COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2087-CR **Cir. Ct. No. 2006CF3724**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT EVELYN RAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer[1] and Kessler, JJ.

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

¶1 PER CURIAM. Vincent Evelyn Ray appeals from an order denying his postconviction motion seeking to modify his sentence. Ray asserts two grounds for appeal. First, he claims that the trial court's sentence imposing consecutive rather than concurrent time was unduly harsh. Second, he claims that his worsening health and his belief that he cannot obtain the health care he needs in prison constitute a new factor warranting sentence modification, and the trial court erred by not holding a hearing on his postconviction motion. Because consecutive sentences were not unduly harsh, and because no new factors exist warranting sentencing modification, we affirm.

BACKGROUND

¶2 On July 21, 2006, Ray was charged with being a felon in possession of a firearm and possession of heroin (.30 grams) with intent to deliver. On September 22, 2006, Ray changed his plea to guilty. The trial court then sentenced him on November 28, 2006, to eighteen months of initial confinement and twenty-four months of extended supervision on count one and eighteen months of initial confinement and twenty-four months of extended supervision on count two, concurrent to each other and consecutive to any other sentence. Ray had a prior charge for which he was on probation and had a five-year suspended sentence. As a result of the instant case, the probation was revoked and the five-year sentence was imposed and stayed. At the time of sentencing, Ray asked that counts one and two run concurrently with each other and with the prior charge; the trial court denied the request.

¶3 Ray subsequently filed a motion for sentence modification on the ground that his sentence was unduly harsh and requested a hearing on the motion. Ray's motion asserted that he has significant health problems and needs a kidney

transplant and hip replacement along with care for other serious existing health concerns. He does not believe that he will be able to obtain the health care he needs while in prison and fears his health will deteriorate if his initial confinement period is not reduced to permit him to obtain the medical care he needs outside of prison. On August 17, 2007, the trial court denied the motion without an evidentiary hearing.

¶4 Ray then filed an amended motion asserting that his worsening health and his belief he cannot obtain the health care he needs in prison, constituted a new factor warranting sentence modification. He attached a one-half page memorandum from a prison doctor identifying the medical conditions for which the Department of Corrections is currently treating him. The memo also stated that he is continuing to be evaluated at the University of Wisconsin Hospital for placement on their kidney transplant list. On August 23, 2007, the trial court denied the amended motion, holding that there is no documentation showing that the institution cannot accommodate Ray's treatment needs. Ray appeals.

DISCUSSION

¶5 Ray first claims that the trial court's imposition of consecutive sentences rather than concurrent sentences was unduly harsh. For reasons to be stated, we reject Ray's claim and affirm the trial court.

¶6 In his claim that the sentence is unduly harsh, Ray contends that the trial court failed to adequately explain why it was making his sentences for count one and count two concurrent to each other, but consecutive to any other sentence. Ray's assertion that the trial court must explain the reasons for imposing consecutive sentences is incorrect in this instance. The trial court must explain the reasons for imposing consecutive sentences when it imposes multiple sentences at

a single hearing. The trial court, however, is not required to provide that explanation when it orders that the sentence imposed at the sentencing hearing be served consecutively to a sentence the defendant is already serving for another offense. ***State v. Ziegler***, 2006 WI App 49, ¶31 n.6, 289 Wis. 2d 594, 712 N.W.2d 76; ***State v. Matke***, 2005 WI App 4, ¶18, 278 Wis. 2d 403, 692 N.W.2d 265. Moreover, even though the trial court was not required to provide an explanation, it specifically addressed why it was making the sentences concurrent on the instant counts, but consecutive to any other sentence: Ray knew the risks he was taking by engaging in criminal activity again and he ought to pay a separate penalty for the new offenses.

¶7 Ray next claims that his worsening health and his belief he cannot obtain the health care he needs in prison constitute a new factor warranting sentence modification, and the trial court erred by not holding a hearing on his postconviction motion. The trial court ruled that no new factors existed. For reasons to be stated, we reject Ray's claims and affirm the trial court's decision.

¶8 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 factor to frustrate the purpose of the original sentence).

¶9 Ray contends that his worsening health and his belief he cannot obtain the health care he needs in prison constitute a new factor warranting sentence modification. This is not a new factor. The law is well established that a medical condition or worsening medical condition does not constitute a new factor for purposes of sentence modification. ***State v. Johnson***, 210 Wis. 2d 196, 204, 565 N.W.2d 191 (Ct. App. 1997); ***Michels***, 150 Wis. 2d at 99-100. Ray did not assert any facts that, if true, would prove he would not be able to get adequate medical care in prison. The memo from the Department of Corrections doctor that was attached to Ray's amended motion indicates that Ray is receiving adequate medical care in prison. Prison officials indicated that they could adequately care for his medical needs in prison and he would be transferred to a hospital if he needed additional medical care, which could not be provided within prison.

¶10 Moreover, Ray failed to allege any new facts that would frustrate the purpose of the original sentence. The trial court was aware of Ray's medical condition at the time of sentencing and took all of the information presented about his medical condition into account in imposing sentence. The trial court noted that but for Ray's age, fifty-nine, and health, he would have been given a longer sentence.

¶11 The second argument is his claim that the trial court erred by not holding a hearing on his postconviction motion. We disagree. The trial court did not err when it denied Ray's motion and amended motion for sentence modification without holding an evidentiary hearing.

¶12 A defendant seeking postconviction relief is not entitled to an evidentiary hearing merely because he requests one. ***State v. Allen***, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433. The trial court may deny a postconviction motion, including a postconviction motion for sentence modification, without an evidentiary hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the [defendant] to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***Id.***, ¶12 (footnote omitted); *see* ***State v. Grindemann***, 2002 WI App 106, ¶19, 255 Wis. 2d 632, 648 N.W.2d 507; ***State v. Washington***, 176 Wis. 2d 205, 216-17, 500 N.W.2d 331 (Ct. App. 1993).

¶13 The trial court said that the allegations are all conclusory and there is no showing that he has been denied the treatment that he needs. Further, Ray's motion did not contain any facts that, if true, would entitle him to relief. Ray's assertion that he would not get adequate care was simply an opinion, not an assertion of objective fact. Per ***Allen***, 274 Wis. 2d 568, ¶¶14-24, a defendant's unsupported opinion does not meet the requirement that the motion must allege objective, historical facts sufficient to warrant an evidentiary hearing. As previously mentioned, the Department of Correction's doctor's memo, attached to Ray's amended motion, indicates that Ray is receiving adequate medical care in prison.

¶14 There are other remedies available to Ray if he feels he is being denied proper medical care. If Ray believes he is being denied necessary and appropriate treatment by the Department of Corrections, he is entitled to pursue a remedy to correct that condition of confinement, but he is not entitled to sentence modification as a remedy. *See* ***State v. Krieger***, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991).

¶15 Based on the foregoing, we affirm the orders denying Ray's postconviction motion.

By the Court.—Orders affirmed.

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