COURT OF APPEALS DECISION DATED AND FILED

March 31, 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. 2008AP2034-CR | **Cir. Ct. No. 2000CF1562**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN LEE MALONE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Norman Lee Malone, *pro se*, appeals an order denying his second motion to modify his sentence. He contends he was sentenced on inaccurate information. He further claims that he received an unduly harsh and lengthy sentence after the trial court erroneously exercised its discretion and

directed his probation officer, who had testified against him, to prepare the presentence investigation report.[1] Malone's claims are either procedurally barred or meritless, so we affirm the order.

¶2 In 2000, Malone was charged with, and convicted by a jury of, seven drug offenses and three counts of possession of a firearm by a felon as a habitual criminal. He received what amounted to a sentence of twenty-five years' initial confinement and twelve years' extended supervision. He filed a motion for postconviction relief, which was denied, and took direct appeal, which he lost. *See* ***State v. Malone***, No. 2002AP619-CR, unpublished slip op. (WI App Jan. 14, 2003).

¶3 In March 2007, Malone moved for sentence modification. He asserted the court had erroneously exercised its discretion, giving him too harsh a sentence, particularly in light of a co-defendant's sentence.[2] He asked the court to reduce his prison term to fifteen years. The circuit court denied his motion, stating the discretion claim was time-barred. Malone did not appeal.

¶4 In July 2008, Malone filed another motion to modify his sentence. He claimed a new factor based on a claim that his due process right to be sentenced on accurate information had been violated. He also re-alleged that the court had erroneously exercised its discretion at sentencing, this time asserting it

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[1] Malone alleges the trial court abused its discretion. We no longer use the phase "abuse of discretion" and instead refer to the "erroneous exercise of discretion." ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

[2] Malone argued that his co-defendant had only been sentenced to two years' imprisonment. The circuit court, in denying Malone's motion, noted that the co-defendant had been convicted of only a single drug offense.

was in error to order his probation officer, who had been a witness for the State, to prepare the presentence investigation report. The court denied the motion. First, it noted that any erroneous exercise of discretion claim had already been rejected as untimely and would therefore not be considered on this motion. The court then rejected the inaccurate information claim. It stated there was no reason Malone could not have raised the claim in a former motion, meaning the present claim was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). The court also concluded that the claim was meritless. Malone appeals.

¶5 When the only claim for postconviction relief relates to the severity of the sentence, WIS. STAT. § 973.19 (2007-08) offers an "expeditious alternative" to WIS. STAT. RULE 809.30(2).[3] ***State v. Walker***, 2006 WI 82, ¶28, 292 Wis. 2d 326, 716 N.W.2d 498. However, the motion to modify must be brought within ninety days of the sentence's entry.[4] WIS. STAT. § 973.19(1). In his first motion for sentence modification, Malone alleged only that the court's erroneous exercise of discretion resulted in too long a sentence. Thus, it could properly be characterized as a § 973.19 motion, but it was time-barred because it did not come within the appropriate time frame.

¶6 Malone again challenges his sentence by arguing the court's erroneous exercise of discretion yielded an unduly harsh sentence. This claim is barred by issue preclusion.

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[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[4] If the defendant has already ordered transcripts, the motion to modify the sentence must be brought within sixty days of the later of the service of the last transcript or the circuit court record. WIS. STAT. § 973.19(1)(b); WIS. STAT. RULE 809.30(2)(h).

¶7 “The doctrine of issue preclusion forecloses relitigation of an issue that was [actually] litigated in a previous proceeding involving the same parties or their privies.” ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. Issue prelusion may foreclose an issue of evidentiary fact, ultimate fact, or of law. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. Application of issue preclusion requires us to evaluate whether there is an identity of parties, which is a question of law, and whether application of issue preclusion is consistent with fundamental fairness, which is a mixed question of fact and law. ***Masko***, 265 Wis. 2d 442, ¶¶5-6.

¶8 There is no question that the parties are the same. Further, Malone has not filed a reply brief to refute the State’s assertion that preclusion is appropriate or to show that the court erroneously applied the preclusion doctrine against him. *See* ***State v. Mikkelson***, 2002 WI App 152, ¶16, 256 Wis. 2d 132, 647 N.W.2d 421 (failure to file a reply brief concedes respondent’s arguments).

