COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 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. 2008AP1858-CR

Cir. Ct. No. 2002CF3787

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHERWOOD L. HARD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sherwood L. Hard appeals from two postconviction orders denying his motions for sentence modification and for

postconviction relief pursuant to WIS. STAT. § 974.06 (2007-08).[1] The issues are whether any of the factors Hard raised in his sentence modification motion are "new" as preliminarily required, and whether Hard asserted a "sufficient reason" for failing to previously raise, or for renewing the thirty-two issues he raised in his postconviction motion. We conclude that none of the factors Hard raised in his modification motion were "new," and that his reason for belatedly raising or renewing these thirty-two issues was not sufficient to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Therefore, we affirm both orders.

¶2 A jury found Hard guilty of the second-degree sexual assault of a child. The trial court imposed a seventeen-year sentence, comprised of twelve- and five-year respective periods of initial confinement and extended supervision. Appellate counsel filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), to which Hard filed multiple responses and several motions. We addressed the sufficiency of the criminal complaint, various inconsistencies in the trial testimony, the sufficiency of the evidence, the trial court's exercise of sentencing discretion, and an ineffective assistance of counsel claim. *See* ***State v. Hard***, No. 2004AP1193-CRNM, unpublished slip op. at 2-10 (WI App Feb. 11, 2005) ("***Hard I***"). We ultimately concluded that there were no issues of arguable merit, and affirmed the judgment of conviction. *See* ***id.*** at 10.

¶3 Hard then filed a petition for a writ of habeas corpus ("***Hard II***"), followed by a motion seeking an evidentiary hearing on his ineffective assistance

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

of trial counsel claims ("***Hard III***"). The trial court summarily denied the petition and the motion in separate orders, neither of which Hard appealed.

¶4 Hard next filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06) ("***Hard IV***"), challenging his arrest, the criminal complaint, and the effectiveness of trial counsel. The trial court summarily denied the motion as procedurally barred by ***Escalona*** and ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574 (***Tillman*** extended ***Escalona***'s applicability to postconviction motions following no-merit appeals). Hard did not appeal.

¶5 Hard then filed a petition for a writ of habeas corpus, alleging the ineffective assistance of appellate counsel who pursued the no-merit appeal in ***Hard I***. In his habeas petition, Hard re-cast the challenges that we had previously rejected in ***Hard I*** in the context of appellate counsel's ineffectiveness for deficiently pursuing them. *See* ***Hard v. Endicott***, No. 2006AP168-W, unpublished slip op. at 3 (WI App Mar. 3, 2006) ("***Hard V***"). We explained why Hard had not established either deficient performance or resulting prejudice, both necessary to a viable ineffective assistance claim. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Consequently, we denied the habeas petition in ***Hard V***, No. 2006AP168-W, unpublished slip op. at 4.

¶6 Hard filed another postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06) ("***Hard VI***"), raising and renewing issues such as the legality of his arrest, the denial of his right to counsel, violations of his ***Franks***, ***Riverside***, ***Batson*** and confrontation rights, erroneous jury instructions, sentencing challenges implicating the trial court's authority and its misuse of discretion, and the

ineffectiveness of trial counsel.[2] The trial court summarily denied the motion as procedurally barred. We affirmed, explaining the ***Escalona-Tillman*** procedural bar in detail to demonstrate its applicability to Hard's challenges. We also explained why we concluded that the no-merit procedures were properly followed and that the record demonstrated a sufficient degree of confidence in the result.[3] *See* ***State v. Hard***, No. 2006AP1629, unpublished slip op. at 3-5 (WI App Aug. 6, 2007) (explaining ***Tillman***, 281 Wis. 2d 157, ¶20).

¶7 Hard then filed the two motions that underlie this appeal: sentence modification, and postconviction relief pursuant to WIS. STAT. § 974.06. The trial court summarily denied each in separate orders: modification because the factors Hard raised were not "new," prompting the trial court to construe the motion as seeking relief pursuant to § 974.06, and for Hard's failure to overcome ***Escalona***'s procedural bar in either motion. It is from these two orders that Hard appeals.

¶8 Hard sought sentence modification based on new factors ("***Hard VII***"). 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."

[2] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978) (complaint with factual misrepresentations may be defective); ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991) (requires a timely probable cause hearing); and ***Batson v. Kentucky***, 476 U.S. 79 (1986) (State may not use race as a basis for its peremptory challenges).

[3] In ***Hard VI***, we also described Hard in ***Hard I***, as "actively involved in objecting to the no-merit report." *See* ***State v. Hard***, No. 2006AP1629 ("***Hard VI***"), unpublished slip op. at 4 (WI App Aug. 6, 2007).

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).

¶9 Hard's principal new factor is the victim's original statement to police that Hard contends was coerced. Hard seemingly believes that the victim's statement that he was "not sure if the suspect had an erection [because he] did not see [his] penis" negates the claim of sexual intercourse pursuant to WIS. STAT. § 948.01(6) (2001-02). First, a conviction for second-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(2) (2001-02), does not require the defendant to have an erection, nor does it require the victim to see the defendant's penis; sexual contact is all that is required, and the victim testified at trial to sexual contact. *See* ***id.*** Second, Hard does not persuade us that the victim's allegedly coerced statement to police was "not known to the trial judge at the time of original sentencing," or that the statement was "highly relevant to the imposition of sentence." *See* ***Rosado***, 70 Wis. 2d at 288. Third, Hard seeks only sentence modification. We do not view the victim's statements, coerced or otherwise, as persuasive to reducing Hard's sentence. Hard also raises other issues, such as the alleged denial of his right of allocution, trial counsel's alleged unpreparedness at sentencing, the trial court's consideration of Hard's character in imposing sentence, and the inaccurate information on which Hard was allegedly sentenced. Hard attended the sentencing hearing.[4] He should have been aware of these

[4] With respect to the denial of his right to allocution, Hart said, when given the opportunity to address the trial court at sentencing, "[a]t this time, I don't have any comment."

claims at sentencing or shortly thereafter. We have reviewed Hard's sentence modification motion, and independently conclude that the claims he raised are not new factors. *See* ***Franklin***, 148 Wis. 2d at 8 ("Whether a fact or set of facts constitutes a new factor is a question of law.").

¶10 Rather than denying the motion as characterized, the trial court afforded Hard the benefit of the doubt and construed his claims pursuant to WIS. STAT. § 974.06. Although a sentence modification motion does not require the assertion of a "sufficient reason" for failing to previously raise an issue, a § 974.06 postconviction motion does.[5] Hard's failure to assert a "sufficient reason" is fatal to his third postconviction motion following a direct appeal. *See* § 974.06(4).

¶11 Hard raises thirty-two issues in his most recent motion pursuant to WIS. STAT. § 974.06 ("***Hard VIII***"). He alleged as his "sufficient reason" for raising or renewing these issues is that this court, in ***Hard VI***, "had not clearly and expressly relied on [a] '*plain statement*.'" (Emphasis in original.) Hard claimed that he should nevertheless be entitled to belatedly raise or renew these issues "because to do [otherwise] is unfair and unreasonable and constitutes a '*sufficient reason*.' Defendant request[s] manumission from 17 years [of] 'slavery.'" (Emphasis in original.)

¶12 This is Hard's eighth postconviction proceeding. We are unaware of what type of a "plain statement" we should have "clearly and expressly relied on," and why it is "unfair and unreasonable" to require Hard to assert why he did not raise these thirty-two issues (all of which appear familiar) previously, or why he

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[5] A "'new' factor" is generally required to determine whether sentence modification is warranted.

believes he is permitted to renew issues that we have already decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues). WISCONSIN STAT. § 974.06(4) and ***Escalona*** require the movant to assert a "sufficient reason" for failing to previously raise an issue. *See* ***Escalona***, 185 Wis. 2d at 181-82. We independently conclude that Hard's reason is not sufficient to justify his eighth postconviction proceeding. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (application of ***Escalona***'s procedural bar is subject to independent review). We therefore affirm the trial court's orders denying Hard's motions for sentence modification and postconviction relief.

By the Court.—Orders affirmed.

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