COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP420-CR **Cir. Ct. No. 1999CF2189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Andrew Obriecht appeals from an order denying his motion to modify a sentence imposed in 2001, which has already been

affirmed once on a prior pro se appeal and once on a habeas corpus petition that did not reach the merits.[1] The State contends Obriecht's present claims are procedurally barred, and further requests limitations on Obriecht's future ability to file cases as a sanction for filing a frivolous appeal. We agree the present claims are procedurally barred, but decline to impose sanctions.

BACKGROUND

¶2 In 2000, Obriecht entered a no-contest plea to battery as a habitual offender and was placed on probation. In 2001, following the revocation of Obriecht's probation, the court imposed a one-year sentence on the battery charge to be served consecutive to that in another case. After a series of extensions, a competency proceeding, the withdrawal of postconviction counsel, and an unsuccessful writ petition claiming ineffective assistance of postconviction counsel, Obriecht eventually filed a pro se appeal from his post-revocation sentence. We affirmed in an opinion dated October 27, 2005.

¶3 Obriecht next filed the "Motion for New Sentencing and Sentence Modification," which is the subject of this appeal. He claimed: (1) the trial court erroneously exercised its discretion during the post-revocation proceeding by failing to adequately discuss the relevant sentencing factors; (2) the trial court was acting upon inaccurate information contained in the complaint and police reports; and (3) defense counsel failed to provide the court at the post-revocation hearing with previously gathered witness statements that undermined the facts presented in the complaint and police report. The trial court denied Obriecht's sentence

[1] The prior unpublished appeal was assigned docket number 2005AP254 and the writ was assigned docket number 2005AP14-W.

modification motion without a hearing on the grounds that it was procedurally barred by the successive motion principle set forth in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

STANDARD OF REVIEW

¶4 We independently review whether claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

DISCUSSION

¶5 Obriecht contends that the trial court improperly applied ***Escalona-Naranjo*** to his motion because the motion was brought under the court's inherent authority to modify a sentence based upon a new factor, rather than under WIS. STAT. § 974.06 (2005-06).[2] The State asserts that the trial court properly applied ***Escalona-Naranjo*** without even addressing the distinction raised by Obriecht, which is the primary focus of his appeal. The State further asks this court to impose restrictions on Obriecht's future filings based upon an alleged pattern of "repetitive and frequent filings" he has made in a number of cases.

¶6 We begin by noting that there a number of mechanisms for seeking postconviction review of a sentence, depending upon the type of issue to be raised and the amount of time that has passed since the sentence was imposed. For instance, WIS. STAT. §§ 973.19 and 974.02 each permit a defendant to challenge a sentence on any grounds—including an alleged abuse of discretion—within ninety days after sentencing or according to the deadlines set forth in WIS. STAT. RULE

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

809.30, respectively. WISCONSIN STAT. § 974.06(1) permits a defendant who is still in custody to challenge a sentence after the § 973.19 and RULE 809.30 deadlines have expired, but it limits the available grounds to such things as constitutional or jurisdictional issues. WISCONSIN STAT. § 973.13 authorizes a defendant to challenge a sentence which exceeds the maximum term at any time, since such a sentence is void. Finally, the court also has inherent power to modify a sentence at any time based on new factors. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); ***State v. Krueger***, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984).

¶7 ***Escalona-Naranjo*** holds that a constitutional claim that could have been raised in a direct appeal or in a postconviction motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim earlier. 185 Wis. 2d at 185. This procedural bar plainly applies to successive motions filed under § 974.06, since the court was specifically interpreting language from that statute in that case.[3]

[3] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

¶8 The State seems to presume that the ***Escalona-Naranjo*** doctrine also applies to all other postconviction motions, without regard for the statute or other authority under which they were brought. However, we have previously held that the ***Escalona-Naranjo*** doctrine does not bar a defendant from seeking relief under WIS. STAT. § 973.13 for a sentence imposed in excess of the statutory maximum. ***State v. Flowers***, 221 Wis. 2d 20, 22-23, 586 N.W.2d 175 (Ct. App. 1998). In addition, we have explicitly declined in at least one instance to address whether the ***Escalona-Naranjo*** doctrine extends to a request for resentencing based upon a new factor filed in conjunction with a WIS. STAT. § 974.06 issue. ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507.

