COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1408-CR **Cir. Ct. No. 2002CF6416**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALVADOR CERVANTES-CARRILLO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Salvador Cervantes-Carrillo pled guilty to manufacturing or delivering more than one hundred grams of cocaine as a party to a crime. The circuit court imposed a seventeen-year prison sentence, of which Cervantes-Carrillo was ordered to serve a minimum of twelve years in initial

confinement. After the time for pursuing relief under WIS. STAT. RULE 809.30 (2003-04) had expired,[1] Cervantes-Carrillo sought sentence modification *pro se*, arguing that he had not been informed of his rights under the Vienna Convention on Consular Relations[2] at the time of his arrest. He also argued that his sentence was unduly harsh and unconscionable and that he had been sentenced on the basis of inaccurate information. The circuit court denied the motion without a hearing, and Cervantes-Carrillo appeals. We conclude that the circuit court properly denied Cervantes-Carrillo's claims, and we therefore affirm the postconviction order.

¶2 Cervantes-Carrillo, a citizen of Mexico, was charged with three drug-trafficking crimes. On the day of trial, he pled guilty to two charges in exchange for dismissal of the third and for a relatively favorable sentencing recommendation by the State. In 2003, the circuit court imposed the prison sentence described above.

¶3 Cervantes-Carrillo filed a notice of intent to pursue postconviction relief and he was appointed counsel to represent him in WIS. STAT. RULE 809.30 postconviction and appellate proceedings. Counsel obtained extensions of the applicable postconviction deadlines through July 2004, but ultimately Cervantes-Carrillo pursued postconviction relief *pro se* by filing the motion that is the subject of this appeal in April 2005. The motion, which was entitled "Sentence Modification," was filed outside of RULE 809.30 deadlines, and Cervantes-Carrillo

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

[2] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77.

was thereby limited to seeking sentence modification based on a new factor. 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶4 Cervantes-Carrillo first argued that sentence modification was appropriate because the circuit court had failed to consider "a due process violation" of his rights under the Vienna Convention. He claimed that under an opinion issued by the International Court of Justice after he was sentenced, ***Concerning Avena and other Mexican Nationals***, 2004 I.C.J. 128 (Mar. 31), he, as a foreign national, should have been advised of his rights under the Convention at the time of his arrest, just as he was advised of his rights under the U.S. Constitution. He maintained that the failure to advise him of those rights was a manifest injustice because it deprived him of the opportunity to contact the Mexican consulate regarding financial and legal assistance. He argued that ***Avena***, which was decided after his sentencing, was a new factor warranting sentence modification.

¶5 The circuit court[3] denied this claim, reasoning that Cervantes-Carrillo was not entitled to relief under ***State v. Navarro***, 2003 WI App 50, 260 Wis. 2d 861, 659 N.W.2d 487. The circuit court correctly stated that in ***Navarro***

[3] Although the Hon. Elsa Lamelas conducted circuit court proceedings involving Cervantes-Carrillo through sentencing, the Hon. Mel Flanagan handled Cervantes-Carrillo's postconviction claims.

this court held "that the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case." *See* ***id.***, ¶1. The circuit court concluded that, under ***Navarro***, "neither the arresting officers nor the State owed any duty to the defendant under the Vienna Convention."

¶6 Cervantes-Carrillo's second contention was that the sentence imposed on him was unduly harsh and excessive. The circuit court denied this portion of the motion because the claim that the circuit court erroneously exercised its sentencing discretion was untimely under either WIS. STAT. § 973.19 or WIS. STAT. RULE 809.30. Finally, the circuit court rejected Cervantes-Carrillo's third contention—that he had been sentenced on the basis of inaccurate information, specifically that his co-defendant had been more cooperative with the police investigation and had a lesser role in the crime. The circuit court held that the information on which the sentencing court relied was not inaccurate.

¶7 Cervantes-Carrillo appeals from the circuit court's rulings. His first argument relates to his claim that the failure to advise him of his rights under the Vienna Convention entitled him to sentence modification or other postconviction relief. He argues that the circuit court's reliance on ***Navarro*** is inappropriate, given that the International Court of Justice held in ***Avena*** that a foreign person has a right to confer with his or her consulate at the time of arrest and that the person can enforce that right in a domestic criminal case. We disagree.

¶8 Although Cervantes-Carrillo correctly represents the ***Avena*** holding, he is incorrect that ***Avena*** is controlling law in Wisconsin. This court cannot overrule ***Navarro*** because we may not overrule, modify, or withdraw language from a previously published decision of the court of appeals. *See* ***Cook v. Cook***,

208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Under ***Navarro***, Cervantes-Carrillo does not have the requisite standing to claim a violation of the Vienna Convention.

¶9 Cervantes-Carrillo's remaining claims are both procedurally barred and meritless. These arguments—that the circuit court erroneously exercised its discretion by imposing an unduly harsh sentence and that the circuit court sentenced him on the basis of incorrect information—were not filed timely. Under WIS. STAT. § 973.19, a challenge to a sentence that is not new-factor based must be filed within ninety days of sentencing. Under WIS. STAT. RULE 809.30, the deadline for raising such a challenge is flexible and may be extended by this court. As noted above, Cervantes-Carrillo obtained extensions of this deadline, but his sentence-modification motion was filed eight months after the deadline expired. The circuit court correctly rejected both arguments on that basis.

¶10 Moreover, the sentencing transcript and the remainder of the record demonstrate that both arguments are also meritless. A sentencing court must consider the sentencing factors appropriate to the crime. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987) (primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection). The circuit court noted that Cervantes-Carrillo's crime was "extremely serious" given the large amount of cocaine delivered. The circuit court also noted that it found it hard to believe Cervantes-Carrillo's claim that he had never been involved in the drug trade prior to this crime, pointing out that "it is difficult to believe that [the defendant's] sole and only involvement with the drug business was to deliver three kilos of cocaine that had been negotiated to have a purchase price of 21,000 dollars." The circuit court also noted the considerable evidence that indicated the drug operation was

quite sophisticated. The circuit court noted, though, that Cervantes-Carrillo was apparently attempting to support his family. Given the circuit court's view that the "principal factor [driving] the sentence" was the seriousness of the crime, the sentence imposed is neither harsh nor unconscionable. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (sentence is excessive only when "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").

¶11 Similarly, Cervantes-Carrillo's argument that the circuit court relied on inaccurate information when it imposed sentence is meritless. Cervantes-Carrillo argued that the circuit court erroneously believed that he had a larger role in the crime than he did and that his co-defendant had been more cooperative than he had. The record shows that the circuit court was advised by the State that Cervantes-Carrillo had been less cooperative than his co-defendant, and the circuit court set forth its reasons on the record as to why it believed that representation. It noted in particular, Cervantes-Carrillo's stance that he was unaware that drug dealing was taking place in his residence and that he had never before engaged in drug trafficking. The circuit court's view of the evidence and the level of Cervantes-Carrillo's participation in the crime is not unreasonable, and nothing in the largely unsupported postconviction motion undercuts the reasonableness of the circuit court's view.

By the Court.—Order affirmed.

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