

**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 No. 2007AP1917-CR

Cir. Ct. No. 1990CF902638

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALKER B. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer¹, Fine and Kessler, JJ.

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

¶1 PER CURIAM. Walker B. Johnson appeals from an order denying his postconviction motion seeking to modify his sentence. He also appeals from an order denying his motion for reconsideration. Johnson claims two new factors exist that warrant the modification of his sentence. First, he claims that the sentencing court did not consider the ABA Standards for Criminal Justice Sentencing pertaining to consecutive sentences. Second, he claims that his trial lawyer did not advise him accurately of party to a crime liability. Because Johnson failed to establish a new factor, and because his claim was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 In March of 1991, a jury convicted Johnson of four counts of armed robbery, each as a party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) & 2 and 939.05 (1989-90).² The trial court sentenced Johnson to four consecutive twenty-year prison terms. Johnson filed an initial postconviction motion for sentence reduction claiming that the trial court abused its discretion by imposing a sentence of “unwarranted severity.” This was denied on January 10, 1992. Johnson then filed another motion for postconviction relief, seeking a new trial. The trial court denied the motion on June 26, 1992.

¶3 Johnson filed a notice of appeal, and his appellate counsel filed a no-merit report. This court affirmed Johnson’s judgment of conviction and the orders denying his two postconviction motions in June of 1993.

² All references to the Wisconsin Statutes are to the 1989-90 version unless otherwise noted.

¶4 In March of 2001, Johnson filed a *pro se* motion to modify his sentence and a motion for postconviction relief under WIS. STAT. § 974.06, raising ineffective assistance of trial counsel. The trial court denied the motion under *Escalona-Naranjo*, 185 Wis. 2d at 179, holding that Johnson could have raised these issues in his response to the no merit report filed ten years ago, but did not. Johnson timely appealed and this court summarily affirmed the trial court's denial of Johnson's § 974.06 motion.

¶5 On December 8, 2006, Johnson, by counsel, filed a motion to modify his sentence, based on the existence of two new factors: (1) the sentencing court had not considered the ABA standards for consecutive sentences; and (2) his trial attorney failed to accurately advise him on the law of party to a crime liability. Johnson claimed that he rejected the State's plea offer and elected to go to trial. The trial court denied the motion, holding that neither of the claims amounted to new factors. Johnson filed a motion for reconsideration, which was denied. Johnson now appeals.

DISCUSSION

¶6 Johnson claims new factors exist that warrant sentence modification. The trial court ruled that no new factors existed. For reasons to be stated, we reject Johnson's claims and affirm the trial court.

¶7 For a sentence to be modified based on a new factor, one must show that: (1) a new factor exists; and (2) the new factor warrants modification of his or her sentence. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides *de novo*. *State v. Lechner*, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998). A new factor is defined as:

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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Further, a new factor is “an event or development which frustrates the purpose of the original sentence.” *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citation omitted); *see also State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989) (concluding that the new factor standard has been further refined since *Rosado* and requiring the factors to frustrate the purpose of the original sentence).

¶8 Showing the existence of a new factor does not automatically entitle the defendant to a sentence modification. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). The court must next determine whether this new factor justifies modifying the defendant’s sentence. *Id.* Whether a new factor justifies sentencing modification is an exercise of the trial court’s discretion and is reviewed under the erroneous exercise of discretion standard. *Id.*

¶9 *Escalona-Naranjo*, declared that a claim that was finally adjudicated, waived, or not raised, cannot be raised in a subsequent postconviction motion when it could have been raised in a direct appeal or prior postconviction motion, unless the defendant provides a sufficient reason for not asserting or inadequately asserting the claim in the direct appeal or prior motions. *Id.* at 185. This procedural rule applies to WIS. STAT. § 974.06 motions. *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

¶10 Johnson first contends that a new factor exists because the trial court overlooked the ABA standards for consecutive sentences. This is not a new

factor. In *Green v. State*, 75 Wis. 2d 631, 644, 250 N.W.2d 305 (1977), the Wisconsin Supreme Court declined to impose the ABA Standards as mandatory rules for purposes of sentencing. The court recommended that sentencing courts consider those standards whenever imposing sentences, but did not mandate consideration. *Id.* Whether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion. *State v. Johnson*, 178 Wis. 2d 42, 52, 503 N.W.2d 575 (Ct. App. 1993). *Green*, 75 Wis. 2d at 644, states that the ABA standards may be considered as a part of the test of the exercise of discretion; the court has never said that discretion cannot be appropriately exercised without considering them. The purpose of the original sentence was to emphasize the gravity and violent nature of the armed robberies. Failure to specifically mention the ABA guidelines does not frustrate the purpose of the sentence.

¶11 Further, the sentencing court in this case departed from the recommended nine- to eleven-year sentence found in the Wisconsin Sentencing Guidelines, indicating its intent to not rely on such. Accordingly, we conclude that the ABA standards are not new factors that frustrate the purpose of Johnson's sentence, and a trial court does not have to articulate either acceptance or rejection of those guidelines.

¶12 Johnson next argues that his trial counsel's failure to accurately advise him on the law regarding party to a crime liability caused him to reject the State's plea offer and go to trial. He claims his trial counsel's failure constitutes a new factor. We think not. This claim was available to Johnson on his direct

appeal and was not raised.³ This claim was available at the time he filed his *pro se* WIS. STAT. § 974.06 postconviction motion, where he did raise the issue. It was rejected. Regardless of how Johnson attempts to label this claim, in this instance he claims a new factor exists, this issue is legal and constitutional in nature. It is the nature of the claim, not the label, which should control. *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986), *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. This court has held that a prisoner represented by counsel should not be allowed to avoid procedural bars or prior adjudications by artful pleading. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” The trial court was correct in treating Johnson’s motion as one brought under the authority of § 974.06. The claim is subject to the procedural bar of § 974.06(4) and *Escalona-Naranjo*. It was procedurally barred because Johnson made no attempt to provide a sufficient reason why he could not have raised the claim in his prior direct appeal.

¶13 Based on the foregoing, we affirm the orders denying Johnson’s postconviction motion.

³ The procedural bar 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.* Here, the no-merit procedure was followed and therefore, application of the procedural bar is appropriate.

By the Court.—Orders affirmed.

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

