COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP285-CR **Cir. Ct. No. 2004CF4136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMIAH JACOB LAMBERT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jeremiah Jacob Lambert appeals from an order summarily denying his sentence modification motion. We conclude that Lambert is not entitled to sentence modification or resentencing because the trial court

failed to consider the sentencing guidelines when it imposed sentence. Therefore, we affirm.

¶2 Lambert was convicted of four counts of robbery with the threat of force as a repeat offender. The trial court imposed a twenty-year aggregate sentence, comprised of sixteen- and four-year respective aggregate periods of initial confinement and extended supervision. This court affirmed the judgment of conviction in a no-merit appeal. *See* ***State v. Lambert***, No. 2006AP889-CRNM, unpublished slip op. (WI App July 20, 2006).

¶3 Lambert moved *pro se* for sentence modification, alleging that the trial court's failure to consider the sentencing guidelines constituted a new factor warranting sentence modification. The trial court summarily denied the motion; Lambert appeals.

¶4 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).

¶5 Lambert alleges that the sentencing guidelines were overlooked by counsel and by the trial court at sentencing. Lambert has not shown that these guidelines were "unknowingly overlooked," or how the trial court's failure to consider them "frustrate[d] the purpose of the original sentence." ***Rosado***, 70 Wis. 2d at 288; ***Michels***, 150 Wis. 2d at 99. Consequently, Lambert's alleged issue is not a new factor.

¶6 The trial court's failure to consider the sentencing guidelines is not a new factor, but a challenge to the trial court's sentencing discretion. As such, it was required to be challenged pursuant to WIS. STAT. §§ 973.19 or 809.30(2)(h) (2005-06).[1] The time limits for challenges pursuant to those two statutes have

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

long since expired.[2] Consequently, Lambert's challenge, as properly characterized, was untimely.[3]

By the Court.—Order affirmed.

This opinion will not be published.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

[2] WISCONSIN STAT. § 973.19(1) affords a defendant ninety days from sentencing to file a modification motion; Lambert was sentenced on February 2, 2005. Lambert's deadline for filing a postconviction motion or a notice of appeal pursuant to WIS. STAT. RULE 809.30(2), was extended to and ultimately expired on April 14, 2006. Remittitur occurred August 29, 2006. Lambert filed his sentence modification motion on January 10, 2007, long after the expiration of both deadlines.

[3] This court considered a variety of arguable sentencing challenges in Lambert's previous appeal. *See* ***State v. Lambert***, No. 2006AP889-CRNM, unpublished slip op. at 3-4 (WI App July 20, 2006). Although we did not explicitly consider the trial court's failure to consider the sentencing guidelines, we explained why a sentencing challenge lacked arguable merit. We addressed the trial court's application of the primary sentencing factors, its explanation for the sentence it imposed, and ruled that the trial court did not rely on any improper factors, did not impose an excessive or unduly harsh sentence, and that the sentence was "within the applicable penalty range," in addition to explicitly rejecting the challenges Lambert identified in his response. ***Id.*** Our independent conclusion, that challenging the sentence would lack arguable merit, encompassed Lambert's current challenge because we previously explained why the sentence imposed was proper, even if we did not concoct and refute every imaginable sentencing challenge, such as the trial court's failure to consider the guidelines. We will not revisit our decision that a sentencing challenge would lack arguable merit. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

In his appellate brief, Lambert contends that this issue is not procedurally barred by ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574 (extending a procedural bar to no-merit appeals pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994)). Lambert did not raise this sentencing challenge pursuant to WIS. STAT. § 974.06, nor is it the type of issue that meets the criteria of § 974.06(1). Consequently, we do not rely on ***Escalona*** and ***Tillman*** to affirm the denial of Lambert's sentence modification motion.