COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1673-CR **Cir. Ct. No. 2003CF5885**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD M. MYNOR,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Richard M. Mynor appeals *pro se* from an order denying his second postconviction motion for sentence modification. We affirm.

Background

¶2 In 2004, a jury convicted Mynor of two counts of felony bail jumping and one count of obstructing an officer. The circuit court imposed determinate sentences of two years and six months for each of the felony bail jumping convictions, and it imposed a determinate two-year sentence for obstructing an officer. The court found Mynor ineligible for the Challenge Incarceration Program and the Earned Release Program.[1]

¶3 Mynor appealed his conviction pursuant to the procedure of WIS. STAT. RULE 809.32 (2003-04).[2] Mynor's appellate counsel filed a no-merit report, and Mynor responded. This court conducted an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), and we summarily affirmed. *See* ***State v. Mynor***, No. 2004AP3221-CRNM, unpublished slip op. (WI App Mar. 1, 2006) (***Mynor I***). Our decision and order included a discussion of Mynor's sentencing, and we concluded that the circuit court appropriately exercised its sentencing discretion. *See* ***id.*** at 5-7.

¶4 In 2006, Mynor filed a postconviction motion asking the circuit court to modify his sentences by finding him eligible for the Challenge Incarceration Program. The court denied the motion; Mynor did not appeal.

[1] Both the Challenge Incarceration and Earned Release Programs allow an eligible inmate who successfully completes either program to be released early from prison to extended supervision. WIS. STAT. §§ 302.045(1) (2005-06) & (3m); 302.05(3)(c)2. (amended July 27, 2005).

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

¶5 In 2007, Mynor filed a second postconviction motion. He argued that the circuit court erroneously exercised its discretion at sentencing by finding him ineligible for the Challenge Incarceration Program, and that the court erred as a matter of law by imposing a sentence for obstructing an officer that exceeded the statutory maximum. The circuit court denied the motion, concluding that it was untimely and inadequately supported. This appeal followed.

Discussion

¶6 Mynor first contends that the circuit court erroneously exercised its sentencing discretion in two interrelated ways. He asserts that the circuit court failed to consider the mandatory sentencing factors in the manner prescribed by ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. He further asserts that the court's erroneous exercise of discretion resulted in an improper denial of his eligibility for the Challenge Incarceration Program. The claims are barred.

¶7 A defendant may challenge his or her sentence as a matter of right either in a direct appeal, within the deadlines set by WIS. STAT. RULE 809.30, or by motion pursuant to WIS. STAT. § 973.19, within ninety days after the sentence or order is entered. Mynor could not bring his challenges under these statutes because the deadlines they impose have long since passed. Instead, Mynor grounded his postconviction motion on the circuit court's inherent authority to modify a sentence. That authority is inapplicable.

¶8 The circuit court may exercise inherent authority to modify a sentence without regard to time limits only if the defendant proves that a new factor justifies a modification. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895. 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 … it was unknowingly overlooked by all of the parties.'" ***State v. Michels***, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989) (citation omitted). Mynor's allegations that the circuit court failed to consider mandatory sentencing factors or properly apply ***Gallion*** are not new factors. Mynor's claims therefore could not be addressed pursuant to the court's inherent authority.

¶9 WISCONSIN STAT. § 974.06 is a potential alternate avenue for Mynor to pursue relief from his sentences. The statute permits defendants to raise constitutional and jurisdictional claims after the time for an appeal has passed. ***State v. Evans***, 2004 WI 84, ¶¶32-33, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Mynor's postconviction motion does not reference § 974.06, but we may look beyond the label that a prisoner applies to pleadings to determine if he or she is entitled to relief. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). In this case, however, Mynor has not alleged any constitutional or jurisdictional bases for modifying his sentence that would support a claim for relief pursuant to § 974.06. Moreover:

> [w]e 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.

State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Absent a "sufficient reason" for doing so, defendants may not raise claims in a § 974.06 motion that could have been brought in a prior appeal or motion. ***Id.***

¶10 The procedural bar of ***Escalona-Naranjo*** applies 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. If the no-merit procedure was followed and permits a sufficient degree of confidence in the result, the defendant is barred from bringing postconviction motions raising claims that could have been addressed during the no-merit appeal. ***Id.***

¶11 In Mynor's case, the no-merit procedure was followed, and we specifically addressed the circuit court's exercise of sentencing discretion. We are confident in our earlier review of the potential issues. Accordingly, Mynor may not pursue relief from his sentences pursuant to WIS. STAT. § 974.06.

¶12 Further, Mynor raised the question of his eligibility for the Challenge Incarceration Program in his first postconviction motion, and the circuit court considered and denied the request. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Accordingly, we will not address Mynor's renewed claims for sentence modification.

¶13 Mynor also asserts that his two-year term of imprisonment for obstructing an officer illegally exceeds the nine-month maximum sentence permitted for the offense. WISCONSIN STAT. § 973.13 (2005-06) provides that a sentence in excess of the legal maximum shall be void. This statute reflects a mandate to relieve defendants from illegally excessive sentences "and is not 'trumped' by a procedural rule of exclusion." ***State v. Flowers***, 221 Wis. 2d 20,

29, 586 N.W.2d 175 (Ct. App. 1998). Accordingly, we address the claim, but we conclude that Mynor is not entitled to relief.

¶14 Mynor was charged with obstructing an officer as a habitual offender. As relevant here, a habitual offender is a person who has been convicted of a felony within the five years preceding the crime for which he or she is being sentenced. *See* WIS. STAT. § 939.62. The jury returned a guilty verdict on the underlying charge of obstructing an officer. As required, the State proved Mynor's habitual offender status after the verdict.[3] *See* ***State v. Saunders***, 2002 WI 107, ¶46, 255 Wis. 2d 589, 649 N.W.2d 263.

¶15 Obstructing an officer is a Class A misdemeanor, carrying a maximum sentence of nine months in jail. *See* WIS. STAT. §§ 946.41(1), 939.51(3)(a). Mynor's status as a repeat offender, however, increased his exposure to two years of imprisonment. *See* WIS. STAT. § 939.62(1)(a) (providing that if an actor is a repeater when sentenced, "[a] maximum term of imprisonment of one year or less may be increased to not more than 2 years"). Accordingly, the two-year sentence that the court imposed for obstructing an officer does not exceed the maximum allowed by law.

¶16 We observe that the amended judgment of conviction erroneously shows that Mynor was convicted of obstructing an officer as a party to a crime, and it fails to reflect that he was convicted and sentenced as a habitual criminal.

[3] The presentence investigation report contains the dates of Mynor's qualifying prior felony convictions, proving Mynor's status as a habitual offender. *See* ***State v. Caldwell***, 154 Wis. 2d 683, 693-94, 454 N.W.2d 13 (Ct. App. 1990) (the State may prove defendant's habitual offender status with presentence report). Mynor's trial counsel additionally conceded a factual basis for finding Mynor a habitual offender.

These errors are clerical. A clerical error is "a mere omission to preserve of record, correctly in all respects, the actual decision of the court …." ***Bostwick v. Van Vleck***, 106 Wis. 387, 390, 82 N.W. 302 (1900). Courts may correct clerical errors at any time. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. Accordingly, upon remittitur, the circuit court shall direct the clerk of circuit court to enter a corrected judgment of conviction reflecting Mynor's conviction for obstructing an officer as a habitual criminal and reflecting that Mynor was not convicted as a party to a crime.[4]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

[4] We further observe that record item forty-five is a transcript of a circuit court proceeding that appears unrelated to Mynor's prosecution. We direct the court to ensure that the record in this case accurately reflects only the proceedings related to Mynor.