COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1663-CR **Cir. Ct. No. 1985CF1463**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE BERNARD DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. Di MOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Terrance Bernard Davis appeals from an order denying his sentence modification motion. The issue is whether an alleged change in parole policy constitutes a new factor warranting modification of two consecutive life sentences. We conclude that Davis's failure to explain why he did

not adequately raise this alleged change in parole policy in his previous sentence modification motions constitutes a procedural bar to this, his third, sentence modification motion. Therefore, we affirm.

¶2 In 1985, a jury found Davis guilty of two counts of first-degree murder while armed with a dangerous weapon, two counts of carrying a concealed weapon, and possession of a controlled substance. For the murders, the trial court imposed two life sentences, in addition to a five-year penalty enhancer on each count for using a dangerous weapon. For the concealed weapon convictions, the trial court imposed two nine-month sentences, and for the controlled substance conviction, the trial court imposed a thirty-day sentence. All sentences were imposed consecutively.[1] This court affirmed the judgment of conviction in an extensive opinion on direct appeal. *See* ***State v. Davis***, No. 86-0844-CR, unpublished slip op. at 22 (Wis. Ct. App. Sept. 23, 1987) ("***Davis I***").

¶3 In 2001, Davis moved for postconviction relief, seeking sentence modification among other things. The trial court denied that part of the motion seeking sentence modification for an alleged erroneous exercise of discretion as untimely, citing WIS. STAT. § 973.19 (2001-02). The trial court denied the remainder of the postconviction motion, including the sentencing challenge incident to Davis's ineffective assistance of trial counsel claim, as procedurally barred by WIS. STAT. § 974.06(4) (2001-02) and ***State v. Escalona-Naranjo***, 185

[1] Davis contends that the complaint charged him with only four offenses (only one concealed weapon charge), and that none of the charges included a penalty enhancer. The information however, charged Davis with the five offenses for which he was convicted. Each first-degree murder charge included a penalty enhancer for his use of a dangerous weapon. Consequently, there is no legitimate basis for amending the judgment of conviction or commuting his sentences.

Wis. 2d 168, 178, 517 N.W.2d 157 (1994). We affirmed the trial court's order, explaining extensively that to avoid the procedural bar of § 974.06(4) and ***Escalona***, the defendant must allege a "sufficient reason" for failing to adequately raise an issue previously. *See* ***State v. Davis***, No. 2001AP3177, unpublished slip op. at 2 (WI App Oct. 23, 2002) ("***Davis II***").

¶4 In 2004, Davis again sought sentence modification. The trial court denied the motion as procedurally barred by ***Escalona***, and denied Davis's related reconsideration motion. This court affirmed the trial court's orders. *See* ***State v. Davis***, No. 2004AP448-CR, unpublished slip op., ¶1 (WI App Jan. 19, 2005) ("***Davis III***"). In ***Davis III***, we addressed both of Davis's contentions: (1) trial counsel's alleged ineffectiveness for withholding psychological reports that he claimed cast doubt on his competency to stand trial (which Davis claimed constituted a new factor for sentence modification purposes); and (2) the unavailability of sentence adjustment pursuant to WIS. STAT. § 973.195 (amended Feb. 1, 2003), which Davis claimed constituted an ex post facto change in parole policy. We rejected the first issue as previously litigated and thus barred, pursuant to ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). *See* ***Davis III***, No. 2004AP448-CR, unpublished slip op., ¶10. We rejected the second issue on its merits. *See* ***id.***, ¶12.

¶5 In his current sentence modification motion, Davis relies on two letters from former Wisconsin Governor Tommy G. Thompson stating his endorsement for ending mandatory parole for violent offenders. One letter, written in 1994, directed the Department of Corrections Secretary "to pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date." The other was written in 1997 and

explained the "Truth-in Sentencing" proposal that was enacted in June of 1998 and applied to offenses committed after December 31, 1999.[2]

¶6 A postconviction movant must raise all grounds for postconviction relief on direct appeal (or in his or her original, supplemental or amended postconviction motion) unless, in a subsequent postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. *See* ***Escalona***, 185 Wis. 2d at 185-86. Davis offers no explanation on when he first became aware of these positions to demonstrate why he did not pursue them in his two previous postconviction motions, in 2001, and in 2004. He also did not explain how former Governor Thompson's positions affected his 1985 convictions and life sentences that involved discretionary release (as opposed to mandatory release, the subject of the 1994 Thompson correspondence). *See* WIS. STAT. § 53.11(1m) (1983-84) (inmate serving life term not entitled to mandatory release).[3] We consequently conclude that Davis has not alleged a sufficient reason for not previously raising this issue. Thus, his motion is procedurally barred by WIS. STAT. § 974.06(4) (2003-04) and ***Escalona***. *See* ***id***, 185 Wis. 2d at 185-86.

[2] *See* 1997 Wis. Act 283.

[3] Although Davis's contention in ***State v Davis***, No. 2004AP448-CR, unpublished slip op. (WI App Jan. 19, 2005) ("***Davis III"***) is somewhat different than his contention in this appeal, in ***Davis III***, "[w]e concur[red] in the State's observation that Davis has 'not explained how a statute that does not apply to his sentence and has never applied to his sentence frustrates the purpose of Davis's original sentence.' Therefore, [WIS. STAT.] § 973.195 is not a new factor." ***Id.***, ¶11. "We also fail to see how § 973.195 constitutes a change in parole policy for Davis." ***Id.***, ¶12.

WISCONSIN STAT. § 53.11(1m) (1983-84) applies to Davis's offenses; however that statutory section was renumbered WIS. STAT. § 302.11(1m) and amended effective January 1, 1990.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).