¶9 There may be good reasons for extending the ***Escalona-Naranjo*** doctrine to new factor sentencing motions. However, the State has neither cited any published case in which we have applied ***Escalona-Naranjo*** to a motion brought outside of WIS. STAT. § 974.06 to modify a sentence based upon a new factor, nor provided any argument as to why we should do so. In any event, we need not resolve the issue. Our review of the record shows that two of the three issues Obriecht attempts to raise cannot properly be characterized as "new factors," and the third, which might arguably be construed as a new factor, is procedurally barred for reasons other than ***Escalona-Naranjo***. In other words, we conclude that the trial court could properly deny Obriecht's motion, even assuming for the sake of argument that ***Escalona-Naranjo*** does not apply to new factor motions. *See* ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999) (We may affirm a decision, even when the trial court has relied upon the wrong rationale, if we can determine for ourselves that the facts of record provide a basis for the trial court's decision.).

¶10 A new sentencing factor is "a fact or set of facts highly relevant to the sentence determination, that was not known to the trial judge at the time of the original sentencing because it was not then in existence or was 'unknowingly overlooked' by all parties." ***Grindemann***, 255 Wis. 2d 632, ¶22 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

¶11 Obriecht's first issue — the trial court's allegedly deficient explanation of the basis for the battery sentence — does not present a new factor because it does not focus on factual information that was before the court. Rather, a challenge to the trial court's sentencing discretion is an issue that can be raised only in a first postconviction motion or appeal as of right under WIS. STAT. § 973.19 or WIS. STAT. § 974.02. Since the deadlines for bringing such motions have long since passed, Obriecht's first issue was time barred.

¶12 Obriecht's second issue — the trial court's alleged reliance on inaccurate sentencing information in the complaint and police reports — raises a due process claim. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Regardless how Obriecht attempted to label it, this issue is constitutional in nature, and thus falls within the scope of a WIS. STAT. § 974.06 motion, not the court's inherent authority to consider new factors. Therefore, Obriecht's second issue was, in fact, subject to ***Escalona-Naranjo*** and was procedurally barred because Obriecht failed to provide an adequate reason why he could not have raised it in his prior appeal.

¶13 Obriecht's third contention — that defense counsel failed to provide the court with witness statements from other inmates who claimed the victim threatened Obriecht with a book before Obriecht pushed him into a wall — appears to raise an ineffective assistance of counsel claim that is constitutional in

nature, and therefore is also within the scope of WIS. STAT. § 974.06 and subject to ***Escalona-Naranjo***. Liberally construed, this contention might also raise a new factor claim that the parties unknowingly overlooked the statements at sentencing.[4] We note, however, that Obriecht already raised this issue on pages 40-41 of his opening brief in appeal no. 2005AP254. An appellant may not relitigate matters previously decided, no matter how artfully rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Therefore, Obriecht's third issue is barred by the law of the case, regardless whether it might also be barred by ***Escalona-Naranjo***.

¶14 While we understand the State's frustration with Obriecht's general pattern of filing successive motions, we will not impose the type of filing sanction the State seeks absent a specific finding that a particular appeal is frivolous within the meaning of WIS. STAT. RULE 809.25(3)(c). *See generally* ***State v. Casteel***, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338. Given the lack of precedent addressing whether ***Escalona-Naranjo*** does in fact apply to new factor sentencing motions, we decline to find the present appeal frivolous.

By the Court.—Order affirmed.

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

[4] It is unclear whether the statements were actually overlooked, because counsel alluded to the fact that the victim had initiated the confrontation by making some "loud and rude comments," and that "some words passed between" Obriecht and the victim before Obriecht shoved the victim.