

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 10, 2009**

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. 2008AP1295-CR**

Cir. Ct. No. 2000CF2114

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOHNNY M. MCADOO,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JEFFREY A. KREMERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. In 2000, a jury found Johnny M. McAdoo guilty of endangering safety by use of a dangerous weapon, possession of a firearm by a felon, and bail jumping. He now appeals *pro se* from a circuit court order denying his postconviction motion in which he argued that the main witness's recantation

and “other misleading information” presented by the State at sentencing constituted a new factor warranting sentence modification. The circuit court denied the motion, reasoning, among other things, that the recantation was not a new factor because the witness had recanted by the time of sentencing and that McAdoo had unsuccessfully raised the recantation issue in his prior postconviction motions and appeals. We agree with the circuit court that McAdoo’s allegations do not constitute a new factor, and we therefore affirm the circuit court’s order.

¶2 Sixteen-year-old Antonia O’Neil reported to police that a man she knew had pointed a gun at her and had made threatening remarks. Police responded, and as they were speaking with O’Neil, McAdoo drove by, and O’Neil told the police that he was the man who had threatened her. The police attempted to stop McAdoo, but he fled. Ultimately, however, McAdoo surrendered to police, but only after he had tossed a shiny object from his van. Police recovered a loaded handgun. O’Neil identified McAdoo as the man who had threatened her, an identification O’Neil repeated at McAdoo’s trial.

¶3 At sentencing, O’Neil made a statement seeking leniency for McAdoo. She also attempted to recant her trial testimony, but the circuit court found her testimony at the sentencing hearing to be incredible. The State also presented information that showed witnesses against McAdoo relative to other crimes had recanted their identifications of or testimony against McAdoo.

¶4 In direct postconviction and appellate proceedings, McAdoo argued, among other things, that he should be given a new trial in light of O’Neil’s recantation. The circuit court and this court rejected that argument. McAdoo subsequently filed a postconviction motion in which he argued that postconviction counsel had been ineffective “for failing to bring a postconviction motion for [a

new trial] based upon newly discovered evidence of the recantation of the victim,” and for failing to challenge the circuit court’s use of sentencing information. Again, the circuit court denied the motion, McAdoo appealed, and this court affirmed.

¶5 McAdoo then filed the *pro se* postconviction motion—entitled “Motion to Modify Sentence Under Section 973.19”—that is the subject of this appeal. In this motion, McAdoo argued that he would have received a lesser sentence if the circuit court had known of the victim’s reasons for recanting her testimony. He also maintained that he was sentenced too harshly because the circuit court believed that he had intimidated O’Neil into recanting her statement. The circuit court denied the motion, reasoning that the fact of O’Neil’s recantation was not a new factor in that McAdoo had raised it in his prior appeals. The circuit court further reasoned that because McAdoo had twice unsuccessfully attempted to raise the recantation as a new factor warranting sentencing modification, he was procedurally barred from attempting to raise it again. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings).

¶6 On appeal, McAdoo argues that the circuit court erred by failing to note that the focus of his motion was not O’Neil’s recantation itself, but the purported reasons for the recantation. He contends that those reasons, taken together, constitute a new factor warranting sentence modification because the circuit court wrongly found that the recantation was a result of intimidation and that this finding adversely affected his sentence.

¶7 We reject McAdoo’s arguments for two reasons.<sup>1</sup> First, we reject McAdoo’s argument that he articulated a new factor warranting sentence modification. 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)). Here, it is beyond dispute that at sentencing O’Neil recanted her statements against McAdoo, although the circuit court did not consider her recantation to be authentic. At that time, O’Neil stated that her testimony against McAdoo had been untruthful; that the incident had been mere “horseplay”; and that she had recently found out that McAdoo was “some kin” to her. The additional “reason” that McAdoo now maintains is a new factor is O’Neil’s statement that she recanted because she wished to help him out. Not only is this not “a fact ... highly relevant to the imposition of sentence,” it was a reasonable inference from the recantation itself. Even if we were to consider that reason as a new factor, though, it does not “frustrate[] the purpose of the original sentence.” See *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶8 Moreover, even if O’Neil’s purported reasons could be construed as a new factor or factors, postconviction claims that could have been raised in prior

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<sup>1</sup> Although the applicability of WIS. STAT. § 973.19 (2007-08) is not central to this appeal, we must note that McAdoo, in his postconviction motion, invoked that statute. Without doubt, it has no application here, however, due primarily to the fact that a § 973.19 motion must be filed within ninety days of the conviction, a deadline that passed years prior to McAdoo’s filing.

postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings. *See Escalona*, 185 Wis. 2d at 181-82. McAdoo has presented no reason—much less a sufficient reason—for his failure to raise this argument in his prior postconviction and appellate proceedings.

¶9 Finally, we briefly address McAdoo’s claim that the State presented misleading information that suggested witnesses against him relative to other crimes had recanted. McAdoo does not, however, challenge the validity of the State’s information, only the circuit court’s conclusion that the recantations, including O’Neil’s, were likely due to some form of pressure or intimidation. This, too, is a claim barred by *Escalona* for the reason already set forth above.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

