cunnilingus. Hill has failed to present any grounds for relief.

By the Court.—Orders affirmed.

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