COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2671-CR **Cir. Ct. No. 1995CF954770A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY GILMORE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Cory Gilmore appeals from a postconviction order denying his sentence modification motion.[1] The issues are whether Gilmore is entitled to sentence modification based on alleged new factors, or because the trial court imposed an allegedly harsh and excessive sentence. We conclude that sentence modification is not warranted because Gilmore's sentencing factors are not new, and we had previously rejected his harsh and excessive challenge. Therefore, we affirm.

¶2 A jury found Gilmore guilty of two armed robberies, an aggravated battery, and a substantial battery arising from two liquor store robberies. The trial court imposed a fifty-four-year aggregate sentence. Ultimately, appointed counsel filed a no-merit report to which Gilmore responded. In his no-merit response, Gilmore identified one of the same issues he raises here, as well as his harsh and excessive challenge. This court rejected both potential issues (as well as others), and summarily affirmed the judgment of conviction and postconviction order, concluding that there were no arguably meritorious issues to pursue. *See* ***State v. Gilmore***, No. 2002AP2511-CRNM, unpublished slip op. (WI App Sept. 16, 2003) ("***Gilmore I***").

¶3 Gilmore filed a *pro se* postconviction motion raising a due process claim for being sentenced on allegedly false information (raised in ***Gilmore I*** and again in the instant appeal), sentencing challenges, and the ineffective assistance of postconviction counsel. The trial court denied the ineffective assistance claim as not viable as alleged, and denied the remainder of the motion as procedurally

[1] That postconviction order also denies Gilmore's motion for relief pending appeal. Gilmore does not pursue his challenge to that part of the order.

barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). This court affirmed the trial court's postconviction order on the basis of ***Escalona*** and ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574 (extending ***Escalona***'s procedural bar to no-merit appeals). *See* ***State v. Gilmore***, No. 2005AP828, unpublished slip op. ¶¶6, 10 (WI App July 18, 2006) ("***Gilmore II***").

¶4 During the pendency of ***Gilmore II***, Gilmore filed another *pro se* postconviction motion, seeking sentence modification on the basis of three allegedly new factors and to remedy an unduly harsh sentence. The trial court denied the motion, ruling that Gilmore had waived these issues because he had not raised them in his ***Gilmore I*** response. This postconviction order is the subject of this appeal.

¶5 In his postconviction motion, Gilmore alleges that the trial court relied upon the following three factual errors when it imposed sentence: (1) the victim required 210 stitches for his injuries, rather than 150 stitches; (2) Gilmore had been twice sentenced to a one-year term of confinement as a juvenile, rather than only once; and (3) Gilmore's accomplice pointed a gun at the victim. Preliminarily, the first issue, regarding the number of stitches, was previously litigated and rejected in the context of an ineffective assistance claim in ***Gilmore II***. *See* ***Gilmore II***, No. 2005AP828, unpublished slip op. ¶¶10-11. We will not revisit previously rejected issues. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). The second and third issues are not new factors.

¶6 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. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). ***Michels*** further explains that "[t]here 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.*** The defendant must clearly and convincingly prove the existence of a new factor warranting sentence modification. *See* ***Franklin***, 148 Wis. 2d at 8-10. "Whether a set of facts is a 'new factor' is a question of law which we review without deference to the trial court. Whether a new factor warrants a modification of sentence rests within the trial court's discretion." ***Michels***, 150 Wis. 2d at 97 (citation omitted).

¶7 If the trial court misstated Gilmore's juvenile background and that his accomplice was pointing the gun at the robbery victim, Gilmore and his trial counsel were obliged to correct those misstatements at sentencing, rather than allowing the trial court to allegedly rely on them when sentencing Gilmore, waiting to raise them nine years later. Notwithstanding the applicability of waiver, these issues are not "new." *See* ***Rosado***, 70 Wis. 2d at 288.

¶8 These latter two issues, not being new factors, then must be raised pursuant to WIS. STAT. § 974.06 (2005-06).[2] As such, Gilmore must overcome the

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

procedural bar of ***Escalona*** and ***Tillman*** by asserting a sufficient reason for failing to raise these issues previously. *See* ***Escalona***, 185 Wis. 2d at 185-86; ***Tillman***, 281 Wis. 2d 157, ¶19. Gilmore has not explained why he did not raise these alleged inaccuracies in his ***Gilmore I*** response (much less during sentencing).[3] Consequently, these issues are procedurally barred by ***Escalona*** and ***Tillman***.

¶9 Gilmore also challenges his sentence as unduly harsh. We rejected that precise issue in ***Gilmore I***. *See* ***Gilmore I***, No. 2002AP2511-CRNM, unpublished slip op. at 4. We will not consider it again. *See* ***Witkowski***, 163 Wis. 2d at 990.

By the Court.—Order affirmed.

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

[3] Gilmore raised these issues as new factors. As such, no "sufficient reason" is required. *See* ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. Gilmore's mischaracterization of these issues, however, does not excuse him from the "sufficient reason" prerequisite that applies to the motion's accurate characterization.