COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1534-CR **Cir. Ct. No. 1997CF971568**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTARIO ANTWAN DAVIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ontario Antwan Davis appeals *pro se* from orders denying his postconviction motion seeking sentence modification. Davis claims the trial court erred in ruling that his claim was procedurally barred by ***State v.***

Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Davis's claim is procedurally barred, we affirm.

BACKGROUND

¶2 On January 24, 1997, Davis was charged with first-degree reckless homicide, while armed, as party to a crime. Davis and another individual both shot at and killed Kevin Gibson in an apparent drug deal or robbery. Davis shot into a car where Gibson was located. On April 11, 1997, the charge against Davis was amended to first-degree intentional homicide, while armed, as party to a crime.

¶3 Pursuant to a plea agreement, the charges were amended again. Davis agreed to plead guilty to second-degree reckless homicide, while armed, as party to a crime and first-degree recklessly endangering safety, while armed. Davis signed a guilty plea questionnaire and stated that he understood that the second charge was based upon an unknown person being in the area where Davis was shooting. The State recommended a twenty-four year sentence, which was the maximum for the reduced charges.

¶4 The trial court sentenced Davis to a fifteen-year sentence on the homicide charge and a consecutive nine-year sentence on the recklessly endangering safety charge. On June 2, 1998, Davis's appellate attorney filed a notice of appeal, followed by a no-merit report. Davis filed a response to the no-merit report. This court summarily affirmed the convictions on January 11, 1999.

¶5 On August 3, 2001, Davis filed a *pro se* postconviction motion challenging the reckless endangerment conviction. The trial court denied the motion, citing ***Escalona-Naranjo***, and ruling that the issues Davis asserted could

have been raised in the no-merit appeal. Davis filed a notice of appeal on August 21, 2001. We again summarily affirmed, stating that all claims regarding the reckless endangerment conviction had been resolved in the prior direct appeal. Davis's petition for review to the supreme court was denied in March 2003.

¶6 On May 25, 2006, Davis filed another *pro se* postconviction motion in the trial court, seeking sentence modification on the reckless endangerment conviction. The trial court denied the motion, ruling: (1) motions for sentence modification based on an erroneous exercise of discretion must be made pursuant to WIS. STAT. § 973.19 within ninety days after sentencing or during the direct appeal; (2) this issue could have been raised during the direct appeal and therefore was procedurally barred; and (3) the claim was not a "new factor." On June 8, 2006, Davis filed a motion to reconsider, which the trial court denied. Davis now appeals.

DISCUSSION

¶7 Davis argues that the trial court erred in ruling that his claims were procedurally barred and that no new factor was presented. We reject Davis's contentions.

¶8 Defendants are not permitted to pursue an endless succession of postconviction remedies:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. ***Id.*** "[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error …." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998).

¶9 Moreover, the ***Escalona-Naranjo*** rules apply with equal force where the direct appeal was conducted pursuant to the no-merit process of WIS. STAT. § 809.32. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574 (The procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed, and the record demonstrates a sufficient degree of confidence in the result.).

¶10 Here, the record demonstrates that Davis's challenge to the sentence imposed for reckless endangerment could have, and should have, been raised in Davis's earlier direct appeal. Davis's direct appeal consisted of a no-merit report and a response filed by Davis. The no-merit procedures were followed and the record demonstrates a sufficient degree of confidence in the result. This court reviewed the issues raised in the no-merit report, in Davis's response, and any other potentially meritorious issues. We concluded that there were no meritorious issues.

¶11 Moreover, Davis has failed to present us with any reason why this issue could not have been raised during his direct appeal. The issues Davis raises now—the inability to identify the person endangered and the alleged failure of the

trial court to consider the specific facts of the reckless endangerment count—were known to the parties and the court at the time of sentencing. Thus, both issues could have been raised during the direct appeal. Based on the foregoing, we conclude that the trial court did not err in summarily denying Davis's postconviction motion based on the procedural bar.

¶12 Davis argues that the trial court's "abuse of discretion" and a "new factor" warrant modification of his sentence and should not be procedurally barred. Both of Davis's assertions are without merit.

¶13 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination, and an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988). The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The trial court may also consider secondary factors. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989).

¶14 The weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). After consideration of all of the relevant factors, the sentence may be based on any one of the primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall "allow the

trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable." ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

¶15 Our review of the record demonstrates that the trial court did not erroneously exercise its discretion. The trial court addressed the seriousness of the crime, noting its concern that Davis's conduct could result in innocent children "catch[ing] a stray bullet" and "bullets flying around parts of the city and randomly striking children" who may be on the street or in their homes. The trial court considered Davis's character and rehabilitative needs, including his extensive juvenile record, which included crimes of violence, periods of incarceration and failed past attempts at rehabilitation. The trial court's remarks also reflect its concern to protect the public. Thus, the three primary factors were considered by the trial court. Davis's main argument seems to be the trial court's focus on Gibson's murder, which formed the basis of the homicide count, improperly caused the trial court to impose the maximum sentence on the reckless endangerment count. We are not persuaded.

¶16 The two crimes charged here were inextricably related because they both occurred during one episode. Davis was shooting a gun into a car on a public street with other people in the area. The record makes clear that the homicide was not the only crime Davis committed. Davis admitted during the plea hearing that he also committed a second crime—that is, recklessly endangering the safety of an unidentified person. We have already concluded both in Davis's no-merit appeal and his first postconviction motion appeal that Davis had waived any objections to the sufficiency of the evidence supporting the reckless endangerment charge. Davis's attempt here to make that argument in the form of a challenge to the reckless endangerment sentence is hereby rejected.

¶17 Moreover, we are similarly not persuaded by Davis's attempt to argue that a new factor exists warranting sentence modification. 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."

State v. Ralph, 156 Wis. 2d 433, 436, 456 N.W.2d 657 (Ct. App. 1990) (citation omitted). The mere discovery of a fact which the court could have considered at sentencing, but did not, does not satisfy this standard. ***State v. Michels***, 150 Wis. 2d 94, 99-100, 441 N.W.2d 278 (Ct. App. 1989).

¶18 Rather, a new factor "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." ***Id.*** at 99. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether a fact or a set of facts constitutes a new factor is a question of law decided by this court without deference to the trial court. ***Id.*** at 9. Whether a new factor, once established, warrants sentence modification is a discretionary determination made by the trial court. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997).

¶19 Davis posits three facts which he contends constitute a new factor: (1) no one was injured; (2) Davis was not intentionally firing at an unknown person; and (3) the unidentified person did not really exist. None of these satisfy the new factor standard. The trial court knew that the one person injured during these crimes was the victim who was killed and that the second charge was part of

a plea agreement, wherein Davis would not be charged with first-degree intentional homicide, but rather would be charged with *reckless* homicide and endangerment instead. This is what Davis agreed to and the facts in the record support the charges. Davis picked up a gun and started shooting toward other people. One of those persons was killed. Others could have been killed, considering the location of the shooting and Davis's reckless disregard for the safety of others. Davis's profferings do not constitute a new factor and the trial court acted appropriately in denying his motion.

By the Court.—Orders affirmed.

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