COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP930-CR **Cir. Ct. No. 1987CF8701**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK FRANCIS CUMMINGS, SR.,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Mark Francis Cummings, Sr., appeals *pro se* from circuit court orders denying his motion to modify sentence and motion for reconsideration. Cummings argued in his postconviction motion that sentence modification was appropriate because a change in parole policy frustrated the

sentencing court's intent. He also argued that his competency should have been evaluated at the time of the original proceedings in this matter. The circuit court denied the motion, reasoning that a change in parole policy was not a new factor warranting sentence modification and that Cummings's competency claim was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (defendant barred from raising in postconviction motion claims that could have been raised in prior postconviction and appellate proceedings, unless defendant articulates a sufficient reason justifying that failure). We conclude that Cummings's arguments on appeal are without merit and affirm the circuit court orders.

¶2 In 1987, Cummings was convicted of first-degree murder while armed and as a party to a crime. As background to this appeal, we repeat the statement of facts from our 1989 opinion on Cummings's direct appeal, ***State v. Cummings***, no. 89-0506-CR, (Wis. Ct. App.) unpublished slip op. at 2-3 (Nov. 15, 1989):

> Cummings and Raymond Heingartner were business associates whose relationship soured when Cummings lost money in the venture. Apparently tires on each man's automobile … had been slashed, and they blamed each other for the damage. On May 24, 1987, Cummings spent the afternoon and evening drinking heavily. During that time, he had two telephone conversations with Heingartner about the damage, and he confronted Heingartner at Heingartner's residence. Around 3 a.m. on May 25, 1987, Cummings and Robert Zoltowski went to the Heingartner home armed with a shotgun. Heingartner and his wife opened the door. Initially, Cummings used the shotgun to wedge the door open. As the Heingartners pushed the door closed, a shot was fired that went though the door frame and hit Heingartner. Cummings then fired twice more through the closed door, hitting Joyce Heingartner. She died without regaining consciousness. Heingartner died the following day.

¶3 Cummings appealed from his conviction and from the denial of a motion for postconviction relief. This court rejected Cummings' claims, including one that his trial counsel had been ineffective for failing to adequately develop an intoxication defense. This court held that even assuming counsel's performance had been deficient, Cummings had not been prejudiced by that deficient performance. We concluded that "Cummings' own testimony was sufficient to defeat any intoxication claim" because "he testified in great detail and with clarity of recall concerning the events of the evening" and no jury could reasonably find that he had been incapable of forming the requisite intent. ***Id.*** at 9.

¶4 Cummings then sought postconviction relief *pro se* pursuant to WIS. STAT. § 974.06 (2003-04)[1] and a petition for a writ of *habeas corpus*. The circuit court denied the motion and petition, and this court affirmed.

¶5 Cummings then filed the motion underlying this appeal – ostensibly a motion to modify sentence. As noted above, Cummings argued that an alleged change in parole policy constituted a new factor warranting sentence modification. He also argued that his sentence was unduly harsh or unconscionable, in light of the lesser sentence imposed on Zoltowski, his co-actor. Finally, he argued that his trial counsel was ineffective for failing to seek a competency evaluation because Cummings was intoxicated at the time of the offense. The circuit court denied the motion, concluding: (1) that the claimed change in parole policy did not constitute a new factor warranting sentence modification because the circuit court did not expressly consider parole policy when it imposed sentence; (2) that Cummings's

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

contention that his sentence was unduly harsh and unconscionable was procedurally barred; and (3) that the ineffective-assistance-of-counsel claim was not only procedurally barred, but meritless. Cummings appeals. We affirm, addressing his contentions in order.

¶6 To succeed on a new-factor sentence modification motion, a defendant must prove, by clear and convincing evidence, the existence of a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***Id.*** at 8 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "[A] 'new factor' [also] must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing – something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). This court independently reviews the trial court's determination of "[w]hether a fact or set of facts constitutes a new factor." ***Franklin***, 148 Wis. 2d at 8.

¶7 Here, the sentencing court did not expressly rely or comment on the parole policy in existence at the time as a basis for the sentences it imposed. Although defense counsel, in his sentencing remarks, spent a significant amount of time outlining the parole possibilities, the circuit court made no mention of parole as a factor in sentencing. Instead, the circuit court imposed the sentences it did based upon the seriousness of the crime, the policy of deterrence, and the need for community protection. Thus, Cummings failed to demonstrate that the purported change in parole policy was a new factor.

¶8 In regard to Cummings's contention that the sentences imposed upon him – most particularly, the imposition of consecutive sentences – were harsh and unconscionable, we conclude that the circuit court incorrectly concluded that such a claim must be brought under WIS. STAT. RULE 809.30 or within ninety days of sentencing pursuant to WIS. STAT. § 973.19. A circuit court has the inherent, discretionary authority to modify a sentence if the sentence is unduly harsh or unconscionable. ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524. A court may conclude that a defendant's sentence is unduly harsh in light of the sentence imposed on a co-defendant if the defendant and co-defendant are similarly situated. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990).

¶9 Nonetheless, sentencing is a matter left to the circuit court's discretion, and a reviewing court will not interfere with a sentencing decision unless the circuit court erroneously exercises its discretion. ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). The record demonstrates that, even if the circuit court applied the incorrect legal standard when it denied Cummings's postconviction motion, the circuit court did not err in denying the motion. Here, the record demonstrates that the circuit court considered the appropriate sentencing factors when it imposed sentence. Although the basis for Cummings's motion is that his accomplice, Zoltowski, received lesser sentences running concurrently, there is no dispute that Cummings was the main actor in the underlying crimes: the circuit court at Zoltowski's sentencing indicated that Zoltowski was significantly less culpable in Joyce Heingartner's death than was Cummings. Given the nature and consequences of the crimes and the different roles of Zoltowski and Cummings, there was a reasonable and articulable basis for the difference in their sentences.

¶10 Finally, we turn to Cummings's contention that his trial counsel was ineffective for failing to develop an intoxication defense at trial. This claim is barred because Cummings raised it in direct postconviction and appellate proceedings, and this court rejected it. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter previously litigated in a prior appeal may not be relitigated in subsequent proceeding, "no matter how artfully the defendant may rephrase the issue"). Similarly, Cummings's claim that the circuit court should have ordered his competency evaluated before entering judgment is barred because Cummings easily could have raised this claim in earlier postconviction and appellate proceedings, but did not. ***Escalona-Naranjo***, 185 Wis. 2d at 184-85.

By the Court.—Order affirmed.

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