¶9 In any event, it is evident that issue preclusion is appropriate here. *See* ***Masko***, 265 Wis. 2d 442, ¶6 (listing relevant factors). Ultimately, Malone’s attempt to modify his sentence because of an alleged erroneous exercise of discretion has already been litigated and rejected as untimely; he has only changed his factual underpinning. “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).

¶10 Malone also claims that he was sentenced on erroneous information. This claim of error is not appropriately brought under the sentence modification statute. *See* ***Walker***, 292 Wis. 2d 326, ¶28. Thus, the State suggests the circuit

court treated the remainder of Malone's motion as a WIS. STAT. § 974.06 motion. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶19, ___ Wis. 2d ___, 758 N.W.2d 806 (Section 974.06 motion limited to claims of jurisdictional and constitutional magnitude.); *see also* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (courts liberally construe pleadings despite label given by defendant).

¶11 A defendant has a due process right to be sentenced based on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Claims of error that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 motion are barred from being raised in a subsequent § 974.06 motion, absent a sufficient reason for failing to raise them earlier. ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756. Here, the State asserts that Malone offers no reason why he did not raise his inaccurate information claim on direct appeal. Additionally, the circuit court had noted there was no reason why Malone did not raise this issue in any of his prior motions.

¶12 However, Malone claims that appellate counsel failed to raise the issues for him on direct appeal, and that error should not be held against him.[5] This may be a sufficient reason for failing to raise an issue earlier. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, even if not procedurally barred, Malone's argument still fails because he has not shown the court actually relied on inaccurate information when it sentenced him. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶2.

[5] This does not, however, explain Malone's failure to raise the issue in his March 2007 motion, which he also brought *pro se*.

¶13 Malone claims the court erroneously thought that he was dealing drugs from a day care center, that he was armed with three firearms at the time of his arrest, and that he was a danger to society. Malone claims it was never proven that the residence at which he was arrested was a day care and that a detective testified "he never could or was able to affirm that this was a day care center." We note that Malone does not cite any specific location in the record or the transcript to support this claim.

¶14 A detective testified that a sign outside the home at which Malone resided, which was apparently owned by Malone's mother, identified the location as "Granny's Kids Day-Care." The sign included various words such as "[n]utritious meals, snacks, educational activities, … [and] private pay vouchers accepted[.]" The detective also testified about items inside that would indicate the residence might have been a day care, including a play kitchen, a small table for children, decorations that appeared appropriate for small children and "things on the refrigerator with alphabets and so on."

¶15 What Malone appears to refer to, in claiming it was never established that the home was a day care, is the State's question, "But did you subsequently determine whether or not it was actually a certified day-care?" The detective testified only that he had called the State and confirmed that the residence was not a *certified* day care, despite language to the contrary on the sign outside. Malone does not show how the court was in error to have concluded the house was, in fact, a day care.

¶16 The court also commented that the fact that Malone "was armed with three different firearms when this occurred is another extremely aggravating factor." These three firearms formed the basis for Malone's three felon-in-

possession charges, and were kept in his room. It is evidently true that Malone did not have weapons on his person when he was arrested, and because he was outside the home when he was taken into custody, Malone complains the court was wrong to say he was armed.

¶17 It is apparent that when the court spoke of him being "armed" with these weapons, it was merely referring to the fact that Malone kept them in the location from which he was dealing drugs. Because the jury convicted him of possessing the weapons, the court would necessarily discuss them at sentencing, even if its references were occasionally imprecise.

¶18 The last "error," the court's statement that Malone is a danger to society, is a conclusion that the court was entitled to draw based on the facts before it. It is a conclusion adequately supported by Malone's seven drug and three gun convictions. Therefore, even if the motion for resentencing based on inaccurate information was not procedurally barred or time-barred, it was appropriately denied because Malone has not shown the court relied on any inaccurate information.[6]

By the Court.—Order affirmed.

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

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[6] Malone appends a motion for resentencing to his appellate brief. It is not clear if it is meant to be a copy of the motion filed in the trial court or a motion directed to this court. The motion is captioned with his appellate case number and dated at the same time as his appellate brief, but the language appears identical to his trial court motion. To the extent the motion is directed to this court, we do not entertain such motions.