

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2007AP410-CR
2007AP411-CR**

**Cir. Ct. Nos. 1998CF3215
1998CF4403**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NORRIS J. BATSON,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer¹ and Kessler, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Norris J. Batson appeals from a consolidated order summarily denying his sentence modification motion. The issue is whether Batson has made a sufficient showing of a new factor to warrant an evidentiary hearing to further explore the circumstances of that alleged new factor. We conclude that Batson has waived his objection to what he now claims were misstatements in the guilty plea questionnaire and waiver of rights forms he signed, and by the prosecutor and the trial court at the plea and sentencing hearing. Therefore, we affirm.

¶2 In Milwaukee County Circuit Court Case No. 1998CF3215 (Appeal No. 2007AP410), Batson pled guilty to delivering no more than five grams of cocaine as a party to the crime, and in Milwaukee County Circuit Court Case No. 1998CF4403 (Appeal No. 2007AP411), Batson pled guilty to possessing no more than five grams of cocaine with intent to deliver.² The trial court imposed twenty-four- and thirty-month respective sentences to run consecutively to each other and to any other sentence, specifically the sentence Batson was serving for a federal conviction. Batson did not appeal from either judgment.

¶3 Batson moved for sentence modification, contending that the plea bargain to which he agreed included a recommendation (unbeknownst to the trial court) for the state sentences to run concurrent to the federal sentence. He filed an affidavit, averring that the plea bargain contemplated a sentencing structure that was concurrent to the federal sentence he was serving. He did not however, file a corroborative affidavit from the prosecutor or from defense counsel. Batson

² These were two separate circuit and appellate court cases. Batson filed a consolidated motion for sentence modification that was denied in a consolidated order. Consequently, we consolidated these cases on appeal for briefing and dispositional purposes.

characterizes the trial court's unawareness of this aspect of the plea bargain as a new factor warranting sentence modification. The trial court summarily denied the motion, ruling that "[t]his is not a new factor claim," and that the record does not support his position. Batson 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). The allegedly concurrent aspect of the plea bargain, not conveyed to the trial court, is not a new factor, but is more appropriately characterized as a claim for breach of the plea bargain.

¶5 Batson waived his right to object to what could be characterized as a breach of the plea bargain. During the plea colloquy the prosecutor, referring to the delivery charge, expressly stated to the trial court that the State was “recommending that the sentence be either concurrent or consecutive up to the Court. The defendant is ... serving a lengthy prison sentence from the federal system.” The prosecutor essentially repeated the foregoing recommendation in regard to the possession charge. The trial court then repeated that “the State’s ... taking no position as to whether it would be concurrent or consecutive to each other or the federal prison system[.]” The prosecutor clarified that he

recommended that the sentences be imposed consecutively to each other for the state offenses, but did not specify whether the state sentences should be imposed consecutively or concurrently to the federal sentence. Defense counsel agreed to that rendition of the plea bargain, and Batson personally assured the trial court that that was also his understanding of the State's sentencing recommendation. Each guilty plea questionnaire also indicated in handwriting that the State's sentencing recommendation left the consecutive or concurrent nature of the sentences to the trial court's discretion. The plea questionnaires and the trial court also specifically notified Batson that the trial court was not bound by any of the sentencing recommendations, which Batson agreed he understood.

¶6 The record belies Batson's postconviction averments. Batson did not object to the prosecutor's repeated recitations of the plea bargain to the trial court. Likewise, Batson did not object to his trial counsel's confirmation of the prosecutor's rendition of the plea bargain, and expressly confirmed its accuracy to the trial court. After the terms of the plea bargain had been recited and confirmed, Batson pled guilty and then indicated, in response to his trial counsel's inquiry, that he was prepared to proceed immediately to sentencing if the trial court was available to do so.

¶7 Batson had ample and repeated opportunities to object to what he now contends was a breach of the plea bargain. However, he did not object. Consequently, Batson has waived his right to object. *See State v. Smith*, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989) ("the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant.").

By the Court.—Order affirmed.

